Cooperative Federalism in Search of a Normative Justification: Considering the Principle of Federal Loyalty

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Introduction

In recent years, the Supreme Court of Canada has relied, sometimes with mixed results, on the principle of federalism to buttress its decisions in division of powers cases.[1] The renewed reliance on this principle arguably stemmed from the prior revival of unwritten constitutionalism launched, with some *fracas*, by the Court's opinion in the *Quebec Secession Reference*.[2] Some unwritten constitutional principles are less well-known than others, and this appears to be the case with the principle of federalism, and more precisely with the meaning and scope to be given to the concept of "cooperative federalism," to which the Court has regularly referred lately.

The task of delineating what cooperative federalism entails appears more important than ever in light of the Supreme Court's recent hearing of *Quebec (A.G.)* v *Canada (A.G.)*.[3] The case deals with Parliament's jurisdiction to amend the Criminal Code in view of its decriminalizing the possession of unregistered long guns, eliminating registration obligations for possessors of such guns, and destroying the data contained in the registry maintained by the Registrar of Firearms – the latter, over Quebec's objections that it wants to use this data for its own purpose. A comparison of the opinions so far rendered by the Quebec Court of Appeal and the Quebec Superior Court reveal distinct conceptions of the normative consequences flowing from federalism, as well as of the requirements of cooperation in a federation that can no more be characterized, according to the Supreme Court itself, as founded on 'watertight compartments'.

The Court of Appeal considered, in my view correctly, that Parliament had jurisdiction to repeal parts of a statute it had validly enacted; it also opined that the principle of cooperative federalism cannot be used in such a way that the division of powers is modified. For his part, the trial judge held that the impugned federal legislation's main intent was to deprive Quebec of the use of the gun data, thereby colouring legislation that was significantly encroaching upon the province's otherwise unchallenged jurisdiction to establish its own long-gun registry. He also found that Parliament's decision to order the destruction of the data and therefore to prevent the province from using it breached the principle of cooperative federalism and was of no force or effect.

The Court of Appeal's judgment represents an orthodox application of the relevant interpretive doctrines, while the trial judgment evinces a novel interpretive approach, emphasizing the importance of the doctrine of cooperative federalism and seeking to provide it with legal claws. Both judgments are to some extent unsatisfying, as they were unduly constrained by a doctrine of federalism plagued with contradictions as well as shallow, if not largely cosmetic, pronouncements extolling the virtues of cooperative federalism, albeit for sometimes contradictory purposes. Indeed, the Supreme Court of Canada has yet to reconcile its frequent emphasis on the overlapping nature of federal and provincial jurisdictions and on cooperative federalism with the fact that it tends to retain an absolutist conception of powers, once a level of government's jurisdiction over a particular

issue has been established. Assuming that it remains within the boundaries of its constitutional power, the legal holder of this power can do pretty much what it wants - the consequences of what it does being characterized as ontologically political and not susceptible to legal challenge. Actually, it is as if there was a missing juridical link between the requirements of jurisdictional autonomy, on the one hand, and of intergovernmental cooperation, on the other. That link could lie in the doctrine of **federal loyalty**, which could shed an interesting new light on cooperative federalism.

At first sight, federal loyalty does not mean much in Canadian constitutional law, if it means anything at all. However, as we will see in this paper, there are already some aspects of Canadian constitutional law, which can be said to enshrine obligations pertaining to federal loyalty. Ultimately, what federal loyalty can bring to the debate in *Commissioner of Firearms* is a springboard from which to reflect on how and when the principle of cooperative federalism could be brought to bear *in a consistent manner* in division of powers cases. If it cannot alter the division of powers, could federal loyalty be invoked in certain circumstances so as to allow for the judicial monitoring of an otherwise valid exercise of a particular power? Is it possible to conceive of judicially-enforceable constitutional parameters governing that exercise?

My working assumption, as far as the *Commissioner of Firearms* case is concerned, is that Parliament had the constitutional jurisdiction to do what it did. What is more interesting, and what the trial judge hints through a sinuous use of the principle of cooperative federalism, is whether or not the uncontested holder of a particular jurisdiction could be legally bound to respect basic behavioural obligations when exercising that jurisdiction. Currently in Canadian law, the answer is by and large negative. But the *Commissioner of Firearms* case allows us to raise this question in a very straightforward and open manner. It may not be that far-fetched to say that the Supreme Court is now at a critical constitutional juncture, as it is being given the opportunity to align the law of federalism with both the ideal and actual practice of cooperative federalism without disproportionately limiting the space it appropriately grants to political actors in the evolution of the federation.

The ideology of incrementalism that characterizes common law reasoning does not, in my view, constitute a substantial impediment to operating that kind of interpretive turn in the law of federalism. For instance, if one looks at the evolution of the judicial interpretation of the *Constitution Act, 1867*[4] since the creation of the federation, one can observe that in spite of the sometimes indeterminate or alternatively determinate wording of this constitutional instrument, the Judicial Committee of the Privy Council and then the Supreme Court have constantly applied doctrines whose textual foundation can be said to be shaky at best. This is to such an extent that the Fathers of Confederation would probably be very surprised by Canada's contemporary constitutional landscape. Normative choices that were far from self-evident have been made by judges, who have ultimately shaped how we now think of federalism. Given this rather inconsistent interpretation of legal doctrines, reconciling jurisdictional autonomy with the requirements of intergovernmental cooperation would in no way lead to a dramatic shift in the law, but it would certainly represent an important step forward. Federal loyalty could provide a springboard for such a reconciliation.

I – A few thoughts on federal loyalty

Subject to variations in scope and intensity, the doctrine of federal loyalty exists in the law of many federations. It is now expressly enshrined, under different labels, as a constitutional principle in the Belgian,[5] Swiss,[6] and South African[7] federations, even though, as in Belgium, its origins may predate this formal enshrinement, as well as being simply judicially recognized in others, such as in Austria.[8] Nowhere, however, does federal loyalty have a richer history than in Germany, where it originates. I will thus concentrate my analysis on German law before briefly examining other jurisdictions. My focus on

other jurisdictions will be somewhat cursory, focusing on the bundle of principles associated to federal loyalty at the expense of a thorough analysis of the facts of the cases referred to. This is a limit of this paper, explainable by its limited length.

The recognition of federal loyalty as a dimension inherent in the principle of federalism is especially interesting for Canada because it ignores the traditional borders erected between common law and civil law federations, competitive and cooperative federations, as well as between dual and integrated federations. Moreover, it evinces that a doctrine once regarded as a mere unenforceable political principle has over the years turned into a full-fledged, legally enforceable, constitutional principle, more often than not as a result of a judicial intervention[9]. Furthermore, and that is precisely what makes it interesting irrespective of the type of federation involved, federal loyalty is thought of as being con-substantial to federalism itself, and this is irrespective of the particular constitutional expression of federalism at issue and of the actual obligational content and reach that is associated with it. Thus, sorting out what it could mean in the Canadian constitutional context in light of foreign experiences does not amount to advocating its transplant from a particular jurisdiction to Canada; it merely illustrates the principle of federalism's intrinsic normative potential. Lastly, the recognition of the doctrine of federal loyalty seems especially relevant in federations which overlap with "federal societies,"[10] i.e. in societies which reveal a rather deep level of sociocultural diversity, which may in turn shape the type of political relations that federated entities entertain with the federation as a whole. Canada, Belgium and Switzerland are good examples of such societies, while the United States and Australia, where federal loyalty is not recognized, are not.[11]

Thus, the logic underlying an inquiry into federal loyalty, from a Canadian standpoint, is not one envisaging a potential transplant from other federations to Canada but one involving an internal reflection on the core ideas intrinsic to federalism - a view that is contentious in itself.[12]

In Germany, the doctrine of federal loyalty (*bundestreue*) really got wings after the enactment of the Basic Law in 1949, which enshrined the federal nature of the country.[13] Its origins can be traced to the 19th century, but the doctrine, long envisioned solely as a political principle, remained in the realm of rhetoric for decades.[14] Its theorization as a legal principle stemmed from the realization that in a federation, as in any other type of regime, courts must take seriously their role as guardians of the constitution; a link was thus established between the development of *bundestreue* and that of constitutionalism.[15] This link was acknowledged when the Federal Constitutional Court started using it as a legal mechanism for policing relations between federal actors. The Court's approach proceeded from the recognition of the need to avoid unduly formalistic conceptions of constitutional adjudication so as to ensure that the foundational values of the polity are not breached.[16] It is on that basis that federal loyalty was relied upon as a regulatory principle to be individualized in concrete cases with a view to maintaining some equilibrium between the federal government and the *Länder*, and between the *Länder* themselves, as well as inducing respect for core federal values. This operation was inevitably influenced by the specificities of German federalism, but the justifications given in support of the recognition of federal loyalty are those that I wish to examine here.

A first one, highlighted in a case brought by wealthy *Länder* against a federal law seeking to implement a constitutional provision enshrining equalization payments, is that the "[t]he federal principle by its nature creates not only rights but also obligations. One of these obligations consists in financially strong states having to give assistance within certain limits to financially weaker states."[17] The Court could have rejected the *Länder*'s claim on a black letter law basis since the purpose of the law the *Länder* were complaining about fell squarely

under the enabling provision of the Basic Law. But it did not and relied instead on the federal principle to expound its reasoning.

Soon after, in the *Housing Funding Case*, Bavaria asked for an injunction against a federal distribution of funds to *Länder* for housing construction, arguing that it could legally claim a specific portion of the funds to be distributed on the basis of an earlier agreement. Focusing on the valid federal statute at stake rather than on this non-binding agreement, the Court observed that in addition to the statutory need for the agreement of all *Länder* concerned by this distribution, the federal principle required that "all parties to the constitutional 'union' are bound to cooperate according to the nature of this union and to contribute to its consolidation and to the preservation of its interests and well-known interests of its members"[18]. Note the use of the word "interests", which is broader than "competences." In a language that is reminiscent of the Supreme Court of Canada's vocabulary in the *Quebec Secession Reference*, the Court added "that the Lander in their common relationships and the federal government in its relations with the Lander are bound by a constitutional obligation to negotiate in good faith and to reach mutual understanding."[19] On that basis, the Court held that a *Land* may not unreasonably withhold its agreement and must therefore be able to justify its refusal on an *objective basis*.

On the facts of the case, Bavaria's refusal was justified because the allocation of funds to which it objected had been decided by the federal government on grounds that were themselves dubious. These grounds were that other funds would be allocated to Bavaria for other purposes and that another *Land* had unilaterally decided to "build housing beyond its means."[20] The principle of federal loyalty in German law is thus to be understood as imposing a requirement of rational behaviour upon both levels of government, rationality being used as a benchmark for determining whether or not federal actors have negotiated in good faith. Process, rather than outcome, is emphasized here.

In two further cases involving the remuneration of civil servants,[21] the Court found that federal loyalty could be invoked to challenge the negative externalities imposed upon others as a result of administrative decisions made by *Länder*. More specifically, in the *North Rhine-Westphalia Salaries Case*, the Court held that this principle imposed upon federal actors the duty to take into consideration "the possibility of untowards effects on civil servants in another *Land* or in the federal system as a whole."[22] Such "untowards effects" may be avoided by the imposition, on the basis of federal loyalty, of both negative and positive duties.

A negative duty of self-restraint

An important dimension of federal loyalty is that the constitutional obligations of the two levels of government do not stop once a particular level has validly enacted a law; how it actually exercises its jurisdiction may also, in certain circumstances, be relevant from the standpoint of federal loyalty:

> In the German federal state the entire constitutional relationship between the federal government and its member Lander is guided by the unwritten constitutional principle of a duty of reciprocal loyalty; (…). The federal government does not violate its duty solely by executing a constitutionally assigned competence. Rather, it can be deduced from the principle that the exercise must be abusive or in violation of procedural requirements. Which further conclusions can be drawn from this principle can be determined only in individual cases (…). The Constitutional Court must assess not only the order, but the actions which preceded it. It is not a question of whether the federal government did everything required by the duty of reciprocal loyalty to avoid any misunderstanding on the part of the Land after issuing the order, or whether the Land for its part did everything reasonably required to understand the content of the order (…).[23]

This approach focusing on how a power is actually exercised is evident in a 1957 ruling

that addresses the question of the implementation in the domestic realm of international obligations, seems particularly interesting from a Canadian standpoint. In the *Concordat Case*,[24] the Constitutional Court was asked to rule on a decision made by a Protestant *Land* to impose non-confessional schools for all. This was in spite of a concordat which had been agreed upon by the Holy See and the National-Socialist government of the 1930s which guaranteed the presence of religious education in the public school system, as well as the existence of state-funded religious schools for Catholic pupils. In a debate reminiscent of Canada's *Labour Conventions Case*,[25] the federal government took action against the *Land*, claiming that it was constitutionally bound to respect the international obligations validly contracted by the federal government, while the *Land* argued that having been being vested with exclusive constitutional jurisdiction over education, it had to give its assent to international obligations contracted by the federal government that affected its jurisdiction.

The Constitutional Court held that while the concordat still validly bound Germany under public international law, regard had to be had to the constitutional prerogatives of the *Länder* when contracting international obligations. As a result, the law enacted by Lower Saxony was fully within its constitutional jurisdiction and the federal government could not claim that it had the constitutional power to implement international obligations at the domestic level which affected the *Land*'s jurisdiction.

Up to this point, Canadian readers are in familiar territory. But the Court added that although a *Land* may be vested with a given constitutional jurisdiction, it must nevertheless exercise it in a manner that is compatible with federal loyalty. Thus, the refusal by a *Land* possessing exclusive jurisdiction over a particular topic to implement international obligations agreed to by the federal government on behalf of the federation could still be unconstitutional.[26] The result of the Court's imposition of a further obligational layer on the basis of federal loyalty is that both levels of government had to solve potential jurisdictional conflicts through prior consultation and negotiation, and the intensity of this constitutional obligation was obviously higher than if it were a mere political obligation.

Federal loyalty thus imposes constraints on the exercise of a right by its lawful holder if, and only if, that exercise is unreasonable, susceptible to paralyzing institutional mechanisms, or constitutive of disproportionately negative externalities for others.[27]

A positive duty to act in specific circumstances

Federal loyalty in Germany imposes upon a level of government a positive duty to remove obstacles to the lawful exercise of its jurisdiction by another level of government when such obstacles, while not the result of its direct actions, are constituted by an organization that it can legally monitor.[28] It may have acted in good faith, but a type of vicarious constitutional responsibility is imposed on it.[29]

The scope of such positive duties even encompasses the duty to assist financially-distressed *Länder* in times of crisis, beyond the constitutionally-mandated threshold set in the constitutional provisions dealing with equalization payments.[30] But since the reciprocity of duties is central to the idea of federal loyalty, recipient *Länder* are under the obligation to demonstrate that they have made efforts towards financial rehabilitation before being entitled to such supplementary grants.[31] Thus, through the imposition of positive duties, federal loyalty overlaps with solidarity. Yet, federalism not being an altruistic regime, in the interest of fairness, the principle renders solidarity conditional on some form of responsibility on the part of all federal actors.

A duty to act fairly

Federal loyalty has been used as a vehicle for the promotion of fairness and transparency. This explains why the Constitutional Court relied upon federal loyalty in a case where the federal government had adopted a "divide and conquer" strategy in order to achieve its objectives in spite of some *Länder*'s opposition

due largely to their partisan opposition to the federal government's actions.[32] Federal loyalty does not only preclude such tactics; it can also serve as a springboard to challenge strategies which place federal partners before *faits accomplis*. This principle therefore requires that in some circumstances, federal actors be substantially, rather than formally, able to exercise their prerogatives and voice their claims, since they can legitimately entertain basic expectations about the type of behaviour that their partners must adopt. One of these expectations certainly consists in being consulted when appropriate.[33]

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The shape taken by federal loyalty in Germany was undeniably influenced by that country's political and legal evolution, as well as by the design of its governance structures. However, it bears noting that the meaning and scope given to this principle in the other federations where it is recognized, either in the constitutional text itself or as a result of judicial interpretation, do not radically depart from the general ideas highlighted in the above study of German law. Different institutional and factual contexts may affect the outcome of cases, but the concept of federal loyalty by and large remains the same irrespective of the country involved. As in Germany, federal loyalty is more often than not envisaged "partly as a rule of interpretation but mostly as an independent unwritten principle."[34]

Belgium is especially interesting in this regard since federal loyalty made its first appearance as the country was still in a process of federalization that culminated with the 1993 Constitution. The principle was identified as a normative limit to a federated entity's competences even before it was formally enshrined in the Constitution. In a 1988 decision, the Arbitration Court (renamed "Constitutional Court" since 2007) invoked the existence of "limits inherent to the global conception of the state" on how a federated entity could exercise its jurisdiction.[35] The Court was basically saying that intergovernmental coexistence in a developing federation requires that competences be exercised bearing in mind the transcendent and irreducibly federal nature of the country. After long debates, art. 143(1) of the 1993 Constitution was adopted, stating that "[i]n the exercise of their respective responsibilities, the Federal Government, the Communities, the Regions, and the common Community Commission act in the interests of federal loyalty, in order to prevent conflicts of interest."

Two questions immediately arose. One had to do with federal loyalty's juridical status; the other concerned its scope of application. Despite the fact that some commentators opined that constitutionally enshrining this principle was redundant because it is inherent to federalism,[36] federal loyalty's status remained ambiguous. Initially regarded as a form of constitutional soft law, the justiciability of which was unclear,[37] it was eventually vested, after some hesitation, with formal juridical effectiveness.[38] This was confirmed in a 2004 ruling of the Arbitration Court, where the Court's power to examine arguments based on federal loyalty was affirmed, even when a pure jurisdictional question is raised.[39] In that ruling, the Court used federal loyalty as a normative benchmark from which to evaluate the behaviour of federal actors; it expressly established a link between federal loyalty and notions of equilibrium, reasonableness and proportionality:

> B.3.2. The principle of federal loyalty (…) implies for the federal authority and federated entities the duty not to alter the equilibrium of the federal constitution as a whole, when they exercise their competences; it means more than the exercise of competences: it indicates in which spirit this must be done (…).
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> B.3.3. The principle of federal loyalty, read with the principle of reasonableness and proportionality, means that each legislator is bound, when exercising its own competence, to ensure that, through its actions, the exercise by other legislators of their competences is not rendered impossible or unduly difficult."[40]

The second question involved the type of disputes covered by article 143(1), which refers to "conflicts of interests" rather than to "conflicts of competences." In a nutshell, the former were originally conceptualized as referring to political disputes between the federal authority and federated entities, or between federated entities, while the latter were deemed to raise questions pertaining to the validity of the exercise of a competence. The predictable conclusion was that federal loyalty, dealing with conflicts of interests, was to remain a political principle, albeit a constitutionally-enshrined one. Not positing a criterion upon which the allocation of competences could be decided, it could thus not be justiciable or judicially enforceable.

However satisfying it might have been in theory, such a sharp distinction between interests and competences proved unsustainable, since many conflicts were rather "mixed," revealing an entanglement of politics and law, in which case a judicial intervention was viewed as preferable.[41] Depré has identified three main types of conflicts of interests.[42] The first refers to cases where the equal constitutional status of federal actors is breached, for example when a federal actor exercises its competences in such a disproportionate or unreasonable manner that other actors are de facto precluded from efficiently exercising their own competences.[43] The second type, closely linked to the first one, encompasses cases where a federal actor exercises its competences in an abusive manner, by actively creating obstacles to the exercise by other actors of their own competences, or by omitting to do something that would ease that exercise. The last type of conflict of interests envisaged by Depré is the pure political conflict, where the disagreement between federal actors comes from substantive ideological differences. As can be seen, the first two types have a primarily procedural dimension while the third type points to the substance of the decisions taken; the first two easily overlap with conflicts of competence, which is less the case for the third. With its 2004 decision, the Arbitration Court has to a large extent put an end to these rather byzantine debates; it took stock of the fact that many constitutional disputes have both a political and legal dimension, and that it is not because political actors may be called upon to play a most significant role in a dispute that the judiciary should necessarily refrain from examining its legal dimension.

Depré's typology is reflected in the case law. Indeed, some cases use federal loyalty to urge cooperation between federal actors, through a duty to take into consideration, and thus consult, those who are affected by a potential decision, this, without compromising the decision-maker's power to decide once it has consulted its partners.[44] In other words, no obligation of results exists as to the outcome of the consultation.[45] That said, the proceduralization of cooperation on the basis of federal loyalty has led the Court to strike down the unilateral regulation of a subject matter by a federated entity when the legal framework applicable provided for cooperation between that entity and the federal government;[46] placing a federal partner before a *fait accompli* is no more acceptable.[47] Other cases use federal loyalty to strike down measures the extra-territorial effects of which create such negative externalities that the ability of the affected federal actor to effectively exercise its competences is compromised.[48]

While less developed than in Germany or Belgium, partly because of the longstanding formalization of cooperation mechanisms, the Swiss expression of federal loyalty, called "confederal fidelity," is envisaged as "the foundation of the federative state," and thus as being inherent to federalism.[49] As in Belgium, it was judicially recognized before being formally enshrined in the constitution.[50] This principle imposes upon federated entities (cantons) "to respect the territory of neighbouring cantons (…) [and to adopt] an attitude evincing good faith – thus devoid of any trickery or abuse - in all intercantonal relations, this, even when the requirement of good faith is not already recognized in rules that would be determinative in the context of relations between sovereign states."[51] From this

standpoint, federal loyalty in Switzerland implies more than mere comity, which is only one, minimalist component of loyalty; it requires a consideration of common interests when exercising one's competences.[52]

This requirement is broadly consonant with the numerous "principles of cooperative government" imposed by the South African constitution on the country's federal actors. Section 41(1) of the South African Constitution, which arguably represents the most comprehensive codification of the basic ideas underlying federal loyalty,[53] has so far been construed in a way that is broadly consistent with the interpretation provided in other federations. For example, in 1999, the Constitutional Court examined whether the federal Parliament had encroached "on the geographical, functional or institutional integrity of government in another sphere" when enacting a statute reforming the country's civil service on the basis of its constitutional power to do so. The Court emphasized that "every reasonable effort [had to] be made to settle disputes before a court is approached to do so.[54] It held that the purpose of s. 41(1)(g) was

> to prevent one sphere of government from using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government", without, however, having the effect of providing provinces with a veto over "national legislation with which they disagree, or to prevent the national sphere of government from exercising its powers in a manner to which they object.[55]

Thus, a mere political objection by provinces to an otherwise valid federal law is insufficient to trigger the application of the principles of cooperative federalism. On the facts of the case, no violation of s. 41 was found, and as to the process leading to the adoption of the impugned law, the Court noted that the federal government had consulted the provinces and given them opportunities to make representations before adopting the law. Since it did not substantially deprive provinces of any of their powers and that it was not arbitrary, the law as a whole did not encroach on their functional or institutional integrity.[56]

In a subsequent case, the Court opined that the unilateral decision of a province to adopt a law in an area of concurrent jurisdiction with the federal Parliament, without informing the latter of that decision and while the central government was conducting discussions in view of elaborating a federal legislative intervention in the same area, was a contravention to the obligation "to co-operate with one another in mutual trust and good faith." Interestingly, the Court held that the obligation to make reasonable efforts to settle constitutional disputes "entails much more than an effort to settle a pending court case. It requires each organ of the state to re-evaluate its position fundamentally."[57]

Having mapped out, with very broad strokes, the central ideas underlying federal loyalty, which are generally the same across federations in spite of inevitable contextual differences, the question is where does Canada stand on federal loyalty?

II – The shadow of federal loyalty in Canadian constitutional law[58]

In 2001, Stéphane Dion, who was then Canada's Minister of Intergovernmental Affairs, stated that the principle of federal loyalty was as valid for Canada as it is for Germany.[59] However, when one looks at the law of federalism in Canada, this principle seems conspicuously absent. At the very least, it is not theorized, but neither are the normative implications of federalism itself, leaving aside the often technical discussions triggered by the formal division of powers provided for in the *Constitution Act, 1867*. Two claims can be made regarding the presence of federal loyalty in Canadian constitutional law, a weak one and a strong one.

The weak one goes as follows: some dimensions of federal loyalty are already recognized in Canadian law, primarily under the guise of the doctrine of "comity." This doctrine, which comes from customary international law, refers to states' obligations to respect differences between their own legal system and a foreign state's legal system to which they turn for judicial assistance, the rationale being that the failure by the former to respect these differences could threaten the latter's sovereignty. Since intergovernmental relations within federations are also susceptible to trigger disputes, the doctrine has been transplanted into federal contexts. The famous "full faith and credit clause" of the United States Constitution arguably represents the canonical example of such a transplant in a federal setting.[60]

The *Constitution Act, 1867* contains no such formal provision, but various cases, including those examining the extraterritorial effects of provincial legislation,[61] have confirmed the role of comity as providing a functional equivalent to the full faith and credit clause, the Supreme Court having gone as far as to mention that the extraterritorial application of otherwise valid provincial legislation must be conditioned by "the requirements of order and fairness that underlie our federal arrangements."[62] In other words, the application of such legislation should not unduly interfere with the interests of the province where extraterritorial effects will materialize. Viewed in this light, comity bears some resemblance to federal loyalty, albeit in a much weaker form than that given to this doctrine in other federations. It is certainly a dimension of federal loyalty, but the latter is more demanding.

In contrast, a stronger claim would be that loyalty already enjoys a stronger, albeit implicit, status in Canadian constitutional law, but that this recognition should be made explicit and loyalty's status, enhanced. In other words, loyalty should be explicitly acknowledged as consubstantial to the constitutional principle of federalism, as elaborated upon in the *Quebec Secession Reference*, even though both its recognition and the strengthening of its status could induce changes – in my view welcome ones - in the way some fundamental issues are approached. Recall that all the federations where federal loyalty is recognized and implemented by courts of law have justified it not on the particular type of federalism that their institutional regime establishes, but as being inherent to the very idea of federalism.

Yet, as even a cursory examination of the case law reveals, Canadian constitutional law remains ambiguous as regards loyalty. While it recognizes some obligations that are akin to those imposed upon federal actors in other federations, it sometimes falls short of drawing all the consequences from a full-fledged recognition of this principle.

Fiduciary duty

The notion of loyalty, and its corollary of good faith, is not foreign to the fiduciary duties imposed upon the government, where applicable, when it deals with Aboriginal peoples. The link between loyalty and the duty to act in a manner that upholds the honour of the Crown is even stronger. What is especially relevant to note here is the fact that these doctrines, which rely in one way or another on the notion of loyalty as a foundational principle, apply to special types of relationships between the government and entities that possess a particular constitutional status under the *Constitution Act, 1982*,[63] i.e. Aboriginal peoples. As with federal loyalty, these doctrines are inherently relational. Federalism, as established by the *Constitution Act, 1867*, institutionalizes just another type of relationship between other political actors, i.e. the federal and provincial governments, both enjoying a formal constitutional status.

Cooperation between federal and provincial governments

Now, what about cooperation between these two levels of government? Since, as we have seen, federal loyalty presupposes transcending purely antagonistic conceptions of federalism, thereby emphasizing cooperation, the old case of *Montreal Street Railway* can be read as creating a rebuttable presumption of reasonable cooperation between the federal and provincial governments, which, however, cannot be assimilated to a formal duty to cooperate.[64] Evoking this hypothesis raises, in turn, the question of whether the duty to negotiate identified in the *Quebec Secession Reference* could outgrow the exceptional context in which it was found to exist. If the Supreme Court mentioned in that case that a vote favourable to the secession of a province from the federation would impose upon relevant constitutional actors, assuming that it led to a clear majority on a clear question, a duty to negotiate in good faith, then one can ask the following question: if federal actors negotiating the secession of one of them from the federation are under a constitutional duty to negotiate in good faith the terms of that secession – even if it is a procedural obligation of means and not of results, is it not arguable that federal actors dealing with each other in the "ordinary life" of the federation are under a similar duty to act in good faith and to take into consideration the rights and interests of each other? This line of inquiry, I suggest, necessarily leads to the principle of federal loyalty, and, perhaps unsurprisingly, this principle has begun to *explicitly* make its way into constitutional discourse in Canada, with the Supreme Court stating that cooperation is both inherent to federalism, and to be encouraged and valued. Indeed, while it did not in any way adopt a single conception of the requirements for cooperative federalism, the Court nevertheless adopted in recent cases such as *Pelland*[65] and *NIL/TU, O Child & Family Services Society*[66] a "benevolent" form of scrutiny when examining instances of cooperative federalism.[67]

But if cooperation is clearly valued, its normative justification and consequences remain rather difficult to fathom. One could for example expect that unilateralism would tend to be discouraged as the antithesis of reasonable federal behaviour, especially if it results in imposing negative externalities on others. Again, the case law is inconclusive, which is understandable since the demise of a "watertight compartments" conception of federalism remains relatively recent in the country's constitutional history. The Supreme Court's revival of unwritten constitutional principles and lukewarm embrace of cooperative federalism are even more recent. Moreover, as we will see, this revival has led some judges to express a deep malaise towards the use of such principles.

Unwritten constitutional principles

The Supreme Court's advisory opinion in the 1981 *Patriation Reference* first stands out as having rekindled interest in the potential normative consequences of federalism.[68] Faced with a federal attempt to unilaterally patriate the Constitution from the United Kingdom in the absence of any amending formula, the Court found that while the federal government's initiative could be upheld on the basis of the laws of the Constitution, it went against a constitutional convention, which required a substantial degree of provincial consent for the contemplated amendment since it affected federal-provincial relationships. Importantly, the reason for such a convention was found to be the federal principle. This opinion echoed prior cases of the same era affirming the constitutionally problematic nature of unilateral changes, be they the result of federal or provincial initiatives, affecting either the 'federalness' of central institutions such as Parliament,[69] or the political compromise on which Canada had been founded and which transcended the powers of a single province.[70] The Court's opinion as to the unconstitutional nature of the federal initiative was based on constitutional conventions deemed to be ontologically political and thus unsusceptible to juridification.

But that finding took place in an era where the conception of the law was much more

influenced by legal positivism's staunch distinction between law and morality, or law and politics. As well, it was made before the late 1990s' revival of unwritten constitutional principles; such principles provide a much stronger normative foundation for decisions seeking to give meaning and implement the core values that inform federalism; even if the enforceability of these principles is variable, they are legal in nature. It is difficult to imagine how the majority opinion on the constitutional convention issue would have unfolded had it been informed by a reasoning based on constitutional principles rather than on constitutional conventions, but it shall suffice to say that it would have been relatively easy to ground such an opinion on federal loyalty provided one agrees that the core features of this doctrine are indeed inherent to the principle of federalism. Indeed, federal loyalty creates suspicion towards unilateral actions encroaching upon the rights or interests of others. At the same time, the reliance on the principle of federalism as a normative standard that can be used by courts to tame political unilateralism remains contentious. The vigorous intellectual debate that took place between Justices Iacobucci and La Forest in the *Ontario Hydro* case epitomizes the tension that this reliance provokes. Dissecting that debate sheds light on the main sources of resistance to the use of the unwritten principle of federalism and, more specifically, to uses that give it real interpretive claws.

The *Ontario Hydro* case

In this case, it is the scope of Parliament's unilateral and discretionary power to declare works for the general advantage of Canada that was at stake.

Justice Iacobucci, speaking for himself and three other judges, opined that

> [t]he federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. (…) Parliament's jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved.[71]

In contrast, Justice Laforest, writing for two other judges, rejected his colleague's federalism-inspired, narrow reading of the declaratory power, arguing that 1) the Constitution, which expressly contemplates transfers of provincial powers to Parliament over certain works "must be read as it is, and not in accordance with abstract notions of theorists", 2) Iacobucci J.'s views revealed a "misunderstanding of the respective roles of law and politics in the specifically Canadian form of federalism established by the Constitution", and 3) "protection against abuse of these draconian powers is left to the inchoate but very real and effective political forces that undergird federalism."[72] Despite Justice Laforest's observations, the majority in *Ontario Hydro* seemed inclined to give some legal status to a principle of political morality limiting the ways in which an undisputed constitutional power can be exercised, which is akin to decisions made in other federations on the basis of the doctrine of federal loyalty.

Laforest J.'s views are debatable for several reasons. One lies in the sharp dichotomy he establishes between law and politics, the exact same type of dichotomy that was envisioned as unfounded in the *Quebec Secession Reference*. Indeed, a particular action with constitutional ramifications may raise both legal and political issues, which co-exist in the same time, space, and which may necessitate actions from both legal and political actors. The former's task is to identify the boundaries within which the latter evolve, which still leaves them a lot of room to manoeuver. The second problem lies in Laforest J.'s assumption about the alleged "clarity" of the constitutional text applicable in the case at bar. Read alone, it may be that the declaratory power granted to the federal Parliament in the Constitution Act, 1867, is "clear." But should the focus of the inquiry be on the text *alone*? More importantly, is that text as clear as it is alleged to be? If the text is so important, and it undeniably is, then one must consider both what the text says and what it

does not say. In *Ontario Hydro*, the constitutional provision did confer a power to Parliament without qualifying it at the outset, but this absence of qualification could be construed both as Laforest J. did *and*, alternatively, as an indication that the constituent did not want to elaborate on the way the said power could or should be exercised. In other words, while the grant of power is clear, the normative consequences flowing from this grant are not so clear, and are actually largely indeterminate, hence the possible interest of reflecting on these consequences from the broader standpoint of federalism. Declaring that a provision is clear itself requires a prior interpretation grounded on potentially debatable assumptions.

Laforest J.'s idealization of the political process represents a third problem. A power that is abused is a power that is abused, and the possibility that "the inchoate but very real and effective political forces that undergird federalism" be mobilized so as to prevent such abuse is a possible, but far from certain outcome, particularly in today's highly complex and fragmented societies. In short, this outcome is contingent at best. As a result, decisions having a significant and potentially deleterious impact on the dynamic of federalism and on the equilibrium of the federation would all be left unchecked if courts adopted a policy of systematic non-intervention on the assumption that political actors will inevitably find mutually acceptable, pragmatic solutions. This ignores how imbalances in political power may precisely prevent finding such solutions. It also confuses a legitimate concern for maintaining an appropriate balance between the role of courts and political actors in the evolution of federalism, with an outright abdication by the former of their role as guardians of the Constitution, of which federalism is, like it or not, a component.

Fourthly, Justice Laforest's remarks that caring about how uncontested powers are actually exercised by federal actors would somehow reveal the influence of "abstract notions of theorists" are misleading. If indeed some theorists are concerned not only by the identity of the legal holder of such powers but also by the manner in which their legal holder exercises them, it is precisely because there are very practical consequences to the exercise of constitutional powers. In that respect, federalism hardly differs from other structures or regimes that are constitutionally enshrined. Moreover, if there really is an abstract position in that type of debate, it arguably lies much more in the views of those who, because of a formalist rather than teleogical reading of the constitution, willfully choose to ignore the real and tangible consequences of the exercise of constitutional powers on the dynamic of federalism. In fact, Justice Laforest's position evinces the strong influence of functionalist approaches to federalism, which tend 1) to reduce this political regime to the status of a mere toolbox designed for optimizing, whenever possible, the delivery of public services in a context of competition between service providers, 2) to deny that some values can be inherent to federalism, and 3) to advocate for the resolution of federalism-related disputes through political processes characterized by "pragmatic" as opposed to principle-based decision-making, and for the consequential ousting of the judiciary from that realm.[73] Such views are incommensurable with the logic underlying the explicit or implicit recognition of federal loyalty and with the view that I myself espouse in this paper. However, there is no indication of a "functionalist" turn in the Supreme Court's recent case law.

In line with its suspicion of unilateralism, federal loyalty also tends to promote stability and predictability by leading to the adoption of solutions that discourage abrupt and unexpected shifts in the relationships between the governments of the federation. In other words, it may, in appropriate circumstances, justify considering the legitimate expectations that federal actors may entertain as to the behavior that their partners will adopt. On this question, the Canadian law of federalism also sends mixed signals. A negative one can certainly be found in the *Canada Assistance*

Plan Reference,[74] which dealt with a unilateral change of the federal government's financial commitments to recipient provinces, and where the Supreme Court construed the principle of parliamentary supremacy as if federalism simply had no relevance in the case. But was the Court correct in giving this principle an absolutist interpretation – in line with the type of interpretation that it could have received in a non-federal state such as the United Kingdom - in a context where internal sovereignty is divided, thereby implicitly condoning potential clashes of absolute parliamentary sovereignties, provincial and federal?[75] Arguably, resorting to federal loyalty in that case could have opened the door to imposing procedural obligations either to better consult the provinces negatively affected by Parliament's legislation, or to better take into consideration their interests and legitimate expectations, as opposed to formal jurisdictions, when legislating.

Recall that the provinces affected suffered tangible negative externalities as a result of Parliament's unilateral action, their budgetary planning being significantly upset. Alternatively, without even questioning the power of the federal government to change its policy concerning financial assistance to provinces, federal loyalty could have been relied upon to impose upon the government additional requirements as to the manner in which it was exercising its power, for example by forcing it to reconsider the timeline for the implementation of its new policy so as to reduce to a reasonable extent the significant negative externalities caused by the policy change. As can be seen, federal loyalty could lead to the imposition of additional, and more or less stringent, behavioural obligations upon federal actors. It would not in and of itself dictate any particular outcome, but it would at least ensure that federalism-related considerations are taken seriously whenever they are relevant, i.e. when the "functional and institutional integrity" of federal actors, to borrow from the language of the South African Constitution, is at stake.

Reference re Securities Act

Lastly, concerns for federal loyalty, as we have seen, often overlap with concerns for proportionality and equilibrium. In this respect, the Supreme Court's recent case law evinces a preoccupation with reducing the impact of interpretive doctrines that may serve as justifications for actions that disproportionately risk upsetting the federation's internal balance.[76] Nowhere is this concern more obvious than in the 2012 *Reference re Securities Act*, where the Supreme Court unanimously struck down the main provisions of a proposal of federal securities legislation, as massively trenching upon provincial jurisdiction over property and civil rights. To some extent, this came as a surprise since the Court's own prior case law on the federal commerce clause had opened the door to a broader interpretation of that clause, arguably at the expense of the provincial jurisdiction over property and civil rights. However, it did not happen, by and large out of concerns for the balance of powers within the federation. The Court emphasized that "[i]t is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres."[77] It envisages overlapping federalism as encouraging cooperation, but not as imposing it.[78] Instead of distilling all the relevant precedents, the Court strongly relies on the principle of federalism to buttress its normative argument:

> It is not for the Court to suggest to the governments of Canada and the provinces the way forward by, in effect, conferring in advance an opinion on the constitutionality on this or that alternative scheme. Yet we may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet

> the needs of the country as a whole as well as its constituent parts.
>
> Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government has for each other's own sphere of jurisdiction. Cooperation is the animating force. The federalism principle upon which Canada's constitutional framework rests demands nothing less.[79]

The constitutional principle of federalism, as opposed to mere textual arguments, therefore plays a crucial role in the Court's reasoning. However, the Court predictably falls short of juridifying obligations pertaining to intergovernmental cooperation, preferring to exhort political actors to align their practices on the law; we are therefore in the realm of aspirations rather than of formal legal obligations.

Summarizing the examination of the case law

What can we draw from this cursory examination of the case law? At best, that there are contradictory hints as to whether or not federal loyalty, at least in an expression that goes further than mere intergovernmental comity, has any future in the Canadian law of federalism. There are signs pointing towards some form of loyalty-like obligations, but their actual normative strength is unclear. Never has the principle of federalism been so frequently used in the Supreme Court's reasoning. Yet, the normative consequences that it entails remain unclear.

In short, no coherent picture emerges from this study of the most relevant cases for the purpose of inquiring into the potential existence of loyalty-like obligations in the Canadian law of federalism. This is to a large extent due to a discursive shift in the Supreme Court's reasoning, from a formalist, text-centered approach, to a more principle-based one today. That being said, a missing component remains that would bridge the Court's increased reliance on the normative principle of federalism with the fact that intergovernmental cooperation has become a central feature of the federation's daily life. It is as if cooperative federalism were in search of a normative rather than merely factual justification. Federal loyalty, whether or not labeled as such, could provide such a justification.

Conclusion

This paper has emphasized the rather shallow and contradictory use of cooperative federalism in the Supreme Court's recent case law. While the ambiguity inherent in the notion of cooperative federalism partly accounts for the deep disagreements that occasionally arise as to its consequences, it is primarily its a-normative nature that poses a problem. Indeed, cooperative federalism first and foremost designates a state of fact.[80] As Robert Shapiro recently observed in the U.S. context, "[w]hat cooperative federalism lacks is an adequately specified normative theory."[81] In a way, this notion conjures "warm images with little content."[82] This is true as well in Canada.

Federal loyalty sheds light on the possible foundations of a normative theory for cooperative federalism, as it provides for "rules of engagement"[83] in disputes arising from the fact of cooperation which now characterize the functioning of all federations. As a legal *principle*, i.e. as a relatively indeterminate norm, it does not predetermine outcomes, since it needs to be individualized to the particular political and legal context in which it is invoked. Importantly, it can be used to counter both centripetal and centrifugal forces.

But while overlapping to some extent with concerns pertaining to cooperative federalism, federal loyalty acts at a deeper level as it is inherent to federalism, irrespective of the abstract model, be it cooperative or competitive, a given federation is deemed to reflect. Even if one agrees that, normatively, competition is integral and/or beneficial to federalism, or if one simply makes the empirical claim that the competitive model prevails in federation *X*, one

still has to make sense of the circumstances in which this competition takes place and the conditions under which the federation's purposes can best be achieved, bearing in mind that federalism has both procedural and structural dimensions.[84] Law and economics scholarship has demonstrated the importance of trust in view of ensuring the functioning of competitive markets.[85] Federal loyalty provides a normative justification for occasional judicial interventions targeted either at preventing that trust be unduly undermined within the federation, or at facilitating the restoration of trust between federal actors. As such, it is neither a judicial straightjacket imposed on federal actors, nor a panacea.

Deliberately sorting out what federal loyalty could mean in Canadian law would not legitimize unbridled judicial activism either. On the contrary, the judicial identification of its normative contours could assuage fears raised by potential unprincipled and opportunistic uses of unwritten constitutional principles. In spite of the trial judge's brave attempt to elaborate in the *Commissioner of Firearms* ruling a functional equivalent to federal loyalty in the Canadian context, it is not up to Superior Court judges to do this. It is the responsibility of the Supreme Court of Canada, one that can only be performed if the Court adopts the bold attitude that is sometimes needed when the evolution of the law is at a critical juncture. As Louis Brandeis once wrote in a dissenting opinion to a *Lochner*-era case, "[k]nowledge is essential to understanding, and understanding should precede judging. Sometimes, if we would guide by light of reason, we must let our minds be bold."[86]

Does the *Commissioner of Firearms* case represent such a critical juncture in the evolution of the Canadian law of federalism? Arguably so, in light of the particular facts of the case, the novel arguments that are raised, as well as the relative lack of coherence of our current constitutional framework. But that this case provides a unique opportunity to figure out what federal loyalty could mean in our federation's context does not automatically imply that the federal government's actions constitute a breach of that principle should it be formally recognized and even strengthened. For the characterization of that position depends not only on the prior recognition of federal loyalty as a potentially enforceable normative principle inherent to federalism, but also on the particular scope and intensity this principle is given by the Court.

A loyalty-inspired formulation of the Quebec government's argument in *Commissioner of Firearms* would likely posit that the federal government has a duty to help the province exercise its jurisdiction over property and civil rights by not destroying and transferring data already collected under the repealed federal legislation. This is data that the province would have an obligation to gather, including the costs associated to such endeavour, absent the transfer requested from the federal government. It would probably also claim that the federal government would merely suffer a trivial prejudice as a result of the non-destruction and transfer of the data, the only harm suffered being intangible and consisting in its ideological disapproval of a provincial public policy that seeks to replicate on a smaller scale a regulatory regime which was reneged upon by its original designer. Even if a "strong" version of federal loyalty were adopted, it is not entirely clear that a breach of federal loyalty would be found, as a *positive* constitutional duty imposed upon one level of government to assist the other level in the exercise of its jurisdictions would in all likelihood be situated rather highly on the intensity scale of the principle. In any event, such a duty would be qualitatively distinct from a negative one not to erect hurdles in the exercise of such jurisdictions. It is to be hoped that the Supreme Court will seriously address such arguments.

Notes

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German law, respectively. German-language abbreviations are used to cite German cases, and French-language abbreviations are used to cite Belgian and Swiss cases.

1 See Jean-François Gaudreault-DesBiens, "The 'Principle of Federalism' and the Legacy of the *Patriation* and *Quebec Veto References*" (2011) 54 Sup Ct L Rev 77 [Gaudreault-DesBiens "Principle of Federalism"].

2 *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Quebec Secession Reference*].

3 *Quebec (Procureur Général) c Canada (Procureur Général)*, 2012 QCCS 4202, [2012] RJQ 1895, rev'd 2013 QCCA 1138, 108 WCB (2d) 714, leave to appeal to SCC granted, 35448 (November 21, 2013), [*Commissioner of Firearms*].

4 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

5 Art. 143(1), G.G.W.

6 Art. 44 Satz 1, 2 & 3 BV.

7 *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, s 41.

8 In Austria, it is referred to as the "principle of consideration". See Andras Jakab, "Two Opposing Paradigms of Continental European Constitutional Thinking: Austria and Germany" (2009) 58:4 ICLQ 933 at 940.

9 Hans-Albrecht Schwarz-Liebermann von Wahlendorf, "Une notion capitale du droit constitutionnel allemand: la *Bundestreue* (fidélité fédérale)" (1979) 95:3 Revue droit public de la science politique en France et à l'étranger 769 at 771 [Wahlendorf].

10 See William S Livingston, "A Note on the Nature of Federalism" (1952) 67 Political Science Quarterly 81.

11 For the United States, see Daniel Halberstam, "Of Power and Responsibility: The Political Morality of Federal Systems" (2004) 90:3 Va L Rev 731 at 790. For Australia, see Taylor Greg, "The Division of Powers in Federal Systems: Comparative Lessons from Australia" (Paper delivered at the Future of Federalism Conference, University of Queensland, Australia, July 2008), Gabrielle Appleby, Nicholas Aroney & Thomas John, eds *The Future of Australian Federalism: Comparative Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2012) 96 at 96, 107.

12 The very idea that there are core values underlying federalism has been questioned, if not bemoaned, by scholars influenced by functionalist conceptions of federalism, which quickly spread, as of the 1950s, from the United States to Canada, primarily in the Anglophone scholarship. See e.g. Patrick J Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 UTLJ 47.

13 Art, 20, Abs. 1 G.G. This analysis of German constitutional law (*Basic Law of the Federal Republic of Germany*) heavily draws from Jean-François Gaudreault-DesBiens, "The Ethos of Canadian Aboriginal Law and the Potential Relevance of Federal Loyalty in a Reconfigured Relationship between Aboriginal and Non-Aboriginal Governments: A Thought Experiment" in Ghislain Otis & Martin Papillon, eds, *Fédéralisme et gouvernance autochtone / Federalism and Aboriginal Governance* (Québec: Presses de l'Université Laval, 2013) 51 at 63-77 [Gaudrault-DesBiens, "Ethos"].

14 Walhendorf, *supra* note 9 at 777.

15 *Ibid* at 778.

16 Donald P Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed (Durham: Duke University Press, 1997) at 63 [Kommers]. Except where otherwise indicated, all translations from German come from Kommers' book.

17 *Finance Equalization Case 1*, 1 BVerfGE 117 (1952) cited in Kommers, *ibid* at 72.

18 1 BVerfGE 299 (1952) cited in Donald R Reich, "Court, Comity, and Federalism in West Germany" (1963) 7:3 Midwest Journal of Political Science 197 at 209 [Reich].

19 *Ibid.*

20 David P Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994) at 79.

21 *Christmas Bonus Case*, 3 BVerfGE 52 (1953), *North Rhine-Westphalia Salaries Case*, 4 BverfGE 115 (1954).

21 Reich, *supra* note 18.

22 *Ibid* at 210.

23 *Kalkar II Case*, 81 BVerfGE 310 (1990), cited in Kommers, *supra* note 16 at 86-87.

24 6 BVerfGE 309 (1957).

25 *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 326, 1 WWR 299 (PC) [*Labour Conventions Case*].

26 In the more recent *Television Without Borders Case*, 92 BVerfGE 203 (1995), the Court held that federal loyalty imposes upon the federal

government the duty to defend the competences of the Lander when it is negotiating with the European Union, which minimally presupposes that it formally consults with them before and while negotiating.

27 Walhendorf, *supra* note 9 at 787.

28 *Atomic Weapons Referenda II Case*, 8 BVerfGE 122 (1958). If the government is directly responsible for the creation of the obstacle to the other government's exercise of jurisdiction, it then raises a straightforward division of powers issue and no reference to federal loyalty is necessary: *Atomic Weapons Referenda 1*, 8 BVerfGE 104 (1958).

29 Reich, *supra* note 18 at 214.

30 *Finance Equalization III*, 86 BVerfGE 148 (1992).

31 *State of Berlin Case*, BVerfG, 2 BvF 3/03 (2006).

32 *Television 1 Case*, 12 BVerfGE 205 (1961).

33 39 BVerfGE 96 (1975), cited in Kommers, *supra* note 16 at 95-96.

34 Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Oxford: Hart Publishing, 2011) at 57. It must be noted that the enshrining of the principle of supremacy of federal laws over *Land* laws in s.31 of Germany's Basic Law in no way undermines the normative force and scope of federal loyalty.

35 C. Arb., 25 February 1988, no. 47/1988.

36 Sébastien Depré, "Les conflits d'intérêts : une solution à la lumière de la loyauté fédérale" (1995) Revue belge de droit constitutionnel 149 at 167 [Depré].

37 Patrick Peeters, "Le principe de la loyauté fédérale: une métamorphose radicale" (1994) 18 Administration Publique Trimestriel 239 at 239-41.

38 Even in 1992, the Arbitration Court had accepted to examine an argument based on federal "loyalty" or "fidelity", even if it had ultimately rejected the claim for lack of a factual foundation. See: C. Arb., 20 February 1992, no. 12/92.

39 Wouter Pas, "Federale loyauteit, de bevoegdheid inzake toerisme en unicommunautaire reisbureaus. Enkele bedenkingen bij het arrest 199/2004 van het Arbitragehof" (2005) 60 TBP 147 at 150.

40 My translation.

41 Marc Uyttendaele, *Précis de droit constitutionnel belge: regards sur un système institutionnel paradoxal*. 3rd ed (Brussels: Bruylant, 2005) at 1000.

42 Depré, *supra* note 36 at 156.

43 C. Arb., 9 July 1992, no. 55/92.

44 C. Arb., 15 January 1992, no. 2/92.

45 C. Const., 18 January 2012, no. 7/2012

46 C. Arb. (sect. admin.), 9 March 2006, no. 158/548.

47 C. Const., 28 October 2010, no. 124/2010; C. Const., 5 May 2011, no. 60/2011.

48 C. Arb., 3 October 1996, no. 54/92.

49 *Canton de Berne c Canton du Jura*, T. F., 1ère Cour de droit public, June 17, 1992.

50 For such a prior recognition, see: FF 1977 260; 1977 III 266. Art. 44 of the *Federal Constitution of Switzerland* reads as follows:

> The Confederation and the Cantons shall collaborate, and shall support each other in the fulfillment of their tasks.
>
> They owe each other mutual consideration and support. They shall grant each other administrative and judicial assistance.
>
> Disputes between Cantons, or between Cantons, and the Confederation, shall, to the extent possible, be resolved through negotiation or mediation.

51 *Canton du Valais c Canton de BTF*, T.F., 1ère Cour de droit public, Décembre 14, 1994.

52 Sergio Gerotto, *Svizzera* (Bologna: Il Mulino, 2011) at 40.

53 *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, s 41. Section 41 reads as follows:

> 41 (1) All spheres of government and all organs of state within each sphere must
>
> a. preserve the peace, national unity and the indivisibility of the Republic;
> b. secure the well-being of the people of the Republic;
> c. provide effective, transparent, accountable and coherent government for the Republic as a whole;
> d. be loyal to the Constitution, the Republic and its people;
> e. respect the constitutional status, institutions, powers and functions of government in the other spheres;
> f. not assume any power or function except those conferred on them in terms of the Constitution;

g. exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

h. co-operate with one another in mutual trust and good faith by -
   i. fostering friendly relations
   ii. assisting and supporting one another;
   iii. informing one another of, and consulting one another on, matters of common interest;
   iv. co-ordinating their actions and legislation with one another;
   v. adhering to agreed procedures; and
   vi. avoiding legal proceedings against one another.

(2) An Act of Parliament must

a. establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and

b. provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.

54 *Premier Western Cape v The President of the Republic of South Africa and Another* [1999] ZACC 2, 1999 (3) SA 657, 1999 (4) B Const LR 383 at para 54 (CC).

55 *Ibid* at para 58.

56 *Ibid* at paras 91-94.

57 *National Gambling Board v Premier of KwaZulu-Natal and Others* [2001] ZACC 8, 2002 (2) B Const LR 156, 2002 (2) SA 715 at para 36 (CC).

58 This part draws from Gaudreault-DesBiens, "Ethos", *supra* note 13 at 58-63.

59 Stéphane Dion, "Germany and Canada: Federal Loyalty in the Era of Globalization" (Speech delivered by the Honorable Stéphane Dion to the members of the Atlantik-Brucke, Feldafing, Federal Republic of Germany, 28 October 2001), [unpublished].

60 US Const art IV, **§** 1.

61 *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077, 76 DLR (4th) 256 [*Morguard*]; *Hunt v T&N plc*, [1993] 4 SCR 289, 109 DLR (4th) 16 [*Hunt*]; *Tolofson v Jensen*, [1994] 3 SCR 1022, 120 DLR (4th) 289.

62 Unifund Assurance Co of Canada v Insurance Corp of British Columbia, [2003] 2 SCR 63, 227 DLR (4th) 402 at para 56.

63 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

64 *City of Montreal v Montreal Street Railway*, [1912] AC 333, 1 DLR 681 [*Montreal Street Railway*]. An order, issued under the *Railway Act*, had placed upon a railway company under federal jurisdiction a specific obligation concerning the rates to be paid for using its network, which was connected to that of a *to enter into such agreements, or will be coerced to enter into them by the provincial Legislature which controls them*, it cannot be held (…) that is it necessary incidental to the exercise by the Dominion Parliament of its control over federal railways that provincial railways should be coerced by its legislation to enter into the agreements specified in the order appealed from" (*ibid* at 345) adding that "(...) *it cannot be assumed that either body [the provincial Legislature and the Dominion Parliament] will decline to cooperate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of "through" traffic."* (*ibid* at 346 [emphasis added]).

65 *Fédération des producteurs de volailles du Québec v Pelland*, 2005 SCC 20, [2005] 1 SCR 292 at para 15 [*Pelland*].

66 NIL/TU'O *Child & Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696 [NIL/TU'O Child & Family Services Society].

67 Gaudreault-DesBiens "Principle of Federalism", *supra* note 1 at 96.

68 *Reference Re Questions Concerning Amendment of the Constitution of Canada,* [1981] 1 SCR 753, 125 DLR (3d) 1 [*Patriation Reference*].

69 *Reference Re Authority of Parliament in Relation to the Upper House*, [1980] 1 SCR 54, 102 DLR (3d) 1; for more recent authority, see also: *Reference Re Senate Reform*, 2014 SCC 32, 369 DLR (4th) 577.

70 *Attorney General of Quebec v Blaikie et al*, [1979] 2 SCR 1016, 101 DLR (3d) 394.

71 *Ontario Hydro v Ontario Labour Relations Board*, [1993] 3 SCR 327, 107 DLR (4th) 457 at 404 [*Ontario Hydro*].

72 *Ibid* at 370-72.

73 This echoes the view defended by scholars such as Patrick Monahan, *supra* note 12, that courts should not at all get involved in the adjudication of federalism-related debates.

74 *Reference Re Canada Assistance Plan*, [1991] 2 SCR 525, 83 DLR (4th) 297. See also: *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557. Another negative sign lies in the resilience of the doctrine of interjurisdictional immunity, which purely and simply discourages cooperation by strengthening in an absolutist manner the position of the level of government - often the federal government - that benefits from it. In short, this doctrine is a potent incentive not to cooperate with the other level of government. See, for example: *Quebec (A.G.)* v. *Lacombe*, [2010] 2 S.C.R. 453; *Quebec (A.G.)* v. *Canadian Owners and Pilots Association*, [2010] 2 S.C.R. 536. It must however be acknowledged that recent cases have tended to narrow down its scope of application. See, for example: *Bank of Montreal* v. *Marcotte*, 2014 SCC 55.

75 Interestingly, the need to adapt principles of British constitutional law to a federal environment was emphasized by the Supreme Court itself in *Aetna Financial Services Ltd v Feigelman*, [1985] 1 SCR 2, 15 DLR (4th) 161 at 34-35, and reiterated by Laforest J. in both *Morguard* and *Hunt*, *supra* note 61.

76 *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR. 3*; Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457.

77 *Reference Re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 at paras 7, 85.

78 *Ibid* at paras 57, 130, 132.

79 *Ibid* at paras 132-33.

80 Andreas Auer, Giorgio Malinverni & Michel Hottelier, *Droit constitutionnel suisse*, vol 1, (Berne: Stämpfli Editions SA Berne, 2000) at 322.

81 Robert A Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (Chicago: University of Chicago Press, 2009) at 90.

82 Barry Friedman, "Valuing Federalism" (1997) 82 Minn L Rev 317 at 317.

83 *Ibid* at 91.

84 Maurice Croisat, *Le fédéralisme dans les démocraties contemporaines*, (Paris: Montchrestien, 1999) at 126-127.

85 Larry E Ribstein, "Law v. Trust" (2001) 81 BUL Rev 553 at 555.

86 *Jay Burns Baking Co v Bryan*, 264 US 504 (1924) at 520.