

Giacomo Delledonne, Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession. Legacies of the Quebec Secession Reference*, Palgrave, London, 2019, ISBN 978-3-030-03468-9

[This edited collection](#) gathers together Canadian and non-Canadian scholars to reflect on and celebrate the 20th anniversary of the Quebec Secession Reference, delivered by the Canadian Supreme Court in 1998. It opens with two Canadian scholars exchanging thoughts on the legacy of the reference from a domestic perspective as one of the most questioned decisions of the Canadian Supreme Court. To follow, non-Canadian scholars discuss the impact of this reference abroad, reflecting upon its influence in European and non-European contexts (Spain, Scotland, the EU, Eastern European Countries, Ethiopia, and Asia). Two final chapters, one by a lawyer and one by a political scientist, explore the democratic theory behind that reference. The readers could wonder why two non-Canadian scholars have decided to engage in an enterprise like this. There are several reasons of course, let us recall just three of them. First of all, the recent revival of secessionist movements in Europe and elsewhere has definitely given new lifeblood to a long-standing debate gathering the attention of scholars from all around the world. In some cases – the Catalan one perhaps being the most striking example – the secession strategy has been employed together with other arguments in order to present a broader identity question. This is nothing new; quite frequently secession has been invoked to address identity questions and indeed, as Mancini pointed out, “under prevailing circumstances, secessionist movements operate in the context of multinational states inhabited by autochthonous, territorially concentrated minorities which share a national or quasi-national identity” (Mancini 2012). In this, the Canadian Reference has represented a turning point thanks to the incredible effort made by the Supreme Court to frame secession from a legal point of view, by showing this way the added value of the legal dimension and the not-exclusively political flavour of secession.

Second, this Reference contains incredible anti-populist potential. As Giuseppe Martinico argues in his chapter, the Reference resulted in giving a series of guidelines that are very useful to govern the relationship between referendum and representative democracy and because of its complex notion of democracy. This should not come as a surprise, since generally speaking Canada has been traditionally seen as a laboratory for comparative lawyers and this Reference does not represent an exception.

Third, secession – or, better said, the fear of secession – is a typical concern in federal orders and poses a formidable intellectual and political challenge to their stability. The Reference was a turning point in framing the internal balance of a multinational federation which is also a well-established constitutional democracy. In order to do so we have structured the book in three parts, mixing domestic, comparative and theoretical approaches to this landmark opinion. The collection of essays is opened by a foreword by Richard Albert, who makes some relevant points about the enduring influence of the Reference in Canada, paving the way for the first part of the volume.

In the first part, two Canadian scholars discuss the legacy of the Reference from a domestic perspective, exchanging thoughts in a sort of ideal dialogue, on one of the most questioned decisions ever of the Canadian Supreme Court.

Errol Mendes focuses on some of the key political and legal reasons that led the Court to issue its Reference in 1998. In so doing, his chapter looks into the intermingling of politics and law in the ruling itself and the legal attempts to entrench the outcome of the ruling in the Clarity Act, along with the subsequent backlash from Quebec. In Mendes' view, the

political and legal factors underlying the Quebec Secession Reference may serve as cautionary signals for secessionist attempts in liberal democracies, like those which a number of European countries have faced in the last few years: in a nutshell, the Reference warns that process legitimacy is a critical issue for secessionist movements around the world.

Jean-François Gaudreault-DesBiens provides an overview of the main political and legal challenges which the Quebec independence movement is currently facing. His contribution revolves around three problems. First, it revisits the domestic legal framework applicable to a provincial secessionist attempt by virtue of the Quebec Secession Reference, which was a major game changer in the debate over the potential secession of the overwhelmingly Francophone province. Second, it considers the potential impact of recent political events, e.g. the Scottish referendum in Autumn 2014, on the strategy of the Quebec independence movement. Third, it delves into an alleged new legal foundation for secession, i.e. the so-called “right to decide”, as distinct from the right to external self-determination. By emphasising the necessity of transparency throughout the process which may ultimately result in the secession of a constituent unit, the Reference contributes to shedding a critical light on the soundness of the alleged “right to decide”.

In the second part, the influence of this reference abroad is explored by asking non-Canadian scholars to reflect upon its influence in European and non-European contexts (Spain, Scotland, Eastern European countries, Ethiopia, Asia). The contributions are ordered on the basis of the greater or lesser proximity of each case-study towards the Quebec Secession Reference and the Canadian scenario.

Constitutional orders in which a direct influence of the Reference is recognisable are considered first.

Josep Maria Castellà Andreu reviews the reception in Spain of the doctrine elaborated by the Supreme Court of Canada in its Reference. In Spain, both legal and political circles have developed a keen interest in the Reference of 1998 since the time it was issued. The existence of territorial tensions, the attempts at changing the constitutional status of the Basque Country and, above all, the secessionist crisis in Catalonia are among the main reasons for this glance at the Canadian case. In general terms, it is a laudatory, uncritical reception. At the same time, it often tends to be selective and partial, focusing exclusively on those aspects of the Reference which may provide support to the theses advanced by those who invoke it in the domestic debate. Sometimes, arguments drawn from the Reference of the Supreme Court are mixed up and confused with different ones from the Clarity Act. Catalan nationalism has used the Reference to delegitimise the Spanish response to secessionist demands.

Luigi Crema analyses the implications of the Quebec Secession Reference for public international law. International lawyers intervened in the proceedings which preceded the decision of the Canadian Supreme Court, and since 1998 the Reference has become a classic not only of constitutional but also of international legal literature. Most notably, the Canadian Reference was frequently cited in the written briefs submitted by the states that intervened in the proceedings of the 2010 Advisory Opinion of the International Court of Justice (ICJ) on Kosovo. The final section of Crema’s chapter reflects on the legacy of the Canadian Reference and the Advisory Opinion of the ICJ in light of present-day secession crises. Contemporary requests for secession resort to a number of arguments which were not mentioned either in Ottawa or at the Hague, such as the “right to decide”, the principle of stability, and the duty to negotiate between opposing factions.

Alastair MacIver analyses the influence of the Reference on the debate preceding and surrounding the Scottish independence referendum of 2014. The Reference influenced the

framing of the referendum on three levels. First, the Supreme Court's response to Question 2 of the Reference shaped a normative concept of the "principle of constitutional tolerance" with significant implications for defining the relationship between a possible Scottish state and the European Union. Second, the Court's answer to Question 1 influenced those who sought to formulate a European legal response to a would-be Scottish "yes" vote in light of a novel "fact of membership" approach to EU law. Finally, according to MacIver the Reference also offers a way of resolving the procedural dilemma underlying Articles 48 and 49 of the Treaty on European Union.

Asanga Welikala considers the influence as a case of migration of constitutional arguments within the Commonwealth. More particularly, he looks into the Sri Lankan debates about how to accommodate the political and territorial claims of the Tamil minority and putting an end to protracted ethnic conflict. The Reference has made an appearance in Sri Lankan constitutional discourse at two key moments: first, during the peace process facilitated by Norway and, second, in the recent *Chandrasoma v Senathiraja* judgment of the Sri Lankan Supreme Court which recognised the Tamils as a people entitled to a right to internal self-determination.

The subsequent chapters in the second part deal with cases of indirect, implicit or even weak influence of the Quebec Secession Reference.

Erika Arban explores the role of federalism, respect for minorities, constitutionalism and the rule of law, and democracy – the fundamental principles expounded by the Canadian Supreme Court in the Reference – in Ethiopia. The Ethiopian case is unique as its 1995 Constitution (three years before the Reference) is one of the few in the world which explicitly entrench a right to secession for all its Nations, Nationalities and Peoples. Arban argues that in spite of some relevant cultural and ideological differences, the Ethiopian Constitution and the Canadian Reference were both at the origin of the gradual departure from the idea of secession as a constitutional taboo. Furthermore, the secession procedure regulated by Article 39 of the Ethiopian Constitution actually responds to some of the substantial and procedural concerns raised by the Canadian Supreme Court in the Reference, showing a certain – although hidden – continuity.

Giacomo Delledonne and Matteo Monti analyse the impact of the Reference on the Italian constitutional order, looking at both the judgments of the Constitutional Court and the strategies and narratives of the political actors. In order to do so, they first focus on the weight of secessionist claims and threats in the drafting of the Constitution of the Italian Republic and the establishment of a peculiar regional system. After that, they consider the recent attempt to organise a secessionist referendum promoted by the regional legislature of Veneto, which was finally deemed unconstitutional by the Constitutional Court. The Quebec case is often cited in the political discourse – however, political actors almost exclusively focus on the necessity of a referendum. On the other hand, the argumentative strategy of the Constitutional Court – which excludes altogether the admissibility of secession under the Italian Constitution – reveals some limited similarities with the reasoning of its Canadian counterpart in 1998.

Zoran Oklopcic confronts the legacy of the Quebec Secession Reference from the vantage point of the "periphery" of the European Union, be it internal (Catalonia and Spain) or external (Kosovo and Montenegro). In so doing, he focuses on the Reference as an opportunity to re-examine what is generally meant by democracy. In this regard, the most important legacy of the Reference is not a broader understanding of democracy, but an opportunity to look at democratic constitutions from the perspective of institutional responsiveness. Oklopcic's chapter concludes by arguing that the Quebec Secession

Reference should be viewed as an encouragement to approach our understanding of democracy more reflectively and systematically.

Finally, there are three general contributions adopting a broader perspective. A political theorist and a lawyer discuss the democratic theory behind that Reference. In the last chapter, a comparative constitutional law scholar studies the significance of the Reference in the emergence of a comparative constitutional law of secession.

The chapter written by Roberto Castaldi considers the actual and potential impact of the Quebec Secession Reference on the main political theory debates related to the issue of secession. These have to do, first, with legal ways of seceding and how they can be resorted to, especially within a federal system. Second, the decision-making processes linked to secession look intrinsically problematic, most notably because of the use of referendums. Third, the Quebec Secession Reference can provide some lessons for the process of withdrawal of the United Kingdom from the European Union after the Brexit referendum. Castaldi's contribution argues that the Reference sketches a rich and complex constitutional framework for Canada which can be extended to other federal democracies.

Giuseppe Martinico moves from the role of the Quebec Secession Reference in nurturing and enhancing the comparative visibility of the Canadian Constitution throughout the world; furthermore, the Reference hugely contributed to weakening views of secession as a constitutional taboo. In his chapter, Martinico considers the legal foundations underpinning the reasoning of the Supreme Court in 1998. First, he considers the emergence of an "exit related conditionality", thereby meaning the necessity to preserve and respect the basic principles of the constitutional order throughout a secession process. This ultimately undermines the revolutionary potential of secession and ensures an axiological continuity between the old order and the possible new one. Second, he focuses on the complex, distinctive conception of democracy embraced by the Supreme Court in the Reference, which can challenge the constitutional counter-narrative currently advanced by a number of populist movements.

Finally, in his chapter, Francesco Palermo argues that a significant amount of law has been developed over the past 20 years in order to constitutionalise secession. In light of this, the legacy of the Quebec Secession Reference has been remarkably influential and has permeated, implicitly or explicitly, several legal systems, especially through the activity of their top courts. However, the legal regulation of secessionist claims has so far been focusing almost exclusively on referendums. In so doing, it has also neglected the additional safeguards which should prevent referendums from being abusively turned in plebiscitary instruments. At the same time, the legal regulation of political phenomena, which is one of the chief missions of constitutionalism, is clearly also emerging with regard to secession, and several instruments are being or can be employed to achieve a more effective, legally guaranteed and democratic comparative constitutional law of secession.