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CONSTITUTIONALISTS' GUIDE TO THE POPULIST CHALLENGE: LESSONS FROM CANADA

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If in 2017 the academic community celebrated the Sesquicentennial of the Canadian Confederation, 2018 marks another important anniversary: the twenty years of the seminal reference of the Canadian Supreme Court on secession. On that occasion the Canadian Supreme Court broke a "constitutional taboo", by treating secession in legal terms. That was a pretty brave decision, because the Canadian Supreme Court dealt frontally with the issue, accepting the challenge going beyond a formalist reading of its constitutional text(s), i.e. rejecting the argument according to which secession was banned since no written provision provided for that in the Canadian legal system. The Supreme Court did so by identifying the untouchable core of its constitution and reading the issue in light of the principles belonging to such a hard nucleus (federalism, democracy, constitutionalism and rule of law, protection of minorities). When offering its view, the Canadian Supreme Court did not limit its attention to domestic law only but, on the contrary, accepted to take international law into account. For all these reasons, this Reference has become a turning point. Since then a new debate has started about how to constitutionalize secession, how to tame something which had been considered for a long time as a sort of "beast" hard to domesticate.
However, that Reference has an incredible potential which offers

important counter-arguments to the rise of populisms (I use the plural on purpose). These counter-arguments can be summarized as follows: first, the Canadian Court gave a complex notion of democracy which cannot be reduced to the mere majority rule. This is a very important point - as we will see later - which makes this Reference also a powerful tool against populism. Second, the Canadian Supreme Court also presented the referendum as an instrument which needs to be mediated and which should not be considered as a source of automatic political or legal truth. This explains the deference that characterizes the Reference, which is also clear in giving political actors the task "to determine what constitutes a clear majority on a clear question" (par. 153). This way the Canadian Court avoided treating the referendum as something alternative to representative democracy. In light of these considerations the legacy of the Canadian Reference is fundamental to challenge the constitutional "counter–narrative" advanced by populists. In this respect, as Corrias pointed out even populism "contains a (largely implicit) constitutional theory". Even more recently Fournier defined this relationship by relying on a "parasite analogy", saying that: "the relation between populism and constitutional democracy is comparable to a process of parasitism where constitutional democracy would be the host and populism the parasite". In fact, one could say that the real aim of populist movements is to alter the axiological hierarchies that characterize constitutional democracies, for instance by presenting democracy (understood as the majority rule) as a kind of "trump card" which should prevail over other constitutional values. To question this argument, one could recall one of the most important "lessons learned" thanks to the Canadian Reference, which instead proposed a richer understanding of democracy – i.e., non-limited to its formal or procedural sense. Moreover, it is important to recall that the Canadian Supreme Court did not recognize a proper right to secession, rather it treated secession as an option that may be tolerated only in the presence of some important safeguards. In order to make this point the Canadian Court came up with a sort of "exit related conditionality". To understand what I mean by exit related conditionality it is useful to recall par. 90 of the Reference: according to which, in case of

activation of the negotiations with Québec, "The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities". This passage aimed at stressing the necessity of a sort of axiological continuity to be guaranteed in the transition from unity to secession. This axiological continuity would guarantee the rights of minorities. In other words, as Norman put it, this reasoning insists on "the perceived advantages of handling secessionist politics and secessionist contests within the rule of law rather than as 'political' issues that lie outside of, or are presumed (by the secessionists) to supersede, the law". In this sense the Canadian case shows how even in the absence of explicit constitutional clauses it is possible to attempt to proceduralize this phenomenon, by contributing to its domestication and in that the Canadian Supreme Court has indeed sent a message of hope: law - especially constitutional law - can and must have a role, avoiding delegating this issue to violence and a power relationship.

As Fournier recalled, "Populist rhetoric argues that the rule-of-law is used for a specific agenda by non-elected (and so non-representative) bodies. Populism turns the original equilibrium of constitutional democracy into a balance of power in which the majority no longer sits alongside the rule of law, but rather is constrained by it".

To impede such an alteration of the fragile equilibrium characterizing constitutional democracy it is necessary to embrace a complex (i.e., non-reductionist) notion of democracy. In this respect throughout the text of the Reference the Court clarified the relationship between democracy and majority. Here some key passages.

"Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values… Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec

on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize… However, it will be for the political actors to determine what constitutes 'a clear majority on a clear question' in the circumstances under which a future referendum vote may be taken".

These words confirm the strong counter-majoritarian nature of constitutionalism as such and imply the necessity to understand democracy as a mosaic where the will of majority cannot be treated as a trump card against other constitutional values. This is also confirmed by the artificial concept of majority. It is possible to find confirmation of this in comparative law. Both the *Clarity Act* in Canada and Schedule I of the *Good Friday Agreement* give political actors a key role in detecting the existing majorities. The *Clarity Act* was a follow up to the secession Reference in the part in which the Canadian Supreme Court had said that: "in this context, we refer to a 'clear' majority as a qualitative evaluation". In light of this the *Clarity Act* listed some factors that should be taken into account by the House of Commons to verify *a posteriori* the existence of a majority: This has provoked a harsh reaction in Québec as we know. A similar role, but to be played in the phase before the celebration of a referendum, is assigned to the Secretary of State by Schedule I of the *Good Friday Agreement*.

These two examples show that the majority is not a neutral or easy concept; on the contrary, it is an artificial one which can be constructed through political and legal decisions, by excluding or including someone from the right to vote, for instance. That is why procedural caveats are important since they contribute towards ensuring the preservation of that core of untouchable values that is up to constitutionalism to defend. When applied to referendums – frequently recalled by populists as a mantra - this means that the good reasons for the introduction of participation and direct democracy must be balanced with other values that are connected to the need to protect the untouchable core of a legal system.