Courts Without Cases: The Law and Politics of Advisory Opinions by Carissima Mathen

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The best scholarship inspires a reader to keep engaging with the author's primary questions and to look beyond them even after the last page is turned. This kind of inspiring spirit is just one way in which Carissima Mathen's new monograph, *Courts Without Cases: The Law and Politics of Advisory Opinions*, will make its mark.[1] The questions that emerge while reading this important volume, and that linger as the cover is closed, are both of grand and modest order. The reader is compelled to reflect on the nature of courts and the legitimacy of their role in instances of constitutional uncertainty or dispute: what are courts well-suited to offer when political communities are questioning their fundamental values? What special virtues does judicial reasoning bring to bear on the politics of living well together? Readers will also feel impelled to assess the risks and benefits of delegating an advisory function to a federation's apex court: what comparative lessons are to be drawn from the Canadian approach to references? Who has been privileged and who has been disadvantaged by the operation of the Canadian model? And careful readers of Mathen's important study will have to sit with and interrogate their own assumptions about the authority of law and its institutions: can questions of constitutional law ever be "answered"? Whose opinion matters when thinking through these questions?

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1 Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford, UK: Hart Publishing, 2019).

To begin this review by reflecting on the questions that arise from Mathen's book seems particularly apt because the main title of the book could have quite accurately been styled as an interrogative, *Courts Without Cases?* With or without the question mark, the main title signals the set of queries that shape Mathen's study: is a reference and its resulting advisory opinion meaningfully different from a case and its corresponding judgment? And if so, in what ways and with what implications? In short, the query underlying Mathen's inquiry is one questioning an oft-repeated (but also usually dismissed) premise of public law: is a court that carries out an advisory procedure, like the Supreme Court of Canada has done more than 150 times in its (almost) 150 years of existence, best understood as a "court without a case?"

Showcasing Mathen's trademark analytical clarity, cogency, and accessible writing style, *Courts Without Cases* ultimately argues that the answer to this underlying question is no—but it is a "no" with a caveat or two. This short review will outline the main planks of Mathen's inquiry, highlighting what a reader stands to gain from *Courts Without Cases*. This discussion aims to show the potential appeal and relevance of the volume's central themes and claims for an audience across disciplines and sectors. Moreover, in reviewing the book's argument and examples, this review seeks to engage with the book's driving query, wondering whether we learn anything about the nature and future of adjudication from exploring the relationship between references and cases.

REFERENCES IN HISTORICAL, POLITICAL, AND LEGAL CONTEXT

Mathen's sweeping and cross-disciplinary expertise on the advisory function is on full display in *Courts Without Cases*. The book squarely and self-consciously responds to the need for more robust study of the Supreme Court of Canada's advisory function from a structural perspective, that is, from a perspective that is principally concerned with the nature, context, realities, and institutional dynamics of the advisory function instead of the outcomes or doctrinal developments reflected in specific reference opinions.[2] To be sure, *Courts Without Cases* deals with the latter. The book opens with the story of the *Polygamy Reference*[3] and

2 *Ibid* at 6.

3 *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588. This reference is a particularly interesting example of a reference procedure because it was carried out before a trial level, rather than an appellate, court. As Mathen explains, "[v]ery few jurisdictions

throughout the volume, Mathen builds her argument by drawing on the narratives and legal developments of particular references, including from many cases that are well known like the *Anti-Inflation Reference*,[4] the *Secession Reference*,[5] the *Same-Sex Marriage Reference*,[6] the *Senate Reform Reference*,[7] and the *Supreme Court Act Reference*,[8] as well as from several less familiar historical examples, like *Re Wartime Leasehold Regulation*[9] and the *Japanese Canadians Reference*.[10] Telling the stories of these references not only contributes to the readability of the text, but also serves Mathen's substantive aim of theorizing about the advisory function. Indeed, it is hard to imagine how an effective study of references could avoid chronicling the facts and reasoning behind at least some specific instances of the reference procedure in action. The ways in which the procedure is carried out, and the doctrinal impact of advisory opinions, are contextual features that are vital to any effort at understanding either the nature or legitimacy of the reference procedure in Canada's political culture.

But the particulars of individual references are not Mathen's primary concern. As she explains at the outset of the book, her aim is to show that references in and of themselves "raise intriguing questions about the legal system in which they operate; about the motivations and strategies of the actors who initiate and participate in them; about the role of the court that produces them; and about the way that a society understands something as being 'law.'"[11] This broader and structural focus amplifies the potential contribution of *Courts Without Cases.* The public law literature is rich with studies of specific references and the doctrinal, theoretical, and political questions underlying them.[12] But scholarship focusing on the institutional

even allow for references before lower courts. The British Columbia government selected a trial reference so that it could introduce evidence, including via affidavit and examination of witnesses, that could not be easy to do before an appellate court. Most of the references discussed in [*Courts Without Cases*]—and indeed most references anywhere—are issued by appellate courts" (Mathen, *supra* note 1 at 2, n 5).

4 *Re: Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452.

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

6 *Reference re Same-Sex Marriage*, 2004 SCC 79.

7 *Reference re Senate Reform*, 2014 SCC 32.

8 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21.

9 *Reference re Wartime Leasehold Regulations*, [1950] SCR 124, [1950] 2 DLR 1.

10 *Reference re Persons of Japanese Race*, [1946] SCR 248, [1946] 3 DLR 321.

11 Mathen, *supra* note 1 at 6.

12 See e.g. David Schneiderman, ed, *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer & Company, 1999); Sujit Choudhry & Robert Howse, "Constitutional Theory and the Quebec Secession Reference" (2000) XIII Can J L & Juris 143; Carissima Mathen & Michael Plaxton, *The Tenth Justice: Judicial Appointments,*

and political dimensions of the Supreme Court's reference power has traditionally been much leaner.[13] *Courts Without Cases* is a welcome and needed contribution to our knowledge of references, one that shows that we will better understand the particulars and pathologies of individual references when we can situate them within a firm understanding of the institutional, structural, and contextual questions that are implicated by the reference power itself.

Mathen's text will satisfy the scholarly cravings of both public law and political science enthusiasts. Scholars in these fields who have historical interests have long needed better accounts of both the advisory function in Canada and the life-story of the Supreme Court, and they will not be disappointed by *Courts Without Cases*. Indeed, Chapters 2 and 3 are intentionally historical in outlook. Together, these chapters argue that the British experience with the advisory function of the Judicial Committee of the Privy Council, as well as the American approach to "cases and controversies" and mega-constitutional design, were influential in decisions about and controversies over delegating an advisory power to Canada's Supreme Court.

The historical foundation found in the book's early chapters is then complemented by Chapters 5 through 8, which aim to chronicle and analyze select examples from a century of the Supreme Court's advisory opinions on constitutional questions. Mathen expertly and concisely traces decades of constitutional history, showing how the Court's involvement in references, which almost exclusively follows from executive action,[14] puts the Court at the centre of messy legal and political disputes dealing with federalism (Chapter 5), constitutional transition and reform (Chapters 6 and 8), constitutional interpretation and rights (Chapters 7 and 8), and the design and architecture of Canada's public order (Chapter 8). These four chapters offer a particularly apt illustration of the truly sweeping nature of the questions on which the Court has been asked to "advise"

Marc Nadon, and the Supreme Court Act Reference (Vancouver: UBC Press, 2019); "Special Issue—Democracy, Federalism, and Rule of Law: The *Senate Reference* Revisited" (2015) 60:4 McGill LJ 595–903.

13 For one recent contribution from the political science perspective, see Kate Puddister, *Seeking the Court's Advice: The Politics of the Canadian Reference Power* (Vancouver: UBC Press, 2019).

14 Section 54 of the *Supreme Court Act,* RSC 1985, c S-26 provides, "The Court, or any two of the judges, shall examine and report on any private bill or petition for a private bill presented to the Senate or House of Commons and referred to the Court under any rules or orders made by the Senate or House of Commons".

governments in Canada. Through federalism references alone, the Court has had to confront constitutional disputes dealing with the ownership of natural resources and legislative authority to implement environmental protection measures;[15] "political tension…over the production, distribution and marketing of agricultural products";[16] the scope of authority over the economy;[17] and the jurisdiction to criminalize certain marital structures, the ownership of unregistered firearms, human cloning, and reproductive technologies.[18]

Mathen's comprehensive account of references is a rich ground for questioning the motivations of executive actors who initiate references and the social and doctrinal implications of the Court's advisory opinions. Indeed, Mathen weaves lessons about these motivations and implications into the fabric of her analytical discussion. Through these lessons, we are provided with an evidentiary basis for insights into constitutional action and litigation more generally, like the ways in which the procedural benefits of references contributed to the demise of the federal disallowance power[19] and how the Court's expanded reliance on extrinsic evidence in advisory opinions changed the practice of constitutional litigation outside the reference context.[20]

But what is particularly striking about Mathen's account of references over time and across areas of law is how it renders *Courts Without Cases* a contribution that is as much about the judicial advisory function as about the Supreme Court of Canada. Aiming to look at references "as both legally and politically exceptional moments" in the Canadian experience, these chapters explore the Court's history through the lens of the reference function and show how deployment of the advisory procedure has contributed to changes in the Court's identity and power over time. By telling the Court's history through a reference-oriented lens, *Courts Without Cases* adds to the existing literature that collectively tells the

15 See *Reference re Offshore Mineral Rights*, [1967] SCR 792, 65 DLR (2d) 353; *Saskatchewan (AG) v Canada (AG)* (Supreme Court Case No 38663, to be heard on March 24, 2020); *Ontario (AG) v Canada (AG)* (Supreme Court Case No 38781, to be heard on March 25, 2020).

16 Mathen, *supra* note 1 at 96. See e.g. *Reference re Farm Products Marketing Act (Ontario)*, [1957] SCR 198, 7 DLR (2d) 257; *Attorney-General for Manitoba v Manitoba Egg and Poultry Association et al*, [1971] SCR 689, 19 DLR (3d) 169.

17 See e.g. *Re: Anti-Inflation Act*, *supra* note 4; *Reference re Securities Act*, 2011 SCC 66;

18 See e.g. *In Re Criminal Code Sections Relating to Bigamy*, (1897) 27 SCR 461, 1 CCC 172; *In re Marriage Laws*, [1912] 46 SCR 132, 6 DLR 588; *Reference re Firearms Act (Can)*, 2000 SCR 31.

19 Mathen, *supra* note 1 at 83–87.

20 *Ibid* at 92–95.

Court's institutional biography.[21] Mathen's defining contribution to this biographical literature is her claim that the Court's current status as a powerful and authoritative figure in constitutional law and politics—in particular as the "provider of answers"—emerged incrementally during the 20th century at least in part through exercises of its reference power. Of course, this label, if read on its face, could be somewhat deceptive. In the culture of justification that defines conceptions of procedural fairness in Canada,[22] merely providing an "answer" to the kinds of legal and political questions that Mathen describes in *Courts Without Cases* would always be wanting, if not delegitimizing, for the Court and its role in the advisory process. The legitimacy of the reference process, both the executive's impulse to initiate it and the Court's willingness to participate, seem to turn rather on understanding the role as "provider of answers" as the "provider of (responsive) reasons" for those answers.

NO, WITH A CAVEAT

Courts Without Cases also has much to offer readers seeking insight into the conceptual and theoretical questions raised by an apex court's advisory function. The book's conceptual discussion orients around the relationship between references and cases. Mathen begins by introducing the traditional account of what courts can and should legitimately do given their relationship to other branches of government, namely adjudicate cases (Chapter 1). On this traditional account, Mathen argues that the judicial function of adjudicating cases is constrained by, first, the doctrine of justiciability, which establishes the kinds of disputes that can be adjudicated by the courts in order to limit "what otherwise would be an

21 For other examples, see e.g. James G Snell & Frederick Vaughan, *The Supreme Court of Canada: A History of the Institution* (Toronto: University of Toronto Press, 1985); Peter McCormick, *Supreme At Last: Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company, 2000); James W St G Walker, *"Race," Rights and the Law in the Supreme Court of Canada* (Waterloo: Wilfred Laurier University Press, 1997); Constance Backhouse, *Claire L'Heureux-Dubé: A Life* (Vancouver: UBC Press, 2017).

22 See e.g. Mary Liston, "Administering the Canadian Rule of Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3d ed (Toronto: Emond Montgomery Publications, 2018) 139; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. On the role of reasons as part of the defining features of the exercise of adjudication, see Lon Fuller, "The Forms and Limits of Adjudication" in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, revised ed (Oxford: Hart Publishing, 2001) at 101.

extraordinary ability to intervene in human affairs,"[23] and second, the "inescapably political" doctrine of the separation of powers, which understands the state as "optimally divided into three branches of government," each of which "should stay in its respective lane."[24]

Mathen then begins to test the durability of the traditional account (Chapter 4). She considers two possible ways in which the reference procedure "can present challenges to inter-branch relationships"[25] and thereby potentially undermine the separation of powers: first by extending the judicial function beyond the adjudication of cases; and second by empowering the executive to initiate references, thereby aligning the courts and executive to the exclusion of the legislature.[26] Mathen's detailed analysis of these challenges shows how concerns about the impact of the advisory power on the separation of powers are justified. For example, the Supreme Court's response to the first concern has been to assert its authority to refuse to answer questions that are referred to it. By developing this "doctrine of 'reference justiciability,'" the Court has demonstrated its commitment to staying within the bounds of its legal and adjudicative function. But, Mathen argues, the Court "has never *explained* the source of its discretion"[27] to refuse nor considered the issue with reference to the governing legislation, namely section 53(4) of the *Supreme Court Act*, which provides, "it is the duty of the Court to hear and consider it and to answer each question so referred…"[28] The Court's analytical gaps may, Mathen points out, ultimately reflect assertions of judicial independence as a form of resistance to executive directives. But even if so, the gaps of express explanation remain in the public record.

The conceptual scaffolding set in Chapters 1 and 4, coupled with the careful brick-laying of examples in Chapters 5 through 8, establish the foundation for the final two chapters of *Courts Without Cases*. These last chapters turn directly to the question of how to understand *references* in relation to *cases*. It is here that that the argument culminates in an analysis of the "core tension" emerging from the Supreme Court's advisory power, a tension that has "receded from view" with the ubiquity and familiarity of

23 Mathen, *supra* note 1 at 29–30.

24 *Ibid* at 20.

25 *Ibid* at 78.

26 Recall however the legislative power to initiate certain kinds of references: *Supreme Court Act*, *supra* note 14.

27 Mathen, *supra* note 1 at 68.

28 *Supreme Court Act*, supra note 14, s 53(4).

references in Canada.[29] Mathen describes the tension as the "asymmetry between references' formal and practical status."[30] Formally, references are not binding, and they lack many defining elements of the traditional understanding of adjudication. There need not be a live adversarial dispute between parties; they are initiated, in the normal course, by the executive; and they do not require a "current or pending legal issue," but rather can "include any question under the sun."[31] But in practice, references resemble cases in many ways—they usually involve legal questions, they tend to unfold through case-like processes, the resulting opinions are indistinguishable from judgments, and advisory opinions are treated as precedents in common law reasoning.

Mathen offers a number of tools for thinking through this tension: a novel scheme of cataloguing executive motivations for initiating references; an account of why executive actors might not comply with advisory opinions (coupled with a corresponding analysis of why they do usually comply); and careful argument showing how judges approach their advisory role as adjudicative and treat past advisory opinions as "part of the broader set of rulings that make up the common law."[32] With these tools, Mathen arranges and connects the planks of her argument, establishing that the gap between references and cases is neither as wide nor as conceptually sound as traditionally thought. The argument suggests that the gap ultimately narrows because of judicial and non-judicial beliefs about the nature and authority of law, and about what it takes for the work and output of a court exercising its reference function to be understood as part of the "ordinary" legal apparatus. In other words, political actors and judges accept the authority of advisory opinions in part because of the "normal justification thesis," but also because advisory opinions are now taken to fit into "the interpretive discourse of the law in the ordinary way."[33] Implicitly aligning with Fullerian ideas of adjudication and the conditions for compliance with institutional decision-making,[34] Mathen explains the "value (and authority) of [advisory] opinions stems not just from the fact that they were issued by an apex court, but that they involve the substantive interpretation of reasons or principles that animate the

29 Mathen, *supra* note 1 at 180.

30 *Ibid*.

31 *Ibid*.

32 *Ibid* at 205.

33 *Ibid* at 233.

34 See e.g. Fuller, *supra* note 22 and Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart Publishing, 2012).

law. They are treated as ordinary precedents in the ordinary common law way, and appear to have authority for that reason."[35]

It is the analysis in these final chapters of *Courts Without Cases* that best showcases two novel and compelling contributions that this book makes to conversations across law and political science. First, it constructs what will be the defining framework for understanding the judicial advisory function in Canada and for assessing its use. While Mathen takes seriously the traditional descriptions of the distinction between references and cases, she rejects as too simplistic claims that references are not technically binding or are necessarily outside the legitimate role of the courts. *Courts Without Cases* troubles the traditional distinction by showing how references can sit comfortably with cases in a description of the judicial function and indeed, how "references perform the same function…that undergirds much of law, and certainly constitutional law,"[36] namely providing answers. That said, while the new framework might close the traditional distance between references and cases, it does not collapse the two. Some gap (the particulars of which are still to be worked out) is preserved and some challenges (of politics, independence, and access) remain.

This brings us to the second contribution of *Courts Without Cases*: it serves as a lesson against complacency in constitutional law. In *Courts Without Cases*, Mathen took up a premise of Canadian public law—that references are not formally binding but will be treated as such—that had long been taken for granted and seemed to have been discarded as unworthy of attention. *Courts Without Cases* shows that we were wrong to blindly accept this public law premise as unproblematic or uninteresting. In thoughtful and detailed analysis, Mathen shows us why we should care about the distinction between references and cases, how this distinction is and is not significant, and in what ways it exposes broader lessons about our commitments and conceptions of law. In this way, *Courts Without Cases* should be a launching pad for questioning the constitutional *status quo*. Indeed, Mathen concludes *Courts Without Cases* by suggesting that the Canadian experience with advisory opinions might be "a helpful point of reference in much older systems that are being forced to reckon with the role of courts in new and unfamiliar ways."[37] It seems, however, that this experience should equally be an opportunity for reckoning with existing realities and unfamiliar possibilities in the Canadian system as well.

35 Mathen, *supra* note 1 at 233.

36 *Ibid* at 235.

37 *Ibid* at 236.