1867: TWO CONSTITUTIONAL TALES ON MINORITY NATIONALISM

THE AUSTRO-HUNGARIAN COMPROMISE AND THE BRITISH NORTH AMERICA ACT

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Constitutional moments have always been a matter of great interest in comparative constitutional law. Thus it is appropriate, in view of this interest, that I have chosen to compare Canadian and Austro-Hungarian constitutional moments at their 150th anniversary. In the Canadian case, that moment was vividly commemorated across the world. On the contrary, hardly any scholars paid tribute to the Austro-Hungarian Compromise, and no one has ever compared the two events with each other. What I wish to attempt in this paper is to fill this gap.

The multi-ethnic and paternalistic Austro-Hungarian monarchy faced a multitude of ethnic groups organized both territorially and non-territorially, as well as rival and *nested* nationalities clamouring for their own nation-state. Of course, the territorial attachment of Eastern-Central European ethnic communities cannot be separated from international relations. In hindsight, it is clear that it was a lost cause to try to maintain the unity of the multi-ethnic monarchy in the age of nationalism. In turn, essentially, the territorially more manageable ethno-nationalism was able to make Canada's accommodation of its minorities morally better than the Compromise in Eastern-Central Europe. If the British North America (BNA) Act was a success, what was its secret? Why was the subordination of Canada to the British monarchy and the constituent parts of the Dominion to Canada more successful than the subordination of Hungary to the Dual Monarchy, or subordination of the Croats to Hungary?

In this paper I identify 1867 as a constitutional moment, and take a look at the Austro-Hungarian and the Canadian cases. Finally, I want briefly to explore the plans promoting de-territorialization of minority rights in the Austro-Hungarian political context and then I put forward a way of deconstructing the widely used distinction between ethnic and civic nationalism. I shall conclude that in both cases, different nationalist ideologies play crucial functions, but while *Canada* should have been struggling with a sort of peripheral or defensive nationalism, nationalist movements in the former *Austria-Hungary* were driven by a hegemonic nationalism demanding their own homelands on ruins of the Hapsburg Empire.

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1867 as constitutional moment

Interpreting a unique historical event as it happened in the constitutional moment remains of significant importance both in our case in particular and in comparative constitutional law in general. This concept usually appears when we have serious doubt as to whether the political agreement is in fact a constitution or whether the socio-political context is sufficiently mature to adopt a constitution. In that sense, the concept of constitutional moment ubiquitously appeared once, when the plan for a European constitution was discussed by European public lawyers. If the European Union needs a constitution, then it needs one now – that is what was argued by many of them. Other scholars contended that the EU was not (yet) a (federative) state and never would be one; therefore, for a conceptual reason, a European constitution was not possible then or in the future, since the state and the constitution are conceptually inseparable. Some other scholars questioned the meaning of the constitution.[1]

No doubt, much ink has been spilled examining this intriguing conundrum, even though the European constitution in that form is no longer an issue. What we can say – unless we refuse to entertain the concept of constitutional moment[2] – is that it is generally not possible to determine immediately whether this or that moment is actually a *constitutional* one. A century and a half is probably adequate, though, to assess the BNA Act and the Compromise.

So what was going on in the world in 1867? A non-exhaustive and random list of events would include:

- United States of America bought Alaska from Russia for 2 cents per acre;
- Luxembourg became an independent state;
- Karl Marx published *Das Kapital*;
- the British Parliament rejected John Stuart Mill's proposal on women's suffrage; and
- Emily Stowe, the first Canadian woman doctor, begun to practise in Toronto.[3]

These events at the outset of the final third of the long 19th century[4] illustrate the emphasis on the formation of nation-states and federations, the emancipative efforts of

[1] Weiler, Joseph H. H.: The Constitution of Europe. "Do the New Clothes Have an Emperor?" and Other Essays on European Integration. Cambridge–New York, Cambridge University Press 1999; MacCormick, Neil: Questioning Sovereignty. Law, State, and Nation in the European Commonwealth. Oxford, Oxford University Press, Law, State, and Practical Reason, 1999; *Une constitution pour l'Europe?* Ed.: Renaud Dehousse. Paris, Presses de Sciences Po, 2002; Walker, Neil: Europe's Constitutional Momentum and the Search for Polity Legitimacy. *International Journal of Constitutional Law*. Vol. 4 (2005) 211–238. etc.

[2] Sajó, András: Constitution without the Constitutional Moment. A View from New Member States. *International Journal of Constitutional Law*. Vol. 3 (2005) 243–261.

[3] The source of this rather randomly selected information is www.onthisday.com and www.canadahistory.com

[4] See Blackbourn, David: *The Long Nineteenth Century. A History of Germany, 1780–1918*. Oxford–New York, Oxford University Press, 1998; and on its complement, the short twentieth century see Hobsbawn Eric, *The Age of Extreme. The Short Twentieth Century 1914–1991*.

individuals belonging to deprived groups and the writings that reflected these stages of development.

An immense body of historical literature[5] has already explored the historical context of the events surrounding 1867. The Seven Weeks' War of 1866 finished badly for Austria, which was whipped by Prussia at Königgrätz, and thus saw its power significantly weakened in Europe. At the same time, the Habsburgs lost the support of the Russian empire, which had been one of their most important illiberal allies. This meant that Austria was unable to subordinate definitively the Hungarian half of the Dual Monarchy; and obviously the non-Hungarian part of the monarchy would have been even weaker on its own. On the eastern side of the monarchy, Hungarian society was tired of the passive resistance to the Austrian oppression that followed in the wake of the failed popular rising, fuelled by national sentiment, to cast off the Austrian yoke (1848–9). The birth of an independent Italy and an emerging Germany in the geographical neighbourhood were both telling political arguments for consolidating the internal power arrangements.

Besides the *when*, the *where* should also be considered: where did the constitutional moments actually happen. When looking at Canada, comparative public lawyers and social scientists usually also pay attention to a good number of models including United States, Australia, New Zealand, Colombia, Cameroon, Belgium, United Kingdom, etc.[6] Nonetheless, there are important parallel references to Canada and Austria-Hungary to be discovered in political theory, global and nationalism studies. Whereas the Eurocentric concepts of nation and nationalism appear in the literature on Canada; and

London, Abacus 1994.

[5] As far as the Hungarian history of this epoch is concerned, see Ezra, William: *Austria-Hungary*. New York, P. F. Collier, 1907; Eckhart, Ferenc: *A Short History of the Hungarian People*. London, Grant Richard, 1931; Taylor Alan – Percivale, John: *The Habsburg Monarchy 1815–1918. A History of the Austrian Monarchy and Austria-Hungary*. London, Macmillan, 1942; Hanák, Péter: *Hungary in the Austro-Hungarian Monarchy. Preponderance or Dependency?* Houston, Rice University 1967. etc.

[6] Bothwell, Robert: *Canada and United States. The Politics of Partnership*. Toronto, Twayne, 1992; Charters, Claire: Comparative Constitutional Law and Indigenous Peoples. Canada, New Zealand and the USA. In: *Comparative Constitutional Law*. Eds.: Tom Ginsburg – Rosalind Dixon. Cheltenham & Northampton, MA:, Edward Elgar, 2011. 170–188.; Karmis, Dimitrios – Gagnon, Alain-G.: Federalism, Federation and Collective Identities in Canada and Belgium. Different Routes, Similar Fragmentation. In: *Multinational Democracies*. Eds.: Alain-G. Gagnon – James Tully. Cambridge, CUP, 2001. 137–175.; Arel, Dominique: Political Stability in Multinational Democracies. Comparing Language Dynamics in Brussels, Montreal and Barcelona. In: *Multinational Democracies*. 2001. 65–89.; Rocher, François – Rouillard Christian – Lecours, André: Recognition Claims, Partisan Politics and Constitutional Contraints. Belgium, Spain and Canada in a Comparative Perspective. In: *Multinational Democracies*. 2001. 176–200.; Coulombe, Pierre: Federalist Language Policies. The Cases of Canada and Spain. In: *Multinational Democracies*. 2001. 242–256.; Imbert, Patrick: Resentment and Multiculturalism. Kymlicka's Canada, Bonilla Maldonado's Colombia and Modood's UK. In: *Multicultural Interactions. Canada and the World. Politics and Literature*. Ed.: Patrick Imbert. Ottawa, University of Ottawa, 2014, 17–55.; Kuitche, Herman: Multiculturalism, Ethnicity and the Postcolonial State. Cameroon and Canada. In: *Multicultural Interactions*, 2014. 145–165.

vice versa, Canada appears as a good example for export to the multinational democracies in transition in the eastern part of Europe. It would be a shame to neglect the role of Canadian Studies as a proxy for the different branches of critical social sciences, including comparative legal scholarship and critical political theory.

Canada featured in several case studies of federalism and territorial autonomies in post-conflict societies of Eastern and Central Europe in the final decade of the twentieth century. Not surprisingly, while the multicultural Canadian model has been regarded as a positive example to be followed, the disintegrated *pseudo* federal states of the former Soviet Union, Yugoslavia and Czechoslovakia[7] have been categorized as failed models. Patrick Imbert's literature review on the Latin American reception of Kymlicka's multicultural political philosophy pinpoints the fact that if the receptive country is illiberal (like the former Yugoslavia or Egypt), then there is no place for *effective multiculturalism*.[8] While this claim is true that a satisfactorily articulated multicultural politics should take as granted that the society relies on the basic liberal tenets, the liberalism as such a complex worldview and it can be argued that in two different forms it existed in the fin de siècle Canada and Austria-Hungary.

There is indeed good reason for dwelling on a comparison of Canada and Austria-Hungary. What I wish to do here is to discover the reasons for the success and failure of the two different forms of minority nationalism. This project may pinpoint some less than self-evident practical truths about how the different nation-building projects developed at the end of the nineteenth century in different socio-political and geographical contexts shape the identity of our current political communities.

The Compromise compared to BNA

The chief negotiator from Vienna, Beust's letter addressed to the Hungarian political leader, Ferenc Deák, formulated the essence of the compromise in a pretty gothic way, as follows: *Gardez vos hordes, nous garderons les nôtres!*[9] Our best interpretation of his request may be as follows: in 1867, the political leaders of post-revolutionary Hungary and the representatives of the Habsburg monarchy were in search of a basic political

[7] Uniting Czechs and Slovaks, Czechoslovakia was essentially a unitary democratic republic. Some writers think that the main reason for the existence of this country – emerging right after the break-up of the Dual Monarchy – was 'to allow the Czechs to have more autonomy from the Austrians and Germans and the Slovaks to escape from the Hungarian domination.' Watts, Ronald L.: *Comparing Federal Systems.* Montreal, Kingston, etc. School of Policy Studies, Queen's University, McGill-Queen's University Press, 2nd ed. 1999. 31.

[8] For an excellent, fairly Canada-focused overview, see Smith, Graham: Mapping the Federal Condition. Ideology, Political Practice and Social Justice. In: *Federalism. The Multiethnic Challenge.* Ed.: Graham Smith. London – New York, Longman, 1995., 1–28; Imbert: Resentment and Multiculturalism. In *Multicultural Interactions.* 2014. 31.

[9] Quoted by Douin, Claude-Sophie: *Le fédéralisme autrichien.* Paris, Librarie Générale de Droit et de Jurisprudence, 1977. 7.

framework for their cohabitation within a Dual Monarchy, unified by a single king in the form of a Compromise.[10]

It was widely recognized by the Hungarian political elite that the badly handled claims of the national minorities had had a hugely negative impact during the previous fight for independence in 1848/49. The Compromise with Austria allowed the Hungarians to overcome their reluctance to enhance the rights of minority groups. Indeed, in 1868, a year after the Compromise, a statute in support of the national minorities was enacted. Baron Eötvös, the great liberal-conservative scholar who went to live in emigration after being shocked by the excesses of the Hungarian revolution, prepared the draft for this piece of legislation, which promoted a degree of tolerance. Less well known, probably, is that he advanced a plan for a constitutional court in 1854, just fifty years after the American *Marbury vs Madison*. Unfortunately, at the same time, and flying in the face of this progressive legislation, an intensive process of "Magyarization" set in. A similar compromise was reached in the same year with the largest territorially organized minority group, the Croats, after a Croat leadership was chosen that was not actually hostile to the Hungarians. In fact, the nationality question was not a specifically Hungarian problem, since several ethnic minority groups existed in the Austrian part of the monarchy – partly in geographically concentrated forms and partly in the form of different diasporas.

In the year of 1867 Compromise, the British parliament at Westminster presented a seemingly statutory act as a sort of 'constitutional gift' to establish One Dominion under the Name of Canada. Since it did not create a de facto independent Dominium, the BNA Act was originally not a constitution, but a statute. In the strict sense, the Austro-Hungarian Compromise was not a constitution either, even so a political deal that sought to smooth internal relations within the monarchy and restore the ancient constitutionalism in Hungary. While *Edwards* v. *Canada AG* [18 October 1929] upgraded the imperial act and endorsed a liberal interpretation of the text (precisely because the BNA Act can be seen as a constitution), nothing similar ever happened with the Compromise. The positive outcome of the Privy Council's decision was the enhancement of individual rights.

In the Hungarian part of the monarchy, the judicial enforcement of individual rights did not become an issue. As for Austria, in contrast, known as the first country to have a constitutional court (1920), the Basic Law of 21 December 1867 already contained a charter of rights. The territorial validity of this constitution was restricted to west of the Leitha (the frontier stream dividing Hungary and Austria). Apart from this it seems that the Austrian Constitutional Court was more a watchdog for the competencies of the sub-state entities in the federal states than a promoter of individual rights. That sort of moderation was not the case with the Privy Council, which introduced the metaphor of a *living tree* to justify an exceptionally liberal constitutional interpretation of the BNA.

[10] *Ausgleich* – this German word translates as 'Compromise', and its closest Hungarian equivalent is *kiegyezés*.

Until the fall of communism, this sort of individual right-based *new constitutionalism* was rejected in the Eastern-Central European legal culture. In Austria, the European Convention of Human Rights gained constitutional status in 1964, enabling the country to follow for the most part the Western (or Canadian) way of protecting individual rights.

Although no scholar has ever actually compared the Austria-Hungary and Canada, according to Leslie C. Tihany it would appear to be justified, since both countries were in search of suitable constitutional techniques in the service of modernization: "In its world historical contexts the Compromise was part of the late nineteenth-century modernizing process on the peripheries of the West, analogous to the attainment of dominion status by Canada, the Meiji restoration in Japan and the reconstruction of the Union after the American Civil War."[11] As a political regime, the Austro-Hungarian Dual Monarchy might therefore be visualized as occupying the centre of an imaginary spectrum, with the Victorian United Kingdom at one end and the despotic regime in Russia at the other.

Dissimilar to the BNA Act, the Dual Monarchy's foundational document did not aspire to establish a federation – which is a conceptual element in every federative constitution. The Compromise loosely unified the Austrian and Hungarian parts. One may also discover easily a similarity between the Compromise and the much earlier Act of Union enacted in 1707, giving birth to the United Kingdom by empowering the Hanoverian royal dynasty to succeed Queen Anne to the Scottish crown The so-called Pragmatic Sanction (1723) declared alike that even female members of the Hapsburg Family can be common king for both Austria and Hungary. Similarly to the British case, claiming the necessity of mutual acceptance of this act was the core of the constitutional reasoning which was developed by the Hungarian chief-negotiator, Ferenc Deak in order to maintain the Compromise in 1867. Yet the intention behind the Act of Union of 1707 was to resolve a succession crisis, later this Act, as a protoconstitution, became part of an unwritten constitution of the United Kingdom: "This is a very strong narrative in Scotland, where the idea of union, as articulated in the Acts of Union 1707, is central to constitutional understanding of the historical origins of the state. By this account, the 1707 acts were a kind of *protoconstitution* guaranteeing the survival of the distinctive institutions of Scottish public life and, in particular, of a separate legal system."[12] Unlike the 1707 Act of Union, the Compromise ultimately did not withstand the test of constitutional time, therefore there is no any compelling reason to interpret it as a "proto constitutional document".

[11] Tihany, Leslie C.: The Austro-Hungarian Compromise, 1867–1918. A Half Century of Diagnosis: Fifty Years of Post-Mortem. *Central European History.* Vol. 2. (1969) 2. 114., 138. and 136.

[12] Tierney, Stephan: Giving with One Hand. Scottish Devolution Within a Unitary State. In: *Constitutional Design for Divided Societies. Integration of Accommodation?* Ed.: Choudhry, Sujit. Oxford, Oxford University Press, 2008. 438–460. at 444.

The main reason why the Dual Monarchy stands apart from other multi-ethnic states is that there was a bizarre intention simultaneously to establish a unitary state (required by the drive for modernization) and a dual kingdom (as a historical legacy and a result of political realism). In so doing, the Compromise sought to sustain the duality of this Eastern-Central European kingdom and at the same time to forge an artificial KuK *(kaiserlich und königlich)* identity by the mere fact of having the same king in both parts of the monarchy. This hope was not as naïve as it seems today, or as it appeared from the satirical *fin de siècle* literature. The example of multi-ethnic Belgium (founded following secession in 1831) proves that a (multi)national unity can be assured by a single king endorsed by different groups from various ethnic communities. Of course, given the country's turbulent constitutional history, the example of Belgium also emphasizes the fragility of this assurance.

Leaving aside the common king, Austria and Hungary were integrated under the Compromise only in three fields, administrated by three joint ministries that were responsible for foreign affairs, for the armed forces and for funding these joint activities. Each of these ministries was responsible only for its own country's affairs, and did not involve itself in the other country's competencies. In all other fields, the two countries remained separate. Gyula Andrássy, later defending the Compromise against the Hungarian Independence Party[13], used a sort of comparative law argument. He rejected the notion that the Compromise had rendered Austria-Hungary similar to the federation in the United States. The main difference was that the list of competencies delegated to the common ministries was restricted. While federal organs – above all the courts – are able to expand the federative competencies at the expense of the federated states, this list remained set in stone in Austria-Hungary, where the two national parliaments controlled all the decisions taken by the mixed delegations that dealt with the common affairs. The Dual Monarchy was neither a personal union nor a federated state, according to him, but two independent states that regulated their common affairs just as two independent states determine their international relations.

The BNA Act compared with the Compromise

The BNA Act was intended to develop a constitutional design that enabled accommodation of the socio-cultural cleavages by a new political community in Canada. The subsequent birth of Manitoba – and the figure of the Métis leader, Louis Riel[14] – nevertheless revealed very clearly that the topics of ethnicity,[15] language and land were just as hot in the new dominion as in Eastern-Central Europe.

[13] Andrássy, Gyula: *Az 1867-iki kiegyezésről.* Budapast, Franklin-Társulat, 1896.

[14] E. Russell Hopkins, *Confederation at the Crossroads. The Canadian Constitution.* Toronto – Montreal, McClelland and Stewart, 1968. 173. and f.

[15] Bradford W Morse, John Giokas, 'Do the Métis Fall Within Section 91 (24) of the Constitution Act, 1867? In: *Aboriginal Self-Government. Legal and Constitutional Issues.* Eds.: Patrick Mackham et al. Ministry of Supply and Services, 1995. 140–273. 258.

Here again is an important difference between the Compromise and the BNA Act. In this part of Europe, the main question was the constitutional reconciliation between Hungarians and Austrians through having a common king, on the basis of the restoration of the rather scanty common constitutional traditions, as determined by the laws of 1123, 1713 and 1723. At the outset, though the distinctiveness existed, the so-called Quebec question did not appear to be the main issue during the negotiations over of the BNA Act. In this regard, it may appear again to be more fruitful to compare Canada in 1867 with the birth of the independent binational Belgium of 1830. On this matter, two fundamental differences have been pointed out by Dimitrios Karmis and Alain-G. Gagnon. First, they think that the plurality of identities was not as characteristic in Belgium as it was in Canada, because in Belgium, at the beginning, the Flemish population tended to be Francophone. This is true, yet I would contend that nationalism in Quebec was as late development as it was within the Flemish community. It is worth adding that Hungarians and other minorities in the Dual Monarchy were overwhelmingly Germanized during the nineteenth century. Secondly, the scholars rightly point out that federal settlement was not a goal in Belgium. On the contrary it was in Canada.[16] They argue that only later historical circumstances compelled Belgium to adjust its political regime to a polyethnic and federal state, whereas the original intention had been the creation of an independent Belgium as a unitary state.

As for the Canadian case, the peculiarity is that the founding fathers were not in favour of using the term *federation*, because it "had come to mean an association of sovereign entities".[17] They preferred *Confederation*, however with the meaning of *centralized union* – something similar to what we now call *federation*. Something similar has happened in Central Europe. As Gyula Andrássy argued, instead of supporting the Compromise with the Austrians – endorsed by only a part of the population after the Compromise – Kossuth intended to integrate Hungary into a larger confederation of the small nations living on the Danube. Though clearly nationalist, this might have implied greater loss of national sovereignty than the Dual Monarchy, which (according to Andrássy), maintained an equal relationship between the two sovereign states. Now, using the vocabulary of today, while Austria-Hungary established a limited confederation under the name of the *Dual Monarchy*,[18] the BNA Act gave birth to the Canadian federation (which is called a *confederation* only for historical reasons).

The road to the BNA Act – from early negotiations to enactment – scarcely differed in terms of time from the Austro-Hungarian negotiations, if we take Ferenc Deák's so called *Easter Article*, published at Easter's eve of 1867, as its starting point. Nonetheless,

[16] Karmis – Gagnon: Federalism, Federation and Collective Identities. In: *Multinational Democracies*. Eds.: Alain-G. Gagnon – James Tully. Cambridge, CUP, 2001. 137–175. at 145.

[17] Hopkins, Confederation at the Crossroads. 1968. 159.

[18] Douin, Claude-Sophie: *Le fédéralisme autrichien.* 1977. 7. : En matière législative, l'Autriche-Hongrie n'était donc rien de plus qu'une confédération d'Etats *[Staatenbund]*: il y avait deux Etats séparés, mais en union réelle.

what an observer should bear in mind is that, unlike Austria-Hungary, Canada was a dominion, and therefore the steps it took toward independence had to be compatible with the actual state of affairs of the main power. A "Kingdom of Canada" was out of question from the outset: it was considered too pretentious by the British and was rejected by the generally antimonarchical Americans.[19] The European powers remained relatively uninterested in the Canadian issue: Louis Napoleon was more involved in the question of his troops in Mexico; Westminster was primarily concerned with electoral reform; and Russia was concluding its Alaskan business with the Americans.[20]

As to its content, neither the Compromise, nor the BNA Act was intended to be exhaustive; but unlike the Compromise, in the case of the BNA, it was assumed that British constitutional principles were to be applied if a legal loophole arose.[21] Such an assumption never existed in the neighbouring United States, where the founding fathers were seeking a way of repudiating British public law, just as the French Revolution cast off the medieval constitutional legacy. On their behalves, Canadians were afraid of the decentralized model of the American federation, which had led to the recent civil war; also, because of the above-mentioned cleavages, a unitary state was not an option either. Founding fathers in Canada therefore insisted on the application of British common law, which is why the BNA Act uses the *good government* principle, rather than *self-government*. All things considered, the assignment of power to legislate for "peace, order and good government within the jurisdiction of the parliament is the widest possible assignment. Although Sections 91–92 of the BNA Act regulate the distribution of competencies more precisely than the Compromise does, the final decision on the exact line of demarcation between federal and local competencies depended almost exclusively on the lords of the Privy Council.[22]

The use of British public law offered a great opportunity to secure leverage of the constitutional principles in justifying decisions, as occurred in the Secession decision. This embedding of unwritten constitutional law into a written constitution may have been eventually an option in the case of the Compromise, since many Hungarian public lawyers considered Hungarian constitutional law to be similar in principle to British common law. Obviously, that was a romantic notion, hinting that their small nation could be as proud as the British monarchy of its historical roots. In practice, the Hungarian unwritten constitution was actually evidence of profound political disagreement, making it impossible to forge a nation by means of a written constitution. If one were to depart from history and slightly idealize the situation in the United Kingdom (as Hungarians certainly did), one could say that the origin of the British unwritten constitution was diametrically opposed to the Hungarian case, because there had been a strong, overlapping consensus over many centuries regarding the basic

[19] Hopkins: Confederation at the Crossroads. 1968. 162–163.
[20] *Ibid*, 165.
[21] *Ibid*, 178.
[22] Smiley, Donald V.: *The Canadian Political Nationality*. Toronto & London, Methuen, 1967. 20. and f.

principles of the political community. In addition, given that only the Hungarian part of the Dual Monarchy relied on an unwritten tradition, the constitutional settlement may have been transformed into an asymmetrical one: Austria's written constitution is part and parcel of its constitutional history (culminating in the federal constitution of 1920).[23]

Despite the plans for the constitutional courts, judicial review was not an option in Austria-Hungary at that time. Once the Austrian part of the monarchy became independent, judicial review was introduced to guarantee the fair distribution of competencies across the federal state of Austria and its constituent parts. Judges in Eastern-Central Europe were therefore ill prepared to handle the question of secession, as Canadian judges did later using non-written sources of the Canadian constitution;[24] and nor could they rely on rights-based legal reasoning.

Even though the BNA was enacted as an Imperial Statute, its popularity in Canadian society was probably much greater than the popularity that the constitutional deal reached between Kaiser Franz Joseph (1848–1906) and the post-revolutionary Hungarian élite enjoyed within either Hungarian or Austrian society. The dividing line was between those who still supported national independence and the spirit of 1848/49, and those who were in favour of compromise. The British imperial structure in Canada did not seem to have this loyalty effect. Canadian citizenship seems to have been separate from loyalty to the royal family of the United Kingdom. In turn, Canada's dominion status contributed to the emergence of a Canadian state-nationalism vis-à-vis the United States, where the notion of national identity rested basically on the constitution. The imperial structure was important because of the repatriation problem, on the one hand, and on the other hand because of the interpretive practice of the Privy Council, which developed a unique constitutionalism on the basis of the text of the BNA Act. The prima facie advantage of a monarchy was that a royal family's interest was not generally identified with the interest of a particular national group. The Habsburgs, therefore, could transcend such differences, and belongingness to this or that social group was a matter of geography, rather than of race or ethnicity. In contrast, nationalities had overlapping claims on their territories, and they did not want to feel greater loyalty to this de-ethnicized royal family than to their own lands. The nationalist revolutions failed, but the ethnically and territorially based conceptions of

[23] The Austrian Constitution in 1920 introduced a congruent, symmetrical federation to a society on which federalism has never had any impact. This makes the Austrian federation extremely problematic: the "essence of federalism lies not in the constitutional or institutional structure but in the society itself"; cf. Watts, Ronald L.: *Comparing Federal Systems*. Montreal & Kingston, London, Ithaca, School of Policy Studies, Queen's University by McGill-Queen's University Press, 2nd ed. 1999, 15. But, as Claude-Sophie Douin puts it, Austrians were not in favour of an Austrian state either: "federalism was born in Austria in the complete absence of any enthusiasm for an Austrian state"; see Douin, Claude- Sophie: *Le fédéralisme autrichien*. 1977. 10.

[24] Gaudreault-Desbiens, Jean-François: Underlying Principles and the Migration of Reasoning Templates: a Trans-systemic Reading of the Quebec Secession Reference. In: *The Migration of Constitutional Ideas*. Ed.: Choudhry, Sujit. Cambridge, CUP, 2011. 178–208.

nationhood persisted; and in the case of the Hungarians, nationhood was justified by the constitutional myth of the Holy Crown, which represents as Hungarian the whole expanse of territory where the first Christian king, Saint Stephen, was ruler. As far as the Austrian part of the monarchy is concerned, the birth of Germany in the neighbourhood was philosophically justified by the cultural concept of nation; thus the German-speaking part of Austria could identify at least as much with the German population as with the Hungarian. This sentiment was obviously stronger than fidelity to the Hapsburgs.

Promoting de-territorialization

While the virtue of the BNA Act lay in the opportunity is presented for an ethno-cultural kaleidoscope, using clear territorial boundaries, Gellner's *Ruritania*[25], i.e. Eastern-Central European countries failed both to mitigate territorial-ethnic conflicts and to de-territorialize minority rights.

Interestingly enough, the debate is still open as to whether the drafts and plans for non-territorial cultural autonomy, as elaborated by Karl Renner and Otto Bauer in Austria, really count as paradigm shifts in the field of protecting national minorities vis-à-vis federalist theories on the one hand and liberal-individualistic theories on the other. Nevertheless, many contemporary political theorists – driven by a desire to promote stability and eternal peace in international relations – suggest that a *de-territorialized* theory based on cultural autonomy should be considered a panacea for the whole Eastern-Central European misère.

Renner's *State and Nation*[26] should be construed as a political pamphlet, rather than as an academic study. Despite its political character, it contains the intellectual and political seeds of a modern theory of state as cultivated in German and Austrian universities. This pamphlet-study is trying to cloak the ideological content in judicial phraseology. As for the community of persons to be protected, the national minority is defined in a legalistic way as a "factual personal association" which has its own "rights-holder legal personality".[27] With this, Renner, the legal scholar, elaborates a legal analogy to compare the declaration of membership of a national minority with the declaration of paternity. The second analogy that he uses is the organization of a Christian Church. If you take this doctrinal study really seriously, one can easily detect severe faults and methodological shortages of his *per analogiam* arguments. First of all, in most legal systems the declaration of paternity is only a subsidiary possibility in establishing the status of a child, since, if conception took place after marriage (or

[25] Gellner, Ernst: *Nations and Nationalism*. Ithaca, Cornell University Press, 1983. 58–62.

[26] Originally *Staat und Nation. Zur österreichischen Nationalitätenfrage*. Wien, 1899. The study was undersigned as Synopticus. Here I am using this English translation: Renner, Karl: State and Nation [1899]. In: *National Cultural Autonomy and its Contemporary Critics*. Ed.: Ephraim Nimni. London, Routledge 2005. 15–47.

[27] Renner: *State and Nation*. 1899. 27.

within a certain well-defined period of time prior to marriage), there is an assumption of fatherhood. The unilateral declaration of membership of a national minority group cannot be compared to an act of marriage, which presupposes two parties; indeed, neither the presumption of paternity nor the declaration works as an analogy in the field of determination of membership. The second objection is that it is rare for fatherhood to be declared without the consent of the mother, simply because the mother should be aware of someone declaring his paternity. Since the national community's consent cannot be required for a personal declaration of membership, this analogy does not work either. Furthermore, when crafting this legal analogy, we should bear in mind that a declaration of fatherhood is not always a voluntary act, in the sense that it is done on the father's initiative. In turn, a declaration on the membershio in a minority group is essentially a voluntary one. In many cases, the child's mother requests the father to declare his paternity, in order to enforce a set of obligations, for example child support. This set of obligations exists independently of the father's rights. Hence, for instance, a father cannot enforce his right of access to his child in return for the payment of support, while the mother is not allowed to refuse to allow her child to see the father if he has not paid the support and the arrears. In case of a national minority group, there is only a very weak (if any) obligation of simple loyalty to the group. If minority rights exist at all, their function is to protect the group externally from intervention by the majority, rather than to enforce specific rights inside the group.

As for the analogy between a national minority and a Church, that perhaps works but only if we agree with Renner that the origin of individual liberty is the Protestant vision of religious freedom and tolerance. Other churches are inappropriate to be compared with ethnic minority groups based on association. Unreformed Christian churches – for instance the Russian Orthodox Church or the Roman Catholic Church – do not require a personal declaration for the baptism of new-born children or infants who are unable to declare personally their adherence to the Church.

Compared to Renner, the more radically Austro-Marxist Otto Bauer, in his magnum opus, developes a political theory that gives priority to economic considerations over legal and constitutional aspects of the protection of national minorities.[28] Nevertheless, at an important point at the very beginning of his book, he almost immediately enters willy-nilly the field of legal scholarship. He analyses how Carl Friedrich von Savigny's *national spirit(ualism)*[29] refers to the *spirit of the people* as a driver of national action. Using Kant's transcendental philosophy, Bauer's rebuttal claims that this is a substantialist vision of the nation, which attempts to get us to believe that the nation really thinks and acts according to its *spirit*. Such a vision is contrary to materialistic-individualist premises. Savigny and his historical school promoted the organic development of

[28] Originally Bauer, Otto: *Die Nationalitätenfrage und die Sozialdemokratie*. Vienna, Verlag der Wiener Volksbuchhandlung Ignaz Brand, 1907. Here I am using this English translation cf. Bauer, Otto: *The Question of Nationalities and Social Democracy* [1907]. Ttransl.: Joseph O'Donnell, ed.: Ephraim J. Nimni. London, University of Minnesota Press 2000.

[29] Bauer: The Question of Nationalities. 1907. 23.

society and made efforts to immunize the political community against fighting and conflict. Attempting to bring German lawyers to his side effectively, he famously painted the romantic picture of socio-legal development as comparable to the silent evolution of language. In contrast to this romantic-conservative worldview, Bauer – in conjunction with Karl Marx and Rudolf von Jhering – conceptualized the problem of national sovereignty and minority issues in terms of fight and conflict. Bauer seems to feel frightened that "national self-determination on the basis of the territorial principle would simply provoke renewed struggles".[30] He defines the nation as "a relative community of character"; and being "relative", the way of organization of the peculiar unity should be variable. He acknowledges that a national minority should be organized as an association of persons,[31] and refutes that these groups are territorially organized corporations. The conflict situation between minority and majority is not uniquely German or Austro-Hungarian; hence, it can be generalized to all nations.[32]

As one might expect neither Renner nor Bauer was successful in healing the nationalist illnesses of the Austro-Hungarian Empire, and the Dual Monarchy disappeared from the political map. Despite this failure, their theories have had an impact on nation-building strategies in Central European countries. In addition, these theories have witnessed a renaissance in recent debates surrounding federalism, unionism, linguistic and other group rights, legal pluralism, secessionist movements and minority nationalism. The legislation of countries like Latvia, Hungary, Russia, Lebanon, Iraq and Israel has been biased more or less by the *territory-blind* theory of cultural autonomy. The different networks of the so-called cultural councils are probably the most palpable proof of their intellectual influence.

As a matter of fact, the Canadian scholar, Will Kymlicka disagrees with that. He argues that all new liberal democracies are *nation-building states*, and if they are multi-ethnic, then their nation-building component can promote more than one societal culture. This is the case, according to Kymlicka, in Canada, Switzerland, Belgium and Spain.[33] Within this framework, the question of doing justice can play a central role. In a well-established liberal and multi-ethnic democracy, the question is whether it is possible to avoid a situation whereby the majority's nation-building project harms vulnerable groups, which would constitute an obvious injustice (and if it is possible, how). The Eastern-Central European form of the same question is whether a widely recognized past injustice against a minority (or indeed a majority) can be rectified in this normative way, or whether only a sort of factual *Realpolitik* can guarantee national unity sustaining the current status quo in terms of the relationship between majority and minority. Kymlicka criticizes the radical contrast between the theory of justice and the effective ethnic risk management that has been undertaken by so many Western

[30] Bauer: The Question of Nationalities. 1907. 271.
[31] *Ibid.* 281.
[32] *Ibid.* 266.
[33] Kymlicka, Will: Politics in the Vernacular. Nationalism, Multiculturalism and Citizenship. Oxford, Oxford University Press, 2001, 26–27.

scholars. On the whole he thinks that such a strategy overemphasizes the question of security at the expense of justice. Vulnerable groups, including national minorities, have a right even in Central Europe, to a framework within which to practise their group-differentiated rights, other than non-territorial cultural autonomy.

What is more, he is critical of Renner's plan, which took it for granted that the Austro-Hungarian Empire would be divided between Magyars and Austrians; against this background, he advanced a plan for *non-territorial autonomy*: [T]he main point is that the model of the national-cultural autonomy presupposes that we have already determined the territorial units … The *personality principle* operates within the pre-existing territorial boundaries and administrative structures.[34] If the context is a multinational society, then, as part of the nation-building project, one of the conditions for a good moral or legal decision is a well-established spatial context and essentially uncontested borders. Indeed, if there is wider consensus on these spatial contexts, these judgements become more reflective and wiser at the individual level.

Deconstructing the distinction between civic and ethnic nationalism

Though currently sub-state groups, including the Aboriginal population and First Nations people, are entitled to this right today even if they do not live in a compact territory, in the classical sense only a territorially concentrated population can enjoy the collective right of self-determination. In Eastern-Central Europe, it has long been the norm to speak of collective rights and to refer to tracts of land as "our home-, mother- or fatherland", although it is fairly incompatible with Western liberalism and its essential political corollary of individual rights. Here only the most numerous nationalities were grouped in compact territories, and those groups were politically divided. The Hungarians made an agreement with the Austrians; subsequently the Croats did likewise with the Hungarians; while the Czechs favoured a further federalization of Austria-Hungary. In this context, it is the paradigmatic case that nationalism created the nation-state: when the Dual Monarchy disintegrated in 1918, a good number of these ethnic groups – approximately twenty, including Slovaks, Romanians, Croats, Bosnians, Turks and Slovenes – quickly took advantage of the Wilsonian notion of self-determination.

As newcomers to the country, Anglo-Canadians distinguished themselves by race, depending on whether they came from Scotland, England or Ireland. This racial distinction was a conventional one and it "coincides with the pinnacle of European colonialism and with slavery and displacement of indigenous peoples in the Americas."[35] French-Canadian linguistic rights outside Quebec have long been an

[34] Kymlicka, Will: Renner and the Accommodation of Sub-State Nationalisms. In: *National Cultural Autonomy and its Contemporary Critics*. 2005. 141–142.

[35] Heinze, Eric: The Construction and Contingency of the Minority Concept. In: *Minority and Group Rights in the New Millennium*. Eds.: Deirdre Fottrell – Bill Bowring. The Hague, etc: Martinus Nijhoff Publishers, 1999. 25–74, at 56.

unresolved issue, and the disintegration of Canada was a clear and present danger many years before the start of the twenty-first century. Lord Durham's remark from 1837 is often quoted: "I found two nations warring in the bosom of a single state. I found a struggle not of principles but of races."[36]

This all goes to show the fragility of the Canadian model. Curiously enough, Hungarian leaders who are regarded as ethnic nationalists referred to Hungarians as a political (i.e. civic) nation, and treated national minorities in the Hungarian part of the Dual Monarchy as "cultural" (i.e. ethnic) nations, meaning that in their eyes they were only premature societies unable to forge their own nation-states. Dominique Arel points out that in both Canada and Eastern-Central Europe in the nineteenth century, the intended goal was the same: to rationalize the state through the establishment of one central language; "yet the French/American model was called *civic* because the process proved non-conflictual in the end, and the Russian/Hungarian model was never called *civic* since it engendered conflicts".[37] This does not mean, however, that the French/American version of the civic state successfully separated politics from culture, as the idea of the civic state demands; but simply that it "succeeded because cultural minorities did not successfully challenge the culturally hegemonic French/Anglo-American project".[38]

The arguable civic/ethnic distinction was originally introduced to the scholarly discourse by Michael Ignatieff. He construes nationalism as a sort of belief that peoples in the world are divided into nations, along with the claim that each nation should have the right of self-determination. Whereas the basis for civic nationalism is patriotism (internalizing the common values of a political creed), the ethnic nationalist claim is that *belonging* to a nation is something inherited, and therefore the nation as a community cannot be based on a voluntary act of association. According to this distinction, while civic nationalists would argue that the English, Welsh, Scots and Irish nations emerged and united through common attachment to civic institutions (e.g. parliament), ethnic nationalists would appeal to their common roots rather than the legal system; inheritance rather than rational choice; fraternity rather than liberty. Ethnic nationalism is collectivist, claiming that it is the nation which creates individuals and not vice versa.[39]

Not surprisingly, the ethnic/civic distinction has given rise to profound disagreement. Among others, another Canadian political theorist, Will Kymlicka, disagrees: for him, it is probably closer to the truth to say that ethnic and civic elements coexist in both Western and Eastern nationalisms if ethnicity embraces not so much

[36] Quoted by William, Colin H.: A Requiem for Canada? In: *Federalism. The Multiethnic Challenge.* Ed.: Graham Smith. London – New York, Longman, 1995. 31–78. at 37.

[37] Arel, Dominique: Political Stability in Multinational Democracies. In: *Multinational Democracies.* 2001. 73.

[38] Ibid.

[39] Ignatieff, Michael: Blood & Belonging. Journeys Into the New Nationalism. Toronto, Viking 1993. 3–5.

biological similarities, but linguistic paternalism, cultural geography and the search for territorial autonomy delineated by historical borderlines. David Miller endorses this view. He describes the ethnic/civic distinction as a "spectrum", with *ethnic* and *civic* at its two ends, bringing out "qualitative differences between different kinds of nationalism".[40] Hence, he claims that if any civic nationalism exists at all in the world, it is exclusively in the United States – and even then ethnic and cultural elements can be detected. The distinctiveness of Lower Canada/Quebec is primarily linguistic, and for this reason cultural.

In this context, even Anderson's widely used definition of nation as *imagined community*[41] seems susceptible to criticism as an imperfect category, too. Not just Canada (as founded in 1867), but all its constituent nations – French and English-speaking Canadians, plus First Nations – are all "imagined communities", in the sense that these communities are at the same time societies (Quebec is a "distinct society") and their respective members no longer link to one another in face-to-face formed relations. In the absence of clear face-to-face relations, culture seems to replace (or even absorb) the community-constituting links. In that sense, Will Kymlicka uses "culture" as synonymous with a nation or a people. He defines its *societal* form as follows: "a culture which provides its members with meaningful ways of life across the full range of human activities … These cultures tend to be territorially concentrated and based on a shared language."[42] David Miller goes further on the basis of his refusal to connect ethnic identities with a territorial claim.[43] Rival national groups differ from *nested* nationals, in the sense that in the first case each ethnic group has an exclusive territorial justification for the same territory, while nested nationals, though organized territorially, "exist within the framework of a single nation, so that members of each community typically have a split identity".[44] This distinction may explain the success of Canada and the failure of Austria-Hungary. The former is a multinational state, integrating nested Anglo-Canadian and French-Canadian nationals; by the mere fact of reaching the Compromise, Austria-Hungary prevented its nationals from transforming themselves from rival into nested nationals, coexisting with one another. In Miller's argument, if an ethnic group qualifies as a nested nationality, then it has the right to (sub-state) self-determination. Thus, if Quebecers are nested nationals, they have this right; and probably both Austrians and Hungarians in the Dual Monarchy belonged to the same category. Yet, again, we may find that geography matters: what about those supposedly "nested" nation groups on the territory of the monarchy who declared themselves to be "nations", but were considered by Austrians and Hungarians to be (to use Miller's

[40] Miller, David: Nationality in Divided Societies. In: *Multinational Democracies*. 2001. 299–318. at 306.

[41] Anderson, Benedict: *Imagined Communities*. London, Verso, 1990.

[42] Kymlicka, Will: *Multicultural Citizenship. A Liberal Theory of Minority Rights*. Oxford, Oxford University Press, 1996. 18., 76. and 84.

[43] Miller: Nationality in Divided Societies. In: *Multinational Democracies*. 2001. 302.

[44] *Ibid.* 304.

terminology again) "rival nationalities" or "ethnic minorities"? And similarly, what about French-Canadians living outside Quebec? Or the Inuit, Métis or generally the First Nations in Canada? Again, in Austria-Hungary the main political question was essentially territorial. Whereas in Canada, Quebec City belongs indisputably to Quebec, and Toronto indisputably to Ontario, in Austria-Hungary it was always hazy whether Trieste was Slovene, Italian or Hungarian; whether Sibiu was German, Hungarian or Romanian; and whether Lvov was Polish, Ukrainian or home to the Jewish diaspora. Of course, the moral priority of the Canadian model is justified only if we consider that neither rival races (English, Scots, Irish, etc.) nor First Nations existed in Canada in 1867, and only if it is accepted that neither Austrians nor Hungarians were able to consider themselves political nations, but only ethnic-cultural. It appears nevertheless, that both usual presumptions were in fact false.

Conclusion

The Canadian political science has enabled Canada to be one of the core case studies in any discussion of the future of federalism in the post-conflict societies of Central-Eastern Europe and elsewhere in the world. Indeed, whereas the post-referendum (1995) Canadian model has been classified mainly as a *prêt-à-exporter* positive example,[45] the former Soviet Union, Yugoslavia and Czechoslovakia have been assessed as obvious negative examples by a great majority of scholars.[46]

Being the primordial vindication, the foundation of an independent nation-state is the heart of the inevitably conflicting Central-European nation-building strategies. This sort of conflict of territorial interest is not a characteristic in the case of the Canadian minorities, namely the First Nation people and Quebeckers. Through the lens of comparative constitutional law, the analysis of the relevant parts of the BNA Act may show that all-things considered, the Canadian solution was closer to the idea of a fully-fledged multinational constituent power implanting some seeds of the Canadian nationhood with a promise of a representative democracy. The Austro-Hungarian *Ausgleich* was unable to forge a multicultural national identity precisely because minority status here is tantamount with a recognition of a territorially established nation-state. Therefore, minority rights in this particular region of the world seems to resist to be *de*-territorialized, whereas the Canadian model leaves more flexibility to enhance rights of both territorially concentrated and dispersed socially vulnerable groups.

[45] Against this idea see Choudhry, Sujit: Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory. In: *Constitutional Design for Divided Societies. Integration of Accommodation?* 2008. 141–172.; Williams, Colin H.: A Requiem for Canada? In *Federalism. The Multiethnic Challenge.* Ed.: Graham Smith. London – New York, Longman 1995. 51–72.

[46] See, for instance, the chapter entitled "Part II: The Break-Up of Socialist Federations", in *Federalism. The Multiethnic Challenge.* Ed.: Graham Smith. London – New York, Longman, 1995. 155–236 and "Part II: The New Europe – East and West" in *Nationalism, Racism and the Rule of Law.* Ed.: Peter Fitzpatrick. Aldershot, etc. Dartmouth, 1995. 75–148.

The Compromise represents one model of multinational cooperation, which succeeded in integrating various Eastern- and Central-European nations for only a couple of decades. Given that the Dual Monarchy collapsed after half a century, and given that the splintering was one of the direct and indirect causes of both the First and the Second World Wars, the Eastern-Central European way of dealing constitutionally with the multi-ethnic challenge is usually filed under "F" for *Fiasco*. By contrast, ever since the BNA Act came into force (leaving aside for a moment the devastating effects of colonization on the First Nations population), the Canadian model has been one of the most attractive examples of "how constitutional design can accommodate competing nation-building agendas within a single state".[47]

It would be wrong, however, to impute specific attachment to a territory to a particular mindset of the Eastern-Central European population. An American observer who pondered with President Roosevelt why the theorem of the melting pot is not a viable option in this part of the world explains that calling the patch of soil on which a national minority has lived its "home" or "its very own" is historically well founded, given that their forefathers lived there. Emigration is proof of the fact that this attachment does not constitute identity. He observed that once these people had migrated to the United States, they no longer considered that territory in the same way. The American land is already settled, and therefore it cannot be viewed as a wilderness, and new comers cannot be regarded as first settlers either.[48]

It is an undoubted fact that Compromise definitely not constitute a high point in either Austrian or Hungarian constitutional history. As a part of the Austro-Hungarian constitutionalism, its text remained a bulk of dead letters. In the meantime, in Canada and UK, the subsequent interpretations of the Judicial Committee of the Privy Council slowly but surely transformed the BNA Act – which was conceived in the *constitutional moment* – into an *organic instrument* that forms the basis for the contemporary Canadian federal system.[49] To achieve this degree of constitutionalism was difficult. The liberal interpretive practice of the Privy Council lead the lords to act in a "statesmanlike way", which was clearly not the intention of the founding fathers of the BNA and it was also running against interpretive rules of the Anglo-Saxon legal culture, too.[50]

Roughly 80 years after the BNA Act entered into force, the last judgment was rendered in 1954. Tellingly, that very same year Austria, under occupation by the Allied forces, was still struggling with its refugee crisis, sparked by the expulsion of ethnic German minorities from the Eastern-Central European countries. For Hungary, which was occupied by just Soviet troops, 1954 was marked by the emotional trauma of

[47] Choudhry, Sujit: Does the World Need More Canada? In: Constitutional Design for Divided Societies. Integration of Accommodation? 2008. 145.

[48] Schierbrand, Wolf von: *Austria-Hungary. Polyglot Empire*, New York, Frederick A. Stokes Company, 1917. 71-72.

[49] Varcoe, Frederick P.: *The Constitution of Canada.* Toronto, Carswell 1965. 4.

[50] Smiley, Donald V.: *The Canadian Political Nationality*. Toronto & London, Methuen, 1967. 20. and f.

watching the Golden Team (led by the most famous Hungarian of all time, Ferenc Puskás) lose its final match in the football World Cup in Bern, Switzerland. The grief almost drove the population to revolution (which finally happened two years later, in 1956). Nevertheless, astonishingly enough, some Canadian scholars prefer to identify 1982 – the "patriation" of Canada's constitution[51] – as the most profound constitutional moment in Canada instead of 1867 or 1954. However, in doing so, they implicitly recognize the importance of the BNA Act. The Compromise was unable to do what the BNA Act did, and thus it never became an organic part of the Austro-Hungarian constitutional tradition, shaping the identity of the subsequent constitutions.

It remains true that counter-arguments against nationalism should be expressed fairly and objectively, and overall, I find that the ethnic/civic distinction is unable to make evident the difference between the two countries in a comparative scrutiny. That is to say that, while Canada should have been struggling with a sort of peripheral or defensive nationalism, nationalist movements in the former Austria-Hungary were driven by a hegemonic nationalism demanding their own homelands on ruins of the Hapsburg Empire, where there is a strong impression (created by political scientists) that whereas the political failure – and by implication the misery – of Eastern-Central European "small states"[52] might be attributed to the dominant ethnic nationalism, the success of Western nationalism lies in its civic character. This distinction is dubious, and a comparison of the BNA Act and the Austro-Hungarian Compromise showcases a strange convergence: whereas the violent ethnicity of Eastern-Central Europe was not inevitable, Canada was not always exempt from primordialism or cultural-ethnic influences. Sober constitutionalists in Canada note, indeed, that "some lessons from what has occurred elsewhere" can be drawn – for instance, in order to manage "violent resistance of aboriginal peoples in northern Quebec to secession".[53]

Studying comparatively the genesis the nationalism in Eastern-Central Europe and Canada may lead us notwithstanding to see how to reconcile the idea of Rule of Law constitutionalism with different ethno-nationalist claims.

[51] See Peter H. Russell's seminal monograph: *Constitutional Odyssey. Can Canadians Be a Sovereign People?* Toronto, Toronto University Press, 1992.

[52] Istvan Bibó: *A Keleteurópai kisállamok nyomorúsága* [The Misery of Esatern European Small States], Budapest, Új Magyarország 1946.

[53] Choudhry, Sujit: Does the World Need More Canada? In: Constitutional Design for Divided Societies. Integration of Accommodation? 2008. 164.