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Chair of Comparative public Law

**The right of secession: “Quebec in a Comparative Perspective”**

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## **MASTER THESIS**

### **The Right of Secession: “The Case of Quebec in a Comparative Perspective”**

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## SUMMARY

### Introduction

This thesis is inspired by the rise of secession claims in the wake of the 20<sup>th</sup> century and its repercussions on the 21<sup>st</sup> century. Despite its long history, our focus will be on 21<sup>st</sup> century secession as a political and constitutional question that has been raised for many decades, in general, and on the cases of Quebec and Scotland secession movements, in particular.

Although there are undoubtable differences between the two cases, that is, the geographical location of Quebec and Scotland respectively, the nature and features of their respective constitutional systems and the ones from which the two entities want to secede, the ethnic or other claims of the 'candidates' for secession, as well as the legal, financial, and institutional consequences of a potential secession movement, to name only few, there is a common denominator worth-exploring.

More specifically both entities belong, in some form or another, to the British Crown from which they want to break free for their own political/constitutional reasons. In the case of Quebec, its ties to the Crown are defined by the Constitution itself and the type of Governance of Canada, namely Constitutional Monarchy. It is by the arrangements of the Canadian Federation that the Constitutional Monarchy of Canada operates in Quebec, as in any other province of the country, under the name of the *Crown in Right of Quebec*.

The role of the Crown in Canada may appear to be more ceremonial than practical. In reality, however, the Crown is at the center of the country's, and by extension, the provinces' constitutional foundation whereby "the Crown must be seen as a corporation, in which several parts share of the authority of the whole, with the Queen as the person at the center of the constitutional construct."<sup>1</sup> This translates into substantial constitutional powers, in the hands of either the Queen or her viceregal representative at the provincial level, namely the Lieutenant Governor of Quebec.

Quebecers, especially those in favor of the Province's independence from the Canadian Federation, do not recognize the role or the importance of the Crown in their province. The Crown is neither 'natural' nor consistent with the cultural heritage, linguistic foundation, ethnic origins, and historical background of the

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<sup>1</sup>Black v Chrétien: Suing a Minister of the Crown for Abuse of Power, Misfeasance in Public Office and Negligence (n.d.) *E Law, Murdoch University Electronic Journal of Law*. Retrieved from <http://www.murdoch.edu.au/elaw/issues/v9n3/cox93.html>

people of Quebec. Therefore, it is most frequently referred to (pejoratively) as the “English Crown” or “British Monarchy” instead of the “Crown in Right of Quebec”.

In the case of Scotland, the “Union” with its “brothers” from the South was borne out of necessity and fear rather than a sense of brotherhood and ethnic affiliation. The Common Parliament, created as a result of the 1707 Treaty of Union, signaled the end of a tumultuous relationship between the two nations, one that was filled with wars, plotting, and assassinations. Scotland gained free access to markets and new commercial roots as a result of the said Treaty. England, on the other hand, got to appoint a line of Protestant Kings as heads of State. Despite their differences and the ‘forced’ coexistence, the ties between the two entities grew stronger during the imperial adventures overseas, in which Scots played a key role. It is colonialism that forged a shared identity between the Scots and the Brits. Currently, it is this identity that is being questioned by the Scots while resisting cries for independence via secession.

The purpose of this thesis is to highlight differences in how secession claims in both cases (Scotland and Quebec) came to the fore despite shared similarities. We will attempt to explore how Scottish and Quebec political entities (personalities as well as parties) treated the issue of secession by encouraging or discouraging independence from the ‘motherland’ and how these actions influenced the current *status quo*, on local (provincial), national (constitutional), and international level.

Our major contribution is aspired to be one that is in line with a theoretical attempt to consider secession through the lenses of federalism, constitutionalism, and international law. It will be argued that secession claims, even when they do not result in the creation of autonomous, sovereign states or entities, modify federalist theories and/or actual realizations of federalist forms of governance, as an alternative to the dichotomy between a sovereign state and a minority/or minorities claiming secession from the former, thus transforming the scope of application of international law.

More specifically, it will be argued that redundancies, delays or complications resulting from multiple layers of legal and/or regulatory authorities acting in parallel or counter to one another, at the local, national or international level, and which are involved in issues pertaining to same acts and actors, can actually be less obstructive than originally thought.

Instead they can be rather beneficial when rethinking alternative solutions to issues that seem to be at the core of secession claims. To put it differently, when multiple legal, political or regulatory authorities weigh in regarding questions of minority rights, ethnic rights, and independence and/or sovereignty claims, inter-systemic types of governance, within a federalist or quasi-federalist model of governments, can have remedial effects insofar as they can potentially rectify injustices, correct errors, complement deficiencies, etc. This can translate into a more robust field for negotiating 'differences' without necessarily 'breaking free'. In other words, using the lessons learned from Scotland and Quebec, we will argue that a multi-layered, pluralistic decision-making process could enhance awareness of the 'other' while restraining one's view of one's own power and sovereignty.

### **Overview of the Contents**

In this thesis, we commence our analysis by presenting briefly some basic notions evolving around major theories of secession. We firmly believe that secession cannot be viewed separately from the notions of self-determination and sovereignty. For that reason, all three constructs will be examined comparatively to establish legitimacy of secession claims in the cases of Quebec and Scotland, the fate of these claims, the lessons learned and the alternatives to secession. With respect to the hypothesis stated above, it will be argued that the two cases do not fall under the category of remedial or just-cause secession theories. They, therefore, beg special attention from a legal and institutional point of view simply because, as we will argue, they are more susceptible to lead to alternative models of federalist forms of governance.

Firstly, we will discuss the different theories of secession starting from the origins of the concept and the way it evolved throughout the years. Then, we will address the problem of notional and practical limits imposed by current theories, especially from a legal and practical point of view, by emphasizing on the relationship between, on the one hand, constitutional law and relevant jurisprudence, and, on the other hand, international law as is informed by decisions and jurisprudence made at national levels. Finally, the issue of international law with respect to secession will be further explored from the viewpoint of special provisions imposed by EU law to its member-states, in the case of Scotland, and the Commonwealth, in the case of Quebec.

In line with the hypothesis stated above, it will be argued that a more advanced and up-to-date federalist model of government could potentially solve questionable or long-standing heated claims of secession. It will be also demonstrated that federal governments could potentially contain or effectively address separatist movements

had they decided to transfer considerable powers to their federated members as a result of amendments in their respective Constitutions.

These claims are based on the assumption that globalization, as an economic model, has deep political ramifications that call for strong entities, which must be financially viable, i.e. robust, and politically stable to be able, on the one hand, to resist and counter pressures and, on the other hand, to prosper. At the same time, in order to guarantee prosperity for their people or peoples and establish security and appropriate standards of living within their borders, states need to revisit their own perception of nation and ethnicity. Globalization has resulted, among other things, in massive redistribution of ethnic groups around the globe and in the creation of new forms of multiethnic/multinational states, in which ethnic 'entities' or 'minorities' can claim their right to be 'different' yet part of the whole.

In this thesis, we will attempt to demonstrate that a federal state, such as Canada, which provides adequate assurance of security and stability by allowing its federated members to achieve more specific and group-targeted goals could be a sustainable and viable solution to the proliferation of secession movements that can lead to territorial fragmentation. The risks of such fragmentation as well as the inherent danger of supporting hegemonic states that suppress the rights and freedoms of minorities will be addressed in the chapters that follow.

### **Brief Overview of Chapters 1 to 3**

This thesis is divided into three parts, each one corresponding to a chapter. Chapter 1 deals with theoretical as well as methodological issues. In this chapter we analyze the different theories of secession, the concepts of nation-state, hegemonic/dynastic state, minority groups, self-determination, legitimacy, authority, federalism, etc., from a legal as well as a philosophical standpoint.

In Chapter 2, we address the case of Quebec starting from the creation of the Canadian Federation (from its colonial past to its constitutional foundation), and moving toward the position of Quebec under Canadian Law and the *Canadian Reference of Canada's Supreme Court* with respect to Quebec's nationalist movement, the creation of the *Parti Québécois*, its importance on Quebec's political scene and its appeal to Quebec voters, in terms of the party's performance during elections. We also review in passing issues pertaining to the applicability of civil law provisions in a common law country and the protection of rights under both systems in conjunction with international legal provisions referring on the matter at hand.

We also comment on the various referendums held by Quebecers and the political and legal problems associated with them.

In Chapter 3 we explore the case of Scotland by drawing on similarities and differences between Scotland and Quebec which are mainly dealt in the conclusion section (see below). By European standards, Scotland is an interesting case. Scots Law, representing a historical evolution of the relationship between Scotland and England, is a mixture of civil law and common law elements reflecting a series of historical sources. It is the special status of Scotland within the British Crown and the latter's ties with the European Union that makes Scotland's secession claims particularly interesting, especially in the aftermath of the UK's decision to withdraw from the European Union following the referendum held on June 23, 2016.

This "dissolution of marriage", which in a broader way can be construed as a secession case itself,—because it was launched upon activation by the United Kingdom of the exit clause provision of the Maastricht Treaty—creates a series of political, legal, economic, and moral repercussions for other entities under the UK umbrella (i.e. Northern Ireland). It could also create a precedent within the European Union, namely an invitation to secessionist aspirations held or harbored by other member-states, although claims and conditions for secession are never the same for all countries and/or ethnic or minority groups. Above and foremost, the UK-Scotland case reflects clearly on a new era, where entities such as the European Union need clearly to redefine their purpose and scope of existence as well as the extent of their power and legitimacy.

## Conclusions

This is to be a comparative analysis of two secession cases: Quebec and Scotland. Both independence campaigns have failed to produce the desired effect for reasons that were discussed previously and would be summarized, in this section, from a comparative point of view.

Our choice of topic is based on the following similarities: both Quebec and Scotland are *nations* that are currently (as in the case of Scotland) or used to be (as in the case of Quebec) under the British rule and the power of the Crown. Both entities present all the characteristics of *peoples*, because they have been treated as *nations*<sup>2</sup> and have been subsequently recognized as such by the "Constitutions" of

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<sup>2</sup> It is important to note that there is no legal, sociological or other unanimously accepted definition of "peoples". It is understood that members belonging to a "people" share characteristics such as



the countries into which they belong. Additionally, both cases represent states that attempted to achieve independence via referenda. But the said referenda did not produce the 'desired effect', if by 'desired effect' is to be considered to goal of supporters of independence. Most importantly, though, from the international law point of view, both cases represent nations which did not consider the option to proceed unilaterally with the proclamation of an independent state, thus going against the will of the country to which they belong and leaving it up to the international community to recognize (or not) their status as an 'independent state'. Finally, as far as similarities are concerned, Quebec and Scotland share a legal system, which is a mixture of common law and civil law. Equally, given the liberties both entities enjoy within the countries in which they belong, it is hard to defend secession, especially once declared unilaterally, on the 'remedial theory' basis. This is because, there are no serious violations of basic human rights of the respective populations that would justify, from the perspective of the international law, the right to self-determination as a remedial action of breaking free from a suppressive state.

Despite these apparent similarities, there are considerable differences between the two cases. For once, Quebec is a province within a federal state and enjoys strong protection of its linguistic and religious rights under the Canadian Constitution. Scotland, on the other hand, has only been recently recognized as a region (Scotland Act of 1998), with some degree of authority and with most of the competences

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ethnicity (common origin), language and/or religion. It is equally important to underline, that when dealing with the issue of self-determination, the UN Charter does not provide an answer as to what constitutes a 'people' nor does it lay down the content of the principle. Contrary to 'people' the notion of 'nation', there have been attempts to define the concept from a legal as well as sociological point of view. More specifically, the Black's Law Dictionary defines a nation as follows: "A people, or aggregation of men, existing in the form of an organized jural society, usually inhabiting a distinct portion of the earth, speaking the same language, using the same customs, possessing historic continuity, and distinguished from other like groups by their racial origin and characteristics, and generally, but not necessarily, living under the same government and sovereignty." For Benedict Anderson, nation is an 'imagined community' whereas for Paul James 'abstract community'. In other words there is nothing concrete about such a community but the material conditions that allow for a congregation of men to live together and to imagine a shared future. 20<sup>th</sup> century sociological theory recognizes two types of nation: on the hand there is the famous 'civic nation', for which the principal model is France; on the other hand there is so-called ethnic nation, exemplified by the German peoples. The first type of nation is not based on purely ethnic origins, language or religion but primarily on the common pact to live together as one nation. The German example lies upon the principles of common language, religion, culture, history and ethnic origins, namely what would be consider some of the basic characteristics of 'peoples' to which the desire to live together is present but only secondary to the ethnic element of the union. Hence the fact that ethnic nations are mainly nations of 'peoples' ethnically bound together.

falling under the central government jurisdiction, i.e. the U.K. government and legislature.

That said, the two entities and nations compared herein are located in different geographical positions and as such they have different needs and different contexts that define them. Contrary to the case of Scotland and Catalonia, both of which are peoples/entities operating within states that have a membership relationship with the European Union, Quebec has a clearly North-American orientation and currently lacks significant ties with the European Continent from where its people originated. Additionally, the issue of origin and ethnic make-up is highly debatable for all cases, since there is, and has never been, such a thing as ethnic purity. Finally, the case of Scotland differs from that of Quebec insofar as the said entities and their respective peoples live and operate under different political and administrative frameworks, which they define their own being and frame the context upon which they can act and state claim independence claims.

Another major difference between Scotland and Quebec is their legal/constitutional status within the country in which they belong. Although both entities come from similar traditions, Scotland is part of a unitary government, whereby national government dominates state governments, including the Scottish one. The latter, as well as every other regional government within the U.K., have some authority but no constitutional authority. Quebec, on the other hand, has only as ceremonial connection to the Crown and exists within a federated state. The latter allows the former considerable degrees of autonomy, including constitutional authority to legislate in specific areas.

Stressing on the differences between the two cases, especially from a constitutional point of view, and based on what was already demonstrated in Chapters 2 and 3, it is important to make a clear distinction between Quebec, which attempted to secede unilaterally from the Canadian Federation, and Scotland, which, first, sought approval from the UK government so as to ensure legitimacy of the whole process and, then, proceeded with a referendum for its independence.

Our comparative analysis aims at demonstrating the limits as well as the possibilities of constitutional law in dealing with secessionist or independence claims. As a consequence of this position, it will be argued that, in the case of Quebec, which is a

province of Canada, constitutional reform based on a federalist-inspired model managed to deal rather effectively with secessionist threats.<sup>3</sup>

Contrary to what happened in Quebec, unionist governments, such as the governments of the United Kingdom and Spain, failed to control secessionist movement and/or to recognize national/regional specificities. All things being equal, it is important to bear in mind that the reasons for a specific model of governance (federalism vs. unionism) are political, cultural, historical as well as circumstantial and they need to be taken into account in all analyses.

The ambition of this thesis is to initiate a discussion around the role of constitutions when dealing with national, regional, ethnic specificities (entities and peoples), as means for ensuring peaceful co-existence and prosperity. We are not in any position to provide definite solutions, from a legal (i.e. constitutional) point of view. Such a thing would be highly presumptuous. Instead, we are simply launching the debate by suggesting that constitutions, which would allow for a federally-inspired philosophy of governance, by incorporating provisions that take into consideration regional and ethnic diversities of various entities existing within a given state, can become a legal basis for allowing some form of self-governance in areas that are of interest to the said entities. At the same time, such a system would help maintain the supra-national level of government, which will work as the “glue” that binds together members of the federation by guaranteeing their well-being. It is our view, however, that any given constitution cannot and should not be a detailed document that regulates every single aspect of a nation’s political and social life. A constitution is a blueprint that is broad enough to allow for the legislative power to accommodate evolving needs and adjust to new realities.

As far as the case of Quebec is concerned, it is obvious that, during the last decades, the secessionist movement has subsided considerably. This was due, to a large extent, to the constitutional reforms instigated by some key Supreme Court interventions. By general admission, the new generation of Quebecers, or Québécois, to be more exact, is less concerned with a ‘Sovereign Quebec’ than the previous generations. Instead, there is more talk about progress and prosperity, especially in times of recession, than of self-determination. More specifically, according to a Léger Marketing Poll conducted in March 2017, the support for sovereignty among Quebecers is at a historical low of 36 per cent. Additionally, in another poll, published in the *Montreal Gazette* on March 18, 2017, 64 per cent of

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<sup>3</sup> It is a truism to state that Canada is a federation whose federalist ‘persuasion’ has evolved over the years from a centralized model to a more decentralized one and then back again to a more centrally-controlled form of government.

surveyed Quebecers said they would vote “No” in a referendum. Earlier than 2017, and more specifically, in October 2016, during a poll conducted by Angus Reid Institution<sup>4</sup>, with the collaboration of CBC, 64 per cent of surveyed Quebecers agreed that the question of sovereignty is settled in Canada.

In our humble opinion, this shift in attitude is due, to a large extent, to the success of the Canadian federalist model and the assurance provided by the two orders of government that they can control each other more effectively, thus increasing the degree of political accountability in both directions<sup>5</sup>. Moreover, in the case of Quebec’s nationalism, the Canadian Federation, and its institutions, mainly the Supreme Court of Canada, has been a major factor in keeping the country united. It is thanks to the Canadian Federation that Quebec rights were recognized, protected and preserved. It is the nature of the Canadian federal model itself that allows for national/ethnic distinctiveness to be expressed and flourished but appeasing tensions that may arise. There is, of course, the counter argument according to which there may have not been such a strong Quebec nationalism had Canada opted for a unitary government. In our view this an assumption that may not hold true, given all the cases of unitary government faced with independence/separatist claims.

The Canadian Federation is a typical application of a federal model.<sup>6</sup> It is important to underline that, from a historical point of view, in the case of Canada, a federated union emerged as a response to the ‘survival issue’ the colonies of British North America were faced with by factors that were externally imposed upon them. In 1867, the decision of the Province of Canada, New Brunswick, and Nova Scotia to unite federally was a political solution to a series of external constraints. First and foremost was the ‘instinct of survival’ of British North America, apprehensive of American expansionism to the north, fueled by the American Civil War and justified by diplomatic and/or border incidents. It was during the same period that British

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<sup>4</sup> Angus Reid Institution (October, 3, 2016) “What Makes Us Canadians: A study of values, beliefs, priorities, and identity”. Retrieved from: <http://angusreid.org/canada-values/>

<sup>5</sup> This is achieved despite persistent political discontent, especially from the part of Quebec, with regard to the ‘Clarity Act’. It should be said that partisan rhetoric for the purpose of winning election does not always ring favorably with public opinion, which can quite often oblivious to ‘populist debates’ and more concerned with everyday pressing matters.

<sup>6</sup> As is widely accepted, from a theoretical point of view, federalism refers to the division of jurisdiction and authority between at least two levels of government. In other words, a federal system of government has at least two orders of government (a single national government or federal government and multiple regional governments, also known as ‘provincial’ or ‘state’ governments), whose division of power is recognized by and defined in a written, federal constitution, which cannot be amended unilaterally, and whereby revenues and revenue sources are divided in such a way to ensure that each order of government has certain areas of authority, which are equally set out by the federal constitution.

imperialism was undergoing radical changes, with Britain progressively reducing its obligations and responsibilities vis-à-vis its colonies. The new status quo and the relationships with Motherland had resulted in considerable loss of revenue for the colonies. This is because the end of the 'British Preferential System' translated in significant loss in the share of British markets and exceptions from the tariff protection. It is in this particular context that the Canadian Federation came into being to counter external 'threats' and to ensure the peoples' survival.

From a constitutional point of view, the Canadian federation has oscillated from a more centralized form to a more decentralized one and then back to a more centralized system of government. This change followed evolutions in the needs and priorities of the country as well as in the country's relations with the outside world. The changes also followed a modification in philosophy as to the degree of control the central or federal government should have over provincial governments and, inversely, the need to protect local or regional interests to the extent that one region's or one province's freedom does not materialize at the expense of those of another region or province.

The move from the center to the periphery and back to the center is also a direct consequence of the means available to manage and administer large geographical areas, both from the point of view of quality and quantity. In the case of Canada, the benefits of a more centralized government, at the first stages of the federation, were consistent with ensuring a more effective administration of larger geographical areas, which literally extends from ocean, to ocean to ocean. Inversely, the move from a more centralized form of federal government to a more decentralized one was the result of Canada's ability to effectively control its vast and diverse territories with the help of new technologies, namely communications and transportation. Equally, it can also be argued that the very means that allow a national government to devolve a greater number of powers and authorities to the lower order, namely provincial and/or state governments, can also be the reason to centralize power, if the means in question are mainly in the hands of the federal order.

On the basis of the Canadian Constitution, provinces, such as Quebec, have 16 enumerated powers (Section 92 of the Act). From these powers, some of the most important ones, which were devolved to the provinces, include legislative control over healthcare (hospitals and asylums), charities, municipal institutions, prisons, property and civil rights. Most significantly, though, provinces have an exclusive right over education. This right has been one of the most pressing claims of Quebec, because it considered the educational system to be the foundation of French-

distinctiveness and the best means to achieve the conservation of French culture and the expansion of the French language. From a federalist point of view, this is one of the basic reasons why Quebec, once recognized as nation and for its distinctiveness would have a hard time justifying future claims for independence.

Canadian provinces, including Quebec, also enjoy concurrent powers over agriculture and immigration. By concurrent powers one is to understand powers that are shared between provincial governments and the federal government. In other words, both levels of government are permitted to legislate in these areas by sharing a jurisdiction where both levels may enact laws.

As far as Quebec is concerned, this is also an important element to its identity. Although bound by federal restrictions regarding immigration (such as quotas), Quebec is free to impose its own conditions on the admission of newcomers, namely the French-language pre-requisite and/or the preference given to immigrants from French-speaking countries. This constitutes a very powerful tool in the hands of the Quebec government for it can not only control the demographics of the newcomers but also ensure that Francophones and francophone culture prevails in the region. This policy has a counter-balancing effect to the most recent trend of bilingualism. Financial and other imperatives made it necessary for Québécois to become fluent in English as well as in French to be able to be more competitive.

One power that has been under review many times by the Canadian judiciary is taxation. Under the current Constitution, provinces have limited taxation powers that regard, primarily, direct taxation. Most provinces currently collect the following taxes: income tax, corporate tax, sales tax, licensing and other fees. Taxation can be an important factor for citizens who would like to live in provinces with low income tax rates but adequate provision of goods and services. In 2017, Quebec had the lowest income tax indexing rate in Canada.<sup>7</sup>

The federal government, for its part, reserves exclusive rights in the following areas: regulation of international trade and commerce, with some considerable powers over inter-provincial trade, postal service, Census and Statistics Canada, the military, defense policy, navigation, shipping, sea, coastal, and inland fisheries, Indian Affairs and reserve land, criminal law, and others. The federal government has very wide powers in terms of taxation and can raise taxes by any means necessary (income tax, corporate tax or indirect taxation).

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<sup>7</sup> Gouvernement du Québec (2016). *PARAMETERS OF THE PERSONAL INCOME TAX SYSTEM FOR 2017*  
Retrieved from: [http://www.finances.gouv.qc.ca/documents/Autres/en/AUTEN\\_IncomeTax2017.pdf](http://www.finances.gouv.qc.ca/documents/Autres/en/AUTEN_IncomeTax2017.pdf):

Finally, on the most important issues, namely the Constitution Amendments and the Division of Powers, the Canadian federalist model has demonstrated its capacity to adapt in order to respond to new challenges, especially by means of jurisprudence derived from the Supreme Court of Canada. Since the patriation of the Canadian Constitution, there have been several minor amendments to the latter, especially those referring to provincial schooling in Quebec and Newfoundland and Labrador. The most important case is the one following the 1995 Quebec referendum, when Jean Chrétien, then Prime Minister of Canada, although he did not officially alter the constitution, gave provinces the right to veto over proposed constitutional amendments.

In the post-1982 constitutional era in Canada, only minor constitutional changes took place, most of which concerned social benefits and resulted in transferring more powers to the federal government.<sup>8</sup> One can hypothesize that this transfer of powers from the lower order of government to the highest is done in order to ensure reducing financial discrepancies among provinces and, by extension, guaranteeing comparable standards of living for all Canadian citizens regardless of the province they live in.

Certainly there have been historical reasons for such a re-distribution of powers. They were war-related (World War II) and recession-driven and aimed at reducing poverty. In this context, unemployment insurance became an exclusive federal power and old-age pensions became a concurrent power, with newly added powers in favor of the federal government from 1964 onward.

Another area Canadian federalism excelled was on the issue of unilateral constitutional amendment. The 1945 decision on the part of the federal government to allow for the Constitution to be amended unilaterally (by the federal government) in areas of purely federal concern was modified, following appeals, in 1982 via the adoption of new constitutional amending formulas. These formulas can be read as a sign of political maturity and trust in the federalist model that, although imperfect, have proven to be effective and widely approved. In the context of these formulas the rights of each level of government in the Constitution Amendment process are clearly stipulated.

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<sup>8</sup> The said modifications ranged from strengthening Aboriginal rights, changing apportioning number of seats in the House of Commons, making the English and French communities equal in New Brunswick, to allowing secular schools to replace church-based education, replacing denominational school boards with boards organized on linguistic lines, abolishing denominational quotas in Newfoundland religious classes, granting Nunavut representation in the Senate of Canada, etc.

The principles of mutual respect and reciprocity are taken into consideration by requiring some level of consent from one or more provinces should they be affected by proposed constitutional amendments.<sup>9</sup> We would like to underscore that the opinion of the Supreme Court decision on the case of Quebec should be read in light of the amending formulas of the Canadian Constitution.<sup>10</sup>

For some these amendments may not have gone far enough in allowing more powers to lower levels of government in changing the Constitution. They could however be interpreted as a good mix, which will allow for all levels of government to work efficiently and without unnecessary complications, delays of possible deadlocks imposed by any province and/or the federal government. In our view, they demonstrate a country's ability to accept the importance of a supra-provincial/supra-regional authority, namely the federal government, as the guarantor of its fundamental rights, freedoms, and *acquis* and as a vehicle for change in the form of trusting the lower levels of governments and their direct representatives to care for their immediate and more particular needs. It also suggests that the Canadian federal system is evolving to meet new challenges and to respond to constantly emerging needs.

Contrary to what applies in the case of Quebec, within the Canadian Confederation, Scotland is one of the four regions that make up the United Kingdom along with England, Wales, and Northern Ireland. Within the unitary sovereign state, which is

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<sup>9</sup> The 1982 Patriation of the Constitution in 1982 included an amending formula, which as adopted in sections 38 to 49 of the 1982 Constitutional Act.

For an amendment to be passed an identical resolution has to be adopted by the House of Commons, the Senate and two thirds or more of the provincial legislative assemblies representing at least 50 percent of the national population.

"This formula, which is outlined in section 38 of the Constitution Act, 1982, is officially referred to as the "general amendment procedure" and is known colloquially as the "7+50 formula". [...] If a constitutional amendment affects only one province, however, only the assent of Parliament and of that province's legislature is required. Seven of the eleven amendments passed so far have been of this nature, four being passed by and for Newfoundland and Labrador, one for New Brunswick, one for Prince Edward Island and one for Quebec. This formula is contained in section 43 of the Constitution Act, 1982." Source: Wikipedia. *Amendments to the Constitution of Government*. Retrieved from:

[https://en.wikipedia.org/wiki/Amendments\\_to\\_the\\_Constitution\\_of\\_Canada#Amendment\\_formula](https://en.wikipedia.org/wiki/Amendments_to_the_Constitution_of_Canada#Amendment_formula).

<sup>10</sup> It should be noted that, on the basis of the fundamental principles of the Canadian federalist model, Canadian Courts can affect change in the division of powers between the federal and provincial governments. Canadian courts interpret the Constitution whenever conflicts arise. Courts are called in to rule on disagreements between the various levels of government over issues pertaining to the division of powers. The Courts' decisions can impact greatly on how the federal system works in Canada. Nowadays, the most significant court in this respect is Supreme Court of Canada.



the United Kingdom, three of the four regions, namely Scotland, Wales and Northern Ireland, have gained some powers through the process of *devolution*.

The powers that have been delegated to the three countries mentioned above are known under the name of 'excepted matters', and they differ from one region to another, whereas the ones that remain under central jurisdiction, namely the prerogative of the UK government, are called 'reserved matters'. The 'reserved matters' are divided into two major categories: general reservations and specific reservations.

The matters falling under general reservations are the Constitution, including the Crown, the Union with England, Northern Ireland and Wales, the UK Parliament, the High Court of Justiciary (for criminal matters), the Court of Session (for matters pertaining to civil law), registration and funding of political parties, international relations (including international development, trade and international regulatory law), Home Civil Service, National defense and matters of treason.

Under the Specific reservations category there are 11 different headings which cover specific areas of social and economic policy reserved to Westminster. These headings, known as 'Heads' are the following (in the order they are presented in the Constitution): A. Financial and economic matters (including, of course, fiscal, economic and monetary policy); B. Home Affairs (including among other things data protection, firearms, elections, national security, emergency powers, etc.); C. Trade and industry (including business law, competition, imports & exports, telecommunications, postal services, etc.); D. Energy (all sources of energy natural or others, i.e. nuclear); E. Transport; F. Social Security (pensions & child support); G. Regulation of the professions (especially healthcare professionals, solicitors, auditors, etc.); H. Employment (including the protection of workers); J. Health and Medicine (human genetics, etc.); K. Media and Culture (BBC, etc.); L. Miscellaneous (from judicial salaries to control of weapons of mass destruction and outer space policy and research).

Finally, the legislative power, that is, the power to make laws that apply to all four regions, is reserved to the UK Parliament. However, it is the very principle of devolution that allows regional parliaments, such as the Scottish one to approve laws, i.e. to legislate on matters that pertain to issues of a more local interest. Since 1998, through several Acts of Parliament by the UK Parliament, the Scottish Parliament gained authority and power to introduce new laws on a wider range of issues. These are the devolved matters described above. But, as devolution does not

mean independence, Scotland is still part of the United Kingdom, which means that Westminster has ultimate power. The UK Parliament retains power to legislate on any matter, including devolved ones, but will not do that without the consent of the Scottish Parliament. Until now, there have been no instances whereby the UK Parliament had knowingly legislated on devolved matters since devolution without the express consent of the Scottish Parliament.

The devolution of powers to Scotland is described by and defined in three different Acts: the Scotland Act of 1998, the Scotland Act of 2012 as well as the Scotland Act of 2016. The 1998 Act was considered to be the most important piece of legislation to have been passed in UK since the European Community Act of 1972. The 1998 Act was introduced by the Labour Party following the 1997 referendum. It provides for the creation of a Scottish Parliament though reaffirming Westminster's absolute Parliamentary sovereignty over Scotland. It also introduces the creation of an executive power, most commonly known as the Scottish Government. The Act defines, among other things, the scope of the legislative power of the Scottish Parliament by means of statutes and clauses that are not amenable to amendments as well as all the rights 'reserved' to the UK Parliament.

One of the provisions of the said Act relates to the powers delegated to the Secretary of State for Scotland. In the spirit and letter of the Act, the Secretary has the power to instruct the Scottish government not to make decisions that could run contrary to international treaties and their subsequent obligations and, inversely, to act, if needs be, in such a way as to ensure compliance with international obligations. One of the most important aspects of this Act is dispute resolution over competencies falling under the legislative and the executive authority of the Scottish system. The ultimate instance of appeal is the Supreme of the United Kingdom. Most importantly, however, the Act makes provisions for future adjustments of the powers vested in the Scottish Executive and the Scottish Parliament conditional to an agreement and by means of an Order in Council.

On the basis of the 1998 Act, all powers that do not fall under the 'reserved matter' category are devolved to Scotland. These powers include the areas of agriculture, education, the environment, health, local government and justice. The 2012 Act, which received Royal ascent on May 1<sup>st</sup>, 2012, namely before the 2012 Edinburgh Agreement, was considered a victory of the Scottish cause, since it expanded, be it marginally, the powers devolved to Scotland. Whereas direct taxation remains a British prerogative, the Scottish government is now able to raise or lower taxes by 10p in the pound. Should a change like that be introduced, it should apply equally to

all taxation brackets. At the same time, Scotland now has a limited power with regards to indirect taxation, namely stamps duty, or property tax, as in the case of landfill tax. But the most important power delegated in Scotland is the latter's ability to borrow money, if only for an amount that cannot exceed slightly over 2 billion pounds per year.

With the Scotland Act of 2016, Scotland managed to increase its powers in some fields pertaining to the following areas: fiscal policy<sup>11</sup>, transportation, employment, welfare, social policy, and housing<sup>12</sup>. One innovative change found in the Scotland Act of 2016 is the recognition of the Scottish Parliament and Scottish Government as permanent constitutional arrangements. This means that none of them can be abolished unless a decision stemming from a referendum requires so.<sup>13</sup>

Despite gradual changes toward greater degree of devolution, it is clear that Scotland enjoys far less autonomy than Quebec. This explains why Scots keep insisting in considering the option of another referendum to break-free from the UK. These claims became more and more pressing in the aftermath of the June 2016 UK Referendum to leave the EU. The 'Leave' answer prevailed by 52 per cent of the votes. At the same time in Scotland, the electorate was overwhelmingly voting in favor of 'Remaining' within the European Union (62 per cent of registered votes).

Following the result of the said referendum, the Scottish Government published a draft bill to initiate procedures for a second Scottish independence referendum. The draft bill received legislative consent. For such a referendum to be legally binding it

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<sup>11</sup> As far as fiscal policy is concerned, it is important to note that both parties in the negotiations spent a whole year debating and negotiating Scottish fiscal powers. This is because, under the new act, Scotland was to receive part of the VAT revenues as well as income taxes, generated within the Scottish territory. For this reason the block grant, also known as Barnett formula, namely a mechanism created by the UK Treasury to adjust, automatically, money allocated to Scotland, Wales and Northern Ireland to reflect changes in expenditures allocated to public services in England, England and Wales or Great Britain, had to be re-negotiated to reflect these new sources of revenues given that in 2013-14, alone, the said formula applied to about 82 per cent of the total budget approved by the Scottish Parliament. In the context of these negotiations, the Scottish Government proposed any future adjustment of the 'block grant' be indexed, i.e. calculated on the 'per capita index' given that the Scottish economy was not progressing as fast as the UK average.

<sup>12</sup> In the framework of the categories mentioned herein, Scotland was given the right to cash 50 per cent of the VAT raised in Scotland, to control some taxes, such as the Air Passenger Duty, to set income tax rates and brackets on the income coming from non-saving and non-dividend sources. As far as the other categories were concerned, Scotland got legislative control over road signs, speed limits, rail franchising, etc. Important powers were devolved in the area of welfare and housing, disability allowance, carers' allowance, attendance allowance and other social policies. Finally a major step was made toward devolving the abortion law from the 'reserved matter' to the 'excepted matter' jurisdiction realm.

<sup>13</sup> Section 63A of the Amended Scotland Act 1998.

would have to receive the approval of the UK Parliament. But on May 16, 2017 Theresa May said it was not appropriate time for such a discussion, when the UK needed to present a united front instead of division. After the 2017 UK National election, during which the SNP remained in the first choice of the Scots but lost considerable part of its power to the Conservatives, Nicola Sturgeon decided to postpone the discussion over at least autumn 2018, on the premise that the outcome of Brexit negotiations would become clearer.

Brexit triggered a series of political and legal actions on the part of the Scottish Government, given that the latter is adamant to remain within the European family after UK leaves the Union. The Sturgeon administration expressed its willingness to establish links with the European Union on the model of the EFTA (European Free Trade Association) and the European Economic Area (EEA).

From a constitutional point of view, the compliance with the European Law clause, pertaining to any legislation in policy areas devolved to Scotland could mean that the UK could not leave the European Union unless such an obligation was removed from the Constitution. Some analysts considered this to be a possible solution to Scotland's search for a legal means to stop UK's withdrawal from the European Union. However, such a 'veto', can be overridden by UK Parliament because it is founded on parliamentary convention and not on constitutional rights. In UK's unitary form of government/regional state, it is the central's government prerogative to ask devolved government/parliaments to disregard the observance of EU law and not the latter's option to block British Parliament's decisions. This was equally confirmed by a Supreme Court decision, which stated that devolved governments cannot veto in that matter.

The analysis provided above clearly demonstrated two cases that are very different in their current search for independence, or lack thereof. It was suggested that, in Quebec, public opinion seems to be more at ease with the current status quo, mainly because the federated state is a factor of stability and prosperity. In Scotland, on the other hand, a faction of Scottish politicians seems to pursue dynamically the independence card, despite public polls, which show that the public opinion remains divided on the subject and rather reluctant to separate from the UK under circumstances that are extremely unclear and fluid. This is particularly true in the case of Brexit, especially since negotiations between the UK and the EU are proven to be more complicated and more time-consuming than originally expected. In the

face of uncertainty, it is believed that a referendum for independence would complicate matter further.<sup>14</sup>

On the European Union camp, it is clear that secessionist questions are not favored, regardless of the conditions that give rise to them. We are currently going through a post-cold-war phase of the European history, where regional, national or ethnic claims are dealt with more *sang froid* and less emotional load than in the previous decades. Instead, other matters come to the forefront and concern the discrepancies between the sluggish 'South' and the more prospering 'North'. Massive migratory flows, as a result of the Syrian War, the world on terror, and economic suffocation in the countries of the African Continent, change the list of EU immediate priorities.

The Catalan referendum—held on Sunday October 1<sup>st</sup>, 2017 and violently suppressed by the Spanish government, which refused to recognize not only its result but the fact that the referendum ever took place—is suggestive of how some EU countries envision nation-states (especially regional ones) within the European Union. It should be note, all the same, that the Spanish Government's attitude vis-à-vis the said referendum was in line with Spanish Constitutional Court's decision to accept the request put forth by the Spanish Government to suspend the one of the two laws approved by the secessionist majority a week before the referendum.

Contrary to Quebec, who has been financially weaker than Ontario, Alberta and British Columbia, but still more robust than other Canadian provinces, Catalonia and Scotland are among the most prosperous regions of the countries they belong into. This is why Catalonia, as a counter-attack to the Spanish central government implementation of the Constitutional Court's decision, decided to suspend weekly transfers to the Spanish Treasury financial accounts, a measure that was established as a type of 'an insurance policy' on the part of the central government, which wanted to ensure that money public money were not used to finance secession campaigns. In response to the Catalan action, the Spanish Government immediately proceeded with taking over control of most of Catalonia's invoice payments.

Claiming, however, independence on the premise that such entities cannot be forever Spain's or UK's "contributors" is hardly a valid reason from legal point of view. In the same vein, their financial robustness is not sufficient a reason to ensure that such entities will be able to prosper independently.

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<sup>14</sup> On this topic, see also Closa, C. (2017). *Secession from a Member State and Withdrawal from the European Union*. Cambridge: Cambridge University Press, especially pp. 1-11 & 48-68.

These and many other issues bring to the forth the following question: Could a more decentralized form of federal governance be a future alternative to secessionist claims and subsequent political upheaval? And if yes, what about Canada, which is already a federal state and which experimented with various degree of federalism (from a more centralized to a more decentralized and vice-versa)?

It is our view that, beyond promoting the federalist or other model, a plausible approach to dealing with the core problem of secessions and independence insurgences, everywhere in the world, is to acknowledge 'evolutionary' facts that are neither North-American- nor European-specific. More specifically, ethnic nations are more of a chimera than a reality. Although racial purity never existed, today's ability to travel and to do business at a global level, with the help of immense technological advancements, signals the death of the illusion of 'ethnic states'. New states or political formations are multi-ethnic, pluri-linguistic, and pluri-cultural by nature. Consequently, constitutions should reflect these new forms of human associations.

If states and/or other political formations raise to a maturity level sufficient enough to acknowledge, as Haljan says, that "[...] a constitution is [in itself] that institution by which we identify, articulate and apply the commitments representative of our common-holding as association (2014, p. 81).", then there is hope that substantiated independence claims can be satisfied and all members of the said 'association' feel free and safe enough to accomplish their commonly defined goals and aspirations. This translates into putting faith into the capacity of the constitutional law itself. The latter presupposes that peoples, via their representatives, demonstrate sufficient maturity in themselves to mobilize the possibilities offered to them by their respective constitutions.

## INTRODUCTION

This thesis is inspired by the rise of secession claims in the wake of the 20<sup>th</sup> century and its repercussions on the 21<sup>st</sup> century. Despite its long history, our focus will be on 21th century secession as a political and constitutional question that has been raised for many decades, in general, and on the cases of Quebec and Scotland secession movements, in particular.

Although there are undoubtable differences between the two cases, that is, the geographical location of Quebec and Scotland respectively, the nature and features of their respective constitutional systems and the ones from which the two entities want to secede, the ethnic or other claims of the 'candidates' for secession, as well as the legal, financial, and institutional consequences of a potential secession movement, to name only few, there is a common denominator worth-exploring.

More specifically both entities belong, in some form or another, to the British Crown from which they want to break free for their own political/constitutional reasons. In the case of Quebec, its ties to the Crown are defined by the Constitution itself and the type of Governance of Canada, namely Constitutional Monarchy. It is by the arrangements of the Canadian Federation that the Constitutional Monarchy of Canada operates in Quebec, as in any other province of the country, under the name of the *Crown in Right of Quebec*.

The role of the Crown in Canada may appear to be more ceremonial than practical. In reality, however, the Crown is at the center of the country's, and by extension, the provinces' constitutional foundation whereby "the Crown must be seen as a corporation, in which several parts share of the authority of the whole, with the Queen as the person at the center of the constitutional construct."<sup>15</sup> This translates into substantial constitutional powers, in the hands of either the Queen or her

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<sup>15</sup>Black v Chrétien: Suing a Minister of the Crown for Abuse of Power, Misfeasance in Public Office and Negligence (n.d.) *E Law, Murdoch University Electronic Journal of Law*. Retrieved from <http://www.murdoch.edu.au/elaw/issues/v9n3/cox93.html>

viceregal representative at the provincial level, namely the Lieutenant Governor of Quebec.

Quebecers, especially those in favor of the Province's independence from the Canadian Federation, do not recognize the role or the importance of the Crown in their province. The Crown is neither 'natural' nor consistent with the cultural heritage, linguistic foundation, ethnic origins, and historical background of the people of Quebec. Therefore, it is most frequently referred to (pejoratively) as the "English Crown" or "British Monarchy" instead of the "Crown in Right of Quebec".

In the case of Scotland, the "Union" with its "brothers" from the South was borne out of necessity and fear rather than a sense of brotherhood and ethnic affiliation. The Common Parliament, created as a result of the 1707 Treaty of Union, signaled the end of a tumultuous relationship between the two nations, one that was filled with wars, plotting, and assassinations. Scotland gained free access to markets and new commercial roots as a result of the said Treaty. England, on the other hand, got to appoint a line of Protestant Kings as heads of State. Despite their differences and the 'forced' coexistence, the ties between the two entities grew stronger during the imperial adventures overseas, in which Scots played a key role. It is colonialism that forged a shared identity between the Scots and the Brits. Currently, it is this identity that is being questioned by the Scots while resisting cries for independence via secession.

The purpose of this thesis is to highlight differences in how secession claims in both cases (Scotland and Quebec) came to the fore despite shared similarities. We will attempt to explore how Scottish and Quebec political entities (personalities as well as parties) treated the issue of secession by encouraging or discouraging independence from the 'motherland' and how these actions influenced the current *status quo*, on local (provincial), national (constitutional), and international level.

Our major contribution is aspired to be one that is in line with a theoretical attempt to consider secession through the lenses of federalism and international law. It will



be argued that secession claims, even when they do not result in the creation of autonomous, sovereign states or entities, modify federalist theories and/or actual realizations of federalist forms of governance, as an alternative to the dichotomy between a sovereign state and a minority/or minorities claiming secession from the former, thus transforming the scope of application of international law.

More specifically, it will be argued that redundancies, delays or complications resulting from multiple layers of legal and/or regulatory authorities acting in parallel or counter to one another, at the local, national or international level, and which are involved in issues pertaining to same acts and actors, can actually be less obstructive than originally thought.

Instead they can be rather beneficial when rethinking alternative solutions to issues that seem to be at the core of secession claims. To put it differently, when multiple legal, political or regulatory authorities weigh in regarding questions of minority rights, ethnic rights, and independence and/or sovereignty claims, inter-systemic types of governance, within a federalist or quasi-federalist model of governments, can have remedial effects insofar as they can potentially rectify injustices, correct errors, complement deficiencies, etc. This can translate into a more robust field for negotiating 'differences' without necessarily 'breaking free'. In other words, using the lessons learned from Scotland and Quebec, we will argue that a multi-layered, pluralistic decision-making process could enhance awareness of the 'other' while restraining one's view of one's own power and sovereignty.

To achieve our goal, it is important to start by presenting briefly some basic notions evolving around major theories of secession. We firmly believe that secession cannot be viewed separately from the notions of self-determination and sovereignty. For that reason, all three constructs will be examined comparatively to establish legitimacy of secession claims in the cases of Quebec and Scotland, the fate of these claims, the lessons learned and the alternatives to secession. With respect to the hypothesis stated above, it will be argued that the two cases do not fall under the category of remedial or just-cause secession theories. They, therefore, beg special

attention from a legal and institutional point of view simply because, as we will argue, they are more susceptible to lead to alternative models of federalist forms of governance.

Firstly, we will discuss the different theories of secession starting from the origins of the concept and the way it evolved throughout the years. Then, we will address the problem of notional and practical limits imposed by current theories, especially from a legal and practical point of view, by emphasizing on the relationship between, on the one hand, constitutional law and relevant jurisprudence, and, on the other hand, international law as is informed by decisions and jurisprudence made at national levels. Finally, the issue of international law with respect to secession will be further explored from the viewpoint of special provisions imposed by EU law to its member-states, in the case of Scotland, and the Commonwealth, in the case of Quebec.

In line with the hypothesis stated above, it will be argued that a more advanced and up-to-date federalist model of government could potentially solve questionable or long-standing heated claims of secession. It will be also demonstrated that federal governments could potential contain or effectively address separatist movements had they decided to transfer considerable powers to their federated members as a result of amendments in their respective Constitutions.

These claims are based on the assumption that globalization, as an economic model, has deep political ramifications that call for strong entities, which must be financially viable, i.e. robust, and politically stable to be able, on the one hand, to resist and counter pressures and, on the other hand, to prosper. At the same time, in order to guarantee prosperity for their people or peoples and establish security and appropriate standards of living within their borders, states need to revisit their own perception of nation and ethnicity. Globalization has resulted, among other things, in massive redistribution of ethnic groups around the globe and in the creation of new forms of multiethnic/multinational states, in which ethnic 'entities' or 'minorities' can claim their right to be 'different' yet part of the whole.

In this thesis, we will attempt to demonstrate that a federal state which provides adequate assurance of security and stability by allowing its federated members to achieve more specific and group-targeted goals could be a sustainable and viable solution to the proliferation of secession movements that can lead to territorial fragmentation. The risks of such fragmentation as well as the inherent danger of supporting hegemonic states that suppress the rights and freedoms of minorities will be addressed in the chapters that follow.

This thesis is divided into three parts, each one corresponding to a chapter. Chapter 1 deals with theoretical as well as methodological issues. In this chapter we analyze the different theories of secession, the concepts of nation-state, hegemonic/dynastic state, minority groups, self-determination, legitimacy, authority, federalism, etc., from a legal as well as a philosophical standpoint.

In Chapter 2, we address the case of Quebec starting from the creation of the Canadian Federation (from its colonial past to its constitutional foundation), and moving toward the position of Quebec under Canadian Law and the *Canadian Reference of Canada's* Supreme Court with respect to Quebec's nationalist movement, the creation of the *Parti Québécois*, its importance on Quebec's political scene and its appeal to Quebec voters, in terms of the party's performance during elections. We also review in passing issues pertaining to the applicability of civil law provisions in a common law country and the protection of rights under both systems in conjunction with international legal provisions referring on the matter at hand. We also comment on the various referendums held by Quebecers and the political and legal problems associated with them.

In Chapter 3 we explore the case of Scotland by drawing on similarities and differences between Scotland and Quebec. By European standards, Scotland is an interesting case. Scots Law, representing a historical evolution of the relationship between Scotland and England, is a mixture of civil law and common law elements reflecting a series of historical sources. It is the special status of Scotland within the British Crown and the latter's ties with the European Union that makes Scotland's

secession claims particularly interesting, especially in the aftermath of the UK's decision to withdraw from the European Union following the referendum held on June 23, 2016.

This “dissolution of marriage”, which in a broader way can be construed as a secession case itself,—because it was launched upon activation by the United Kingdom of the exit clause provision of the Maastricht Treaty—creates a series of political, legal, economic, and moral repercussions for other entities under the UK umbrella (i.e. Northern Ireland). It could also create a precedent within the European Union, namely an invitation to secessionist aspirations held or harbored by other member-states, although claims and conditions for secession are never the same for all countries and/or ethnic or minority groups. Above and foremost, the UK-Scotland case reflects clearly on a new era, where entities such as the European Union need clearly to redefine their purpose and scope of existence as well as the extent of their power and legitimacy.

Finally, in the section dedicated to conclusions we provide a justification of our working hypothesis, namely the creation of federations as a possible answer to current secession claims. We are fully aware that not all cases are the same and that not one “size fits all”. All things considered, we will attempt to demonstrate that federal statehood can be a valid answer in complicated cases of secession. This is especially true in cases where public opinions or societies are highly divided, as well as in case that have generated heated debates and a plethora of legal and philosophical investigations amongst scholars.

## CHAPTER 1: THE NOTION OF SECESSION

### 1.1. The Origins of the Notion of Secession

As Mancini (2012) points out secession is a political construct that is both extremely revolutionary and conservative. Its dual character reinforces and challenges state sovereignty. Sovereignty is inextricably related with another construct, that of the *nation-state*. In the Westphalian understanding of the formation of states, nation-state is the ultimate goal since it is based on premises that have gained authoritative status over the centuries.<sup>16</sup> These values are non-others than ethnic affiliation (and therefore purity), language, religion as well as a shared vision for prosperity<sup>17</sup>. Nation-states are by their very nature centralized entities that can be hegemonic (empires) and/or be run by the “*King*” or “*Hegemon*”. (Mancini, 2012, p. 480)

Despite their hegemonic aspirations or lack thereof, nation-states do not belong to the ruler but are the ownership of the people or peoples who form them, namely the citizens of the sovereign state, who, in principle, have willingly, freely, and consensually decided to create a solid and strong entity to work collectively toward

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<sup>16</sup>The emergence of the ideal of nation-state, as opposed to a dynastic state, was triggered by the French and the American revolutions of the late 18<sup>th</sup> century, whereas the state system itself dates back to 1648. As Wimmer and Feinstein (2010) highlight in their work, a modern nation-state is a ‘principle’ (‘ideal’) in itself and consists of “an independent state with a written constitution ruled in the name of a nation of equal citizens” (p. 764). Whatever the definition of the nation-state, there is one fundamental problem with this concept. For the discussion as to whether the ‘nation’ came before the ‘state’ or vice-versa is still open. Contrary to temptations to oversimplify things, one could easily recognize the following theoretical trends vis-à-vis nation-state formation and justification. One school of thought considers that the state preceded the nation, as is the case of Hobsbawn who argued that the French nation resulted from the pre-existence of the French State. It is under the creation of a state with a central authority that joined institutions, including a common language, were created to form a nation under which various groups would gather, identify with and adhere to. For others, the process is reversed, namely nationalist principles were the guiding force behind the creation of a nation (as in the case of Germany and Italy). Divided territories with populations who shared cultural elements (including the language) sought unification in the form of share statehood. This type of unification presupposes a cultural unification which preceded state unification in nations that are called ‘ethnic nations’ or ‘ethno-nations’ (see on this topic Hans Kohn and Philip White). The balance-of-power principle (cf. Fénélon), as preached by the Westphalian System, places special emphasis on the nation and the state. The apotheosis of the nation came with Nazism and the ethno-socialist movement.

<sup>17</sup>On the relation between nation-state and prosperity, see relevant footnote in this chapter.

its prosperity.<sup>18</sup> In order to achieve this goal, they have designated a government to work and act in their best interest, in their name, and on their behalf.

It is not clear whether the nation came before the state or the other way around. In reality, the succession of events is of little interest for our current analysis. Whatever the order of their coming into life, nation-states are associated with the rise of the modern system of states. As mentioned above, the latter is known as the “Westphalian System”. The Westphalian system did not create nation-states.<sup>19</sup> Rather nation-states seem to satisfy the criteria of the Westphalian principle of strong, independent, centrally-controlled, and centrally-governed states. It is important to note that a nation-state derives its political legitimacy from a conceptual equation that associates nation with cultural entity.<sup>20</sup> While state refers

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<sup>18</sup>On the same topic, cf. Liah Greenfeld’s claim that “the factor responsible for the reorientation of economic activity toward growth is nationalism”. Although fundamentally anti-nationalist, Greenfeld’s philosophical construct has had a great appeal to pro-capitalists, especially if one is to consider, as does Greenfeld, that the force behind the American society is the importance of the economics (namely money) in the collective consciousness of modern Americans. This dynamic, which stems mainly from the association of prosperity with economic growth, is one of the fundamental features of American nationalism and is sustained because of it. (Greenfeld, 2001, p.1). See also the works of some of the most influential liberal nationalism and liberalism-cosmopolitanism theorists such as David Miller (1995, 2000 and 2007), Kai Nielsen (1998), Michel Seymour (2000) and Chaim Gans (2003). The list provided in here is by no means exhaustive.

<sup>19</sup>The Westphalian system, also known as the ‘Westphalian model’, “acts as an *organic* instrument which can demonstrate, and may actually be strategically used to carry, tremendous social power within the shared consciousness of the international community.” (Beaulac, Australian Journal of Legal History, 2004, para. 1). This is because the influence of this model grew exponentially alongside Europe’s increasing influence around the world to become a central element of the international law. This model came into being as a result of the Peace of Westphalia, which ended the Thirty Year War, a series of European religious wars. The importance of this Treaty resides, among other things, in establishing a precedent of peace by diplomatic congress. The other most important element of the Westphalian Treaty is the creation of a new political order based on the principle of co-existing sovereign states, which respect each other’s independence and refrain from meddling in each other’s domestic affairs. Inside a state, the Westphalian model preaches the prevalence of the balance-of-power principle to avoid or suppress inter-state aggressions (such as insurgencies and/or secessions). Historically, this model was originally created to ensure peace within the European continent. Its ‘success’, if success is to be understood as its duration and expansion, is attested by the place it occupies within international law.

<sup>20</sup>The concept of “cultural identity” is as difficult to circumscribe as are the notions of ‘culture’ and ‘identity’ taken separately. Paul (2015) suggests “[...] that categorizations about identity, even when codified and hardened into clear typologies by processes of colonization, state formation or general modernizing processes, are always full of tensions and contradictions. Sometimes these contradictions are destructive, but they can also be creative and positive.” (p. 175). In other words, cultural identities are extremely important because they are one of the many possible expressions of what Kymlicka (1995) names a ‘context of choice’. Within this context, citizens as well as peoples make a conscious choice vis-à-vis their self-identification. A ‘cultural identity’ is “anchor for [the

to a political formation that possesses well defined geographical borders, a nation is an ethnic and cultural entity in the terms described above.

One of the main characteristics of a state is sovereignty. In other words a state (including a nation-state) embodies sovereignty. Basically sovereignty translates into a state's supreme authority within a given territory. The sovereignty over a territory equates to a three-dimensional notion of political authority: the holder of sovereignty; sovereignty in absolute terms, and the internal and external dimensions of sovereignty. The equation of sovereignty and territory is extremely important and is rooted in two different historical movements. The first is the development of a system of sovereign states as a result of the Peace of Westphalia (1648).<sup>21</sup> The second movement goes from the system of sovereign states to circumscribing a sovereign state in the post-World War II era, as part of the European integration project and the political scheme expanding and strengthening legal frameworks as well as institutional and other practices in order to protect human rights. Oddly enough it is within the context of the second movement that territorial claims by ethnic and/or cultural minorities or nations within existing states came to the fore and led to secession claims based on the need to protect human rights.

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peoples'] self-identification and the safety of effortless secure belonging" (Kymlicka 1995, 89, quoting Margalit and Raz 1990, 448 and also citing Taylor 1992). In reality, this translates as follows: a person's perception and understanding of identity is closely related with one's own culture. The latter needs to be secured in order for cultural membership to serve as a context of choice, which carries meaning and commands self-respect. The sense of belonging has been used as a pretext for exclusion of people who do not identify with a said cultural group or who identify to it only partially. In other words, culture, namely the very principle of inclusion and self-respect, can become a pretext for exclusion of a given group. In other cases, it is the principle of self-respect that underscores claims of cultural identity thus leading to movements in favor or the recognition of suppressed and/or minority cultural communities.

<sup>21</sup>Cf. Machiavelli (1532), Luther (1523), Bodin (1592), and Hobbes (1651).

## 1.2. Principal Theories and the Limits of Secession

Nation-states have been the norm for centuries<sup>22</sup> and have shaped frontiers and interstate relationships as we used to know them. However, political, economic and territorial reshuffling as well as an increased awareness and recognition of the rights of “minorities”<sup>23</sup> have resulted, among other things, in the rise of secession movements. This is particularly true in the wake of the 19<sup>th</sup> century.<sup>24</sup> It is not our goal to offer an exhaustive account of the chronology of secession movements. We will content ourselves with presenting the most salient points of the phenomenon and its corresponding theory.

As in every theory, secession theory emerged from facts that needed rationalization, explanation and, most importantly, resolution. Unhappy, trapped, suppressed or persecuted groups of people, who seek territorial independence and/or self-determination, are a reality that needed to be account for, from a political and legal point of view. Given the sensitive nature of the secession and its various ways of interpretation, there is more than one theories of secession.

In general terms, there are two types of normative theories of secession: the Primary Right Theories and the Remedial Right Theories. For most of the theorists of

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<sup>22</sup>See footnote 6 on the history of the emergence of the nation-state.

<sup>23</sup>The term ‘minority’ is used in a broader sense to encompass all groups that can be defined and/or self-defined as minorities.

<sup>24</sup> See on this topic, Mill’s (1986) claims with regards to multination states and democracy. More specifically, Mill considers that there is an inherent incompatibility between multination states and democracy. Modern proponents of Mill’s argument would be quick to argue that multinational democratic states (such as Canada and Belgium to name only two) exist, among other things, because of the emergence of nationalist secession movements. However, building on Buchanan’s observations regarding Mill’s claim, as portrayed by the latter’s modern proponents, we would argue that the Mill’s theory is a gross generalization for the following reasons: it is pessimistic insofar as it equates multinational states with democracy states without defining democracy per se; it is not clear whether multinational states are equated with multi-ethnic ones or not; it does not account for modern, far more genuine forms of democracy; it ignores modern democracies’ failure to recognize nations and/or ethnic minorities within states and to correct subsequent injustices. For a more detailed analysis, see relevant entry at <https://plato.stanford.edu/entries/secession/#ConTheAboSec>.



secession, Primary Right Theories fall under two different categories: the Ascriptive Group Theories and the Associative Group Theories (Buchanan, 1997, p. 37-8). Other theorists name the same sub-categories as Nationalist Type of Primary Right Theories and Democratic Type of Primary Right Theories (as cited in Mancini, 2012, p. 483).

As far as Remedial Right Theories are concerned, also called just-cause theories, there is only one type of Remedial Right Theory according to which “[...] a group has a general right to secede if and only if it has suffered certain injustices, for which secession **is the appropriate remedy of last resort**”. (Our emphasis) (Buchanan, 1997, p. 34-5).

We would like to draw the readers’ attention to the use of the plural in “Remedial Right Theories” in conjunction with the fact that only one type of theory falls under this category of the right to secession. The plural in theories, as Buchanan points out (*Idem*), asserts that there as many remedial theories as they are or may be injustices. Remedial Right Theories reside on the humanistic principle of remedying an injustice, which is to be understood as a *general*, inalienable right to justice, one that is very similar in many respects to the right to revolution. However, there is a fundamental difference between revolution and secession, namely that the latter “[...] accrues to a portion of the citizenry, concentrated in a part of the territory of the state.” (Buchanan, 1997, p. 35). In other words, whereas revolution aims primarily at overthrowing an unjust, unfair or suppressive government, the object of secession is to “sever the government’s control over that portion of the territory.” (*Idem*).

Contrary to Remedial Right Theories, where *special* rights are taken under consideration as a legitimate justification for secession, as in the case of the violation of fundamental rights, Primary Right Theories appeal to a *general* right to secede regardless of the presence of a perceived or actual injustice. Primary Right Theories are also called choice-theories because they are based on the premise of a

unilaterally expressed right to secede even if this right creates the violation of a series of other rights.

In our view, it is important to note how one theory moves from the fundamental right to deal with violations of basic rights toward the need to remedy the latter whereas the other theory recognizes the fundamental right to secede without taking into account new injustices/violations that may arise as a result of the secession thus denying other peoples' fundamental rights.

Additionally, as mentioned earlier, Primary Right Theories fall under two major headings, specifically the nationalist or ascriptive (group) and the democratic or associative (group) theories. In the first case, that is, the theories that embrace the "nationalist principle", emphasis is placed on nations' or peoples' entitlement to form their own state. In that sense, it is morally justified to form a nation. If one is to consider nation (and or people) as moral value, then, according to Buchanan, this value has ascriptive characteristics insofar as a nation and/or a people enjoys shared commonalities such as culture, history, language, distinctiveness as well as a common view of political unity. For Mill (1991), all these commonalities are the fundamental conditions for a viable state, because the lack of a homogenous polity increases the risk of having to deal with a coercive government.

In the second case, namely the democratic or associative theories of Primary Right to secession, theorists underline a people's or a group's right to associate freely in order to form a political entity that would emphasize on the individual's choice to autonomy and freedom through democratic processes. One could posit that plebiscites are democratic means toward achieving this goal, because, in general, they appeal to a real or perceived public sentiment of highly emotional value by calling the electorate to decide upon a highly important public question, namely the group's autonomy or affiliation with another group. However, it is important to note that any plebiscite when decided, organized and run unilaterally is not as democratic as one would presume, especially since its outcomes creates injustices for other

groups of associations of people, which, in turn, could claim separation from the “union” on the basis of the new injustice it was inflicted upon them.

Ideally, from a purely nationalist point of view, the “perfect” or “model” state would be one where nation and state coincides within the same borders. In reality, as David Miller (1995) remarks astutely, nation and the state should not overlap, because this can be problematic in many aspects. First, it would create a precedent whereby all ethnic entities could claim independence through secession, thus legitimizing the said process and the collapse of the existing legitimate state. Second, secessions would lead to the end of multinational/multiethnic states, which historically are the norm because of the constant flow of populations either by force or by choice. Third, this human flow of races and identities, which is a natural process more than it is the result of artificial creation of independent states, testifies to the wealth of multicultural/multiethnic entities and the diversity of cultures, languages, habits and customs, and the capacity to “infuse diversity into political communities” (as stated in Mancini, 2012, p. 484).

Finally, secession movements launched in the spirit and for the purposes of the Primary Right Theories would run contrary to concept and practice of globalization, since it would encompass the risk of becoming synonymous with purity and/or ethnic cleansing and therefore the establishment of an exclusionary model of citizenry around the world.

It is worth exploring the hypothesis where secession runs contrary to current globalization trends<sup>25</sup>. One can argue that globalization, specifically and most

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<sup>25</sup>This claim stems from current theories on World Polity, where globalization is to be understood as “the growth and enactment of world culture”. This position is deeply rooted in the infamous European tradition, namely the medieval Christendom and its rational structure and content, the principle of state system, which was devised in 1648 and, of course, the Enlightenment, with its universal values with regards to science, philosophy, the arts and, above all, human rights. In Meyer’s definition, ‘World Polity’ is a “[...] system of creating values through a collective conferral of authority” (Meyer, 1980, pp. 111-2) where a central actor is allocating roles and responsibilities to actors operating on the nation-state level. This model runs contrary to the need for self-expression and self-determination through self-appointment of the role one is to claim and play. In the poststructuralist philosophical framework, post-colonial theories, especially decolonization theories focus mainly on issues pertaining to revolution (including secession), political identity, inequalities

importantly, political globalization, which favors “[...] an increasing trend toward multilateralism (in which the United Nations plays a key role), toward an emerging ‘transnational state apparatus,’ and toward the emergence of national and international nongovernmental organizations that act as watchdogs over governments and have increased their activities and influence” (Moghadam, 2005, p. 35) better serves the Primary Right Theories. This is because political globalization recognizes the right to the formation of independent (nation- and/or ethnic-based) states emerging as the result of the application of principles espoused by the associative or democratic primary right theories. This is true especially if one is to take into consideration that all emerging entities would have to exist under the umbrella and/or the auspices of international multilateral organizations.

What is equally interesting is that, contrary to what is considered self-evident, secession seen from the standpoint of political globalization is not really possible if it were to be envisaged through the lens of just-cause theories. If remedial right refers to the right of suppressed minorities to claim their freedom and independence, through acts of self-determination, political globalization cannot be used as a theoretical platform to support secession given that political globalization favors intergovernmentalism, which, in turn, is to be understood either as a theory of regional integration or as a theory that treats states and national governments as primary factors for integration.

This explains why Mason (1999) considers the nation-state as an essential element in securing the moral life of communities. It is the philosopher’s view that this form of political institution can protect communities from globalization and assimilation and their inherent threats. In a globalized world, nation-states can no longer be described as “self-sufficient schemes” capable of regulating essential functions of human life and cooperating in achieving these functions. This is because, deterritorialization as a direct consequence of globalization has modified, better yet

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(especially economic and social ones) as well as violence (against minorities). It is therefore logical to conclude that the end of colonization the changes occurring as a consequence of the latter on the political and geographical level have fueled succession claims not only among the colonized but also the colonizers. This point will be discussed in the course of the analysis provided herein.

redefined, all spatio-temporal contours of human life, thus allowing for a new definition of political, social, and cultural identities of entities forming the newly defined and constantly changing “spaces”.<sup>26</sup> These new ‘spaces’ blur the distinction between what is ‘domestic’ and what is ‘foreign’, what is ‘national’ and what is ‘supranational’ as well as between what is ‘minority’ and ‘majority’<sup>27</sup>.

Finally, it is equally important to repeat that modern democracies, as a means for securing human rights and for correcting and/or compensating injustices, are harder to function on a global scale. Contrary to Hobbs’ or Habermas’ (2012) praises of the principle of global democracy, it is suggested that for a true democracy to exist, people (i.e. citizens) need to have a shared feeling of trust, purpose or commitment to a goal and/or ideal as well as a sense of belonging. Consequently, if it is harder to reach a true democratic status quo at a global level, it is becoming increasingly problematic to view globalization as a ‘friend’ to the protection of “violated or suppressed” human rights at a scale that is larger than that of the state.

As far as intergovernmentalism as a means for integration of regions is concerned, secession movements launched on the basis of regional exclusion, unjust or unfair treatment of a geographical region and its people by central governments are to be dissuaded on the pretext of the primacy of integration, which could lead to other forms of aberration, such as forced annexation of territories. In the second case, that is, the priority given to national governments over individual claims (of parts of the people forming the national government), it precludes the option of secession as a political and legal instrument of rectifying any wrong doing.

All the above demonstrate that secession is a difficult notion because, when associated with actual cases or when used to envisage future cases, it has limitations followed by important legal and international repercussions. These limitations emphasize on the following key issues: realism, consistency with international law,

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<sup>26</sup>For a more detailed discussion, see relevant entry on Globalization in the Stanford Encyclopedia of Philosophy: <https://plato.stanford.edu/entries/globalization/>.

<sup>27</sup>Cf. footnote n. 4 in the present analysis.

incentives (perverse or non-perverse), moral accessibility (explained below). For Buchanan (1997), these four factors correspond to minimal criteria one needs to satisfy to substantiate one's claim for secession. It is our opinion that this taxonomy serves a double purpose: on the hand, it is suggestive of the limits of secession and what needs to be done to broaden the latter's span of application, especially under international law; on the other hand, it can serve as a useful template to categorize all major objections against one or more of the main theories of secession thus allowing for a new theorization of the concept of secession.

As far as realism is concerned, it is important to note that Buchanan (1997), when envisaging secession, talks about *minimal* realism. This means that any theory of secession (Primary, Remedial or other) needs to ensure that secession will create a new situation that will better serve the status quo. The new emerging status would have the potential of being implemented in compliance with all processes recognized by international law. As Beran (1984) points out there has to be a minimum guarantee of responsibility of statehood that will not deprive the status quo from its viable economic, cultural, and military space that is necessary for its survival. In our opinion, Buchanan's minimal realism is similar to Wellman's of secession, namely that "[...] secession should be allowed only if it does not interfere with the production of essential political functions and does not jeopardize the remaining state from doing so." (Wellman as cited in Mancini 2012, p. 485) We posit that the operative word in minimal realism is political stability as is defined by and understood under the international law and in relation to the latter's contribution in guaranteeing political stability.

This first point brings us to the second criterion, specifically what Buchanan names *Consistency with well-entrenched, morally progressive principles of international law*. In our view, this criterion is extremely critical because it posits a necessary condition: any change of a principle and its subsequent acceptance or implementation in the form of a new principle should not call into question "[...] the validity of a well-entrenched, morally progressive principle [of the international law]." (Buchanan, 1997, p. 42).

As per the third criterion, namely the incentives, Buchanan (1997) focuses on the absence of perverse incentives that may occur in the case of *legitimization* of proposals that are being implemented under international law. In his own words “[...] by conferring legitimacy on a certain type of action, international law gives those who have an interest in preventing those actions from occurring an incentive to act strategically to prevent the conditions for performing the actions from coming into existence.” (Buchanan, 1997, p. 43). The point that is being made here is that progressive actions of any kind, especially in the form of introducing new principles in international law, as a consequence of secession claims, should be vested with legitimacy in such a way as to ensure that perverse actions, on the part of “injured party”, are avoided or appropriately dealt with within the confines of international law.

Finally as per the moral accessibility criterion, it is important to examine element of *morality*, which is not to be understood under its most abstract sense. Instead, the proposed criterion can be highly tangible and practical insofar as it takes into consideration all ethical principles that have a broader cross-cultural, cross-ethnic recognition and form the basis of morally sound foundations of international law. For instance, the respect for human life, regardless of race, is a principle that is guaranteed by international law because it transcends individual religious, ethnic or ethical beliefs and is recognized as a globally, universally accepted moral principle.

### 1.3. Secession under International and European Union Law

Kohen notes that “[...] there are different perceptions – as well as political – theories about the phenomenon of secession” (Kohen, 2006, p.2). Some theorists advocate in favor of a **broader notion of secession**, one that would account for cases of separation of states where the predecessor state continues to exist (Ibid), or for dismemberment of states, state dissolution or even decolonization.

Kohen laments that most theorists have a more restricted view of secession as being “[...] the creation of new independent entity through the separation of part of the territory and population of an existing State, **without the consent of the latter.**” (Kohen, 2006, p. 3) (our emphasis).

In the book entitled *Secession: International Law perspectives* (Kohen et al.) it is suggested that the operative word in secession is the lack of consent of the predecessor State. The creation of the State being perceived in the past as a “matter of fact” situation, international law had not actual impact upon the process of state-creation. Instead it would limit its own scope of action by simply taking note of the new sovereign state. But, the attitude of the international community (or the international society for that matter) toward newly emerging states cannot rely on a “matter of fact” approach since legal justification is needed in order to formally acknowledge (i.e. recognize) these new states and cooperate with them on the international arena.

The end of the Cold War was the beginning of the emergence of new states created under the auspices of international law. This has a series of implications. Firstly, as Kohen (2006) astutely suggests, international law acted as the “midwife” of the newborns, namely the new states. Secondly, international law provided necessary legal justification for the creation of these new states. However, not all states that emerged as a result of the Cold War gained the international law stamp of approval, as is the case with some Eastern European countries. Finally, international law’s “neutrality” vis-à-vis the matter-of-fact approach of state-creation is less potent since there are legal mechanisms in place, at the international level, that actually come into force to prevent disruption of States more frequently now than in the past.

Going beyond territorial claims and sustainability, international law posits a series of pre-requisites for acknowledging the emergence of a new state and the latter’s rights and obligations within the international community. Besides rules imposed by the international law vis-à-vis the procedural aspects of the creation of States, the



territorial scope of the newly emerged state and its succession, emphasis is given on the respect for internationally established geographical (and other) boundaries (territorial scope), the respect of the rule of law (international law and security), the respect of human and minority rights, democracy and the prosperity of all ethnic groups within the newly formed states. These are some of the basic questions along with a people's right to self-determination. The latter is a right that arose from customary international law to be currently recognized as a general principle of law.

It is worth-noting that the notional scope of self-determination has evolved overtime, especially during the 20<sup>th</sup> century. As mentioned in the introduction of this thesis, as early as 1900's, there has been a significant international movement toward acknowledging the right of all people to self-determination<sup>28</sup>. The most important change associated with the 20<sup>th</sup> century is that, in the aftermath of decolonization, self-determination changed from a principle to a right. This right is not only enshrined by international treaties. It is protected by the United Nations Charter and the International Covenant on Civil and Political Rights as a "right of all peoples".<sup>29</sup>

Customary international law recognizes an important distinction between the notion of "internal self-determination" and "external self-determination". The first refers or pertains to a series of political and/or social rights of groups of people within a political entity whereas the second encompasses the right for a full legal independence/secession for a given "people" from a larger politico-legal state to which the former belongs.<sup>30</sup> Both legal concepts are enshrined by international treaties, under the general heading of 'self-determination'. Following Hannum's definition "internal self-determination is the right of the people of a state to govern themselves without outside interference. External self-determination is the right of

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<sup>28</sup>International law recognized self-determination in the 1960's especially in the wake of the independence movement of colonial territories, which sought an independent status or an alternative status that would chose freely.

<sup>29</sup>See [https://www.law.cornell.edu/wex/self\\_determination\\_international\\_law](https://www.law.cornell.edu/wex/self_determination_international_law).

<sup>30</sup>When examining the legal concept of secession, one needs to view it in conjunction with another legal premise that of *utipossidetisjuris* which requires the maintenance of the territorial *statusquo* to ensure and preserve stability, order and traditional legal boundaries. This principle may come into direct conflict with the principle of self-determination.

peoples to determine their own political status and to be free of alien domination, including formation of their own independent state.”<sup>31</sup>

From the standpoint of the international law, secession as an act of self-determination is recognized in the following alternative cases (Kohen, 2006, p. 19-20):

1. Territories that have been incorporated into a given state by a decision of the UN General Assembly under certain conditions. If the said conditions are not met or respected, separation is a legal possibility.
2. Entities illegally incorporated into a state. The separation from the annexing state does not constitute a breach of the *uti possidetis juris* principle. Instead separation through secession can be perceived as a restoration of the legal situation preceding the “forced” annexation.
3. States recognizing expressly a right to secession in domestic law. These are case where the state’s constitutional law includes provisions of self-determination. These constitutions need to expressly acknowledge the plurality of people forming their state and the former’s right to self-determination. This recognition falls within matters of international concern to quote Kohen (ibid). A non-respect of relevant domestic rules by the central government can justify legal secession from the international law viewpoint.

Some remarks are deemed necessary. First, one needs to stress that the first two cases stated above fall clearly and unambiguously under the scope of the Remedial Right Theories of secession. The third one, however, is a mixture of Primary Right and Remedial Right Theories. This is because, despite the fact that this pre-requisite recognizes the right to self-determination, it imposes conditions of violation of the said right in order for a people or ethnic group to exercise this right. Consequently, it is suggested that secession is nothing more than a remedy to a faulty central

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<sup>31</sup>Legal Aspects of Self-determination (n.d.) *The Princeton Encyclopedia of Self-Determination*. Retrieved from <https://pesd.princeton.edu/?q=node/254>.

government's failure to ensure compliance with domestic law and to prevent such claims of secession, regardless of them being constitutionally acceptable.

Second, all three cases stated above reflect a conformity between, on the one hand, international law vis-a-vis secession, and, on the other hand, legal trends as reflected in the UN Charter. That is to say that international law is, in Kohen's (2006) own words:

“[...] more and more ‘interventionist’ in the creation of new States. On the one hand, law serves to promote the creation of new States through the operation of the principle of self-determination; on the other hand, outside the context of self-determination, it lays down rather strict requirements for a new State to come into being.”

In the view of the editor [i.e. Kohen], the principle of legality, i.e. the conformity of the fact with the legal order, has become a significant ‘constitutive element’ in the creation of new States.

Kosovo is an interesting case in point demonstrating that international law provisions with regards to Kosovo's independence and its right to self-determination were interpreted in different ways. On February 17, 2008 the 2008 Kosovo Declaration of Independence was adopted by the Assembly of Kosovo, an institutional body established by the United Nations' Interim Administration Mission in Kosovo. The Assembly of Kosovo unilaterally declared Kosovo's independence from Serbia and proceeded with adopting the Constitution of Kosovo, the 15<sup>th</sup> of June 2008.

Serbia was one among the UN General Assembly Nations not to recognize Kosovo as an independent state and sought international validation and support of its stance. As a result of Serbia's refusal, the International Court of Justice was asked by United Nations' General Assembly to provide an advisory opinion on the legitimacy of Kosovo's act of self-determination from the international law point of view. The

advisory opinion was delivered by the majority of 10 to 4 on July 22, 2010 thus stating that “the adoption of the declaration of independence of the 17 February 2008 did not violate general international law because international law contains no ‘prohibition on declarations of independence’”.<sup>32</sup> This non-binding ruling sets the tone of interpretation trends of international law at the time of its adoption while demonstrating the latitude of the existing international legal framework with regards the right for ‘self-determination’ and the lack of uniformity in the application of international law provisions in the case of secession.

As far as the European Union legal framework to secession is concerned, it is important to stress that “[...] in the absence of formal rules in EU law on secession and membership, legal appraisal would seem to lead us, first of all, to the framework of public international law – both when it comes to the actual (unilateral or consensual) *secession*, and when it comes to *succession* to selected international rights and obligations (such as membership of an organization) of a preceding state.” (Brölmann & Vandamme, 2014, p. 4)

According to European legal scholars and secession theorists, there is no legal framework of the EU law in itself to deal, on the one hand, with secession, and, on the other hand, with the consequences of secession of parts of current EU Members states. This is the case of Scotland and that will be discussed in the context of this thesis. Note that legal framework upon which rests the European Union is an extremely complex one and the main question that arises is to which extent public international law can be of help to deal with the complexities arising from such a union.

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<sup>32</sup>Tanner, Adam & Stevenson, Reed (22 July 2010). ["Kosovo independence declaration deemed legal"](https://www.reuters.com/article/us-serbia-kosovo/kosovo-independence-declaration-deemed-legal-idUSTRE66L01720100722). Reuters. <https://www.reuters.com/article/us-serbia-kosovo/kosovo-independence-declaration-deemed-legal-idUSTRE66L01720100722>, Retrieved 01-09/2017 .

Generally speaking, Articles 48, 49, and 50<sup>33</sup> of the Treaty of the European Union (hereafter TEU) deal with admission of new members and withdrawal of existing members. So far, there is a legal vacuum in cases such as the Scots whereby secession from a member-state is desired but not the withdrawal from the European Union. This legal vacuum is closely related with the need to broaden the scope of definition of EU citizenship.

Secession advocates claim that article 48 of the TEU stresses the *autonomous* nature of the EU citizenship, namely that EU citizenship is independent from national citizenship, therefore substantiating claims for EU membership even in the case of secession for a member-state. Another interpretation of article 48 of the TEU considers EU citizenship as *derivative* of national citizenship, thus implying that when one loses the latter one automatically loses the former as well.

Regretfully thought, is it rather a consensus that “EU Treaties remain deafeningly silent on the issue of succession: there is no provision that sets out what would happen in the event of part of a member State becoming independent. Primary law does address situations of territorial enlargement (Article 49 TEU) or contraction (Article 50 TEU), but does not deal with phenomenons of fragmentation (*internal* enlargement scenarios)” (Dermine, 2014, p. 1, para. 1). In the absence of a clear

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<sup>33</sup>Article 50 of the TEU

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
  2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218 (3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
  3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
  4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
- A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

European legal framework, the only available legal instruments remain the set of rules established by public international law. However such legal instruments seem to be of limited applicability. This is especially true since, as Dermine (2014) points out, the 1978 Vienna Convention on Succession of States is insufficient, especially because has been scarcely ratified. This is particularly the case of mainly European countries.

As the case of the Scottish attempts for independence have demonstrated, the absence of a well-defined legal framework to deal with such instances should not be used as a pretext for allowing disruption in the application of EU law. The alternative, as put forth by Sir David Edward (2013/14), a prominent judge, a Scottish legal authority, a member of the Commission on Scottish Devolution, and a moderate unionist, is extensive negotiations of European instances with entities within the European union member-states wishing to claim their independence before independence acts are even proclaimed so as to avoid disruption of the applicability of the EU law.

In other words, against all beliefs claiming that “smaller political entities are more in-tune with the aspirations of their citizens than larger ones [...]” (Edward, 2013/14, p. 3), and contrary to opinions held by prominent political men of the European Union administration<sup>34</sup> as to the moral argument against separation or secession<sup>35</sup>, when peoples, within the European Union, decide through democratic processes to claim their independence, their actions should not be reduced to a simple act of irredentism.

Instead, such instances should allow for an in-depth discussion as to the nature of political unions, such as the European Union, and the rights and obligations of their members, especially in light of two major factors: first, more and more people (in the case of Scotland but also in other cases) support the movements for separation

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<sup>34</sup>Notably Commissioner Van Rompuy.

<sup>35</sup>On the occasion of the Scottish claim for independence, Van Rompuy held the opinion that secession goes against the grain of European integration and, on a wider scale, against the inevitability of globalism.

or independence; second, in the case of the European Union, its Treaty (Article 2 of the TEU) clearly affirms that the Union is founded on core values, including respect for human dignity, freedom and democracy. When a majority or majorities vote in favor of independence, through democratic processes that claim the right for self-determination and individual and collective dignity, it would be extremely difficult to justify the non-respect of core values such as democracy and freedom. All these points will be discussed in greater length in the context of the comparative analysis of our two study cases, namely Quebec and Scotland, in their respective quests for independence through secession.

## CHAPTER 2: THE CASE OF QUEBEC WITHIN THE CANADIAN FEDERATION

### 2.1. Canada and the Motherland

As announced in the introduction, the second chapter will discuss the case of Quebec. Our departing point will be the creation of the Canadian Confederation from its colonial past to its constitutional foundation and the current state of the Confederated State. We will then discuss the position of francophone Quebec within Canada, mainly from the point of view of the Canadian Law, and the nationalist movement launched by the *Parti Québécois* and the infamous *Bloc Québécois*.

Before doing so, it is important to ponder terminology, especially separatism, sovereignty, and independence within the Canadian political discourse. Whereas separatism refers to “the advocacy of separation or secession by a group of people from a larger political unit in which it [the group] belongs”<sup>36</sup>, in Canada, separatism evolved to embrace the notion of a desire for freedom. This notion of freedom was originally and mainly<sup>37</sup> embodied by francophone Quebecers and is commonly associated with the *Parti Québécois* and the *Bloc Québécois*, which emerged in the late 1950’s and the 1960s.

The Quebec case is engraved in the Canadian Confederation consciousness and political discourse for historical reasons. It is the result of “two solitudes” spending centuries rivaling one another, not only in North America, but, before that, in Europe. This clash resulted in persistent cracks in the ‘marriage’ within Canadian Confederation<sup>38</sup>, which materialized in 1867 with the creation of the Dominion of Canada and the adoption of the *British North America Act*.<sup>39</sup> This ‘marriage of

<sup>36</sup> <http://www.thecanadianencyclopedia.ca/en/article/separatism/>

<sup>37</sup> The two adverbs “originally” and “mainly” are used to suggest that, although it is common place to associate separatist movements in Canada with Quebec claims for independence, the case of First Nations and their claims for freedom and independence are usually gone under the radar of political analysts and separatist specialists.

<sup>38</sup> See on this topic the related entry in the Canadian Encyclopedia at:

<http://www.thecanadianencyclopedia.ca/en/article/confederations-opponents/>

<sup>39</sup> On March 29, 2017, Canada celebrated its 150<sup>th</sup> Anniversary. This starts from the day of the enactment of *British North America Act* by the Imperial Parliament in London, which formed the Dominion of Canada as mentioned above and is Canada’s first written constitution. It is important to



convenience', as was used to be referred to for the English and the French, was a 'forced marriage' for other ethnic groups within the Dominion's territory, namely First Nations, the majority of which were not even asked whether they would consent to such a union.

The Dominion of Canada, proclaimed in 1867, is nothing short of the Canadian Confederation. This term is no longer used despite the fact that it is not abolished either. Etymologically speaking, *Dominion* derives from the Latin word *dominus*, which means *master* and/or *rule*. The term, widely used by the motherland (i.e. England), would designate British colonies and territorial possessions around the world. Originally, the Fathers of the Confederation wanted to name the new state the Kingdom of Canada. But the word "Kingdom" was feared by the British, because it would risk offending Canada's southern neighbors, especially after the end of the American Civil War.

The solution of the "Dominion of Canada", with its additional references to the Dominion of God, prevailed and was captured in the *British North America Act*, which was the basis for the 1867 Constitution. The Provinces which formed the infamous "Dominion of Canada" were none others than Nova Scotia, New Brunswick, Québec and Ontario. Note that Québec and Ontario are not stated as such in the Constitution Act of 1867. Instead we read "the Provinces of Canada" which, on the basis of the said Constitution, are to be severed to form two separate provinces,

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stress that although the said Act does not comprise the entire Constitution of Canada, it is one of its fundamental texts complemented by British and Canadian statutes, which have constitutional effect, as well as unwritten principles, namely the conventions of the constitution. The 150-years celebration seems to divide still French-Canadians as of the particular day being a milestone for Canada. For some Quebecers, such as André Binette, a constitutional lawyer in Quebec, the *British North America Act* marked the establishment of "colonial federalism, that is, Quebec's imprisonment in a federal framework in which it was to become increasingly a minority". There is residual sentiment among French-Canadians that the said Act was nothing more than an attempt to appropriate and neutralize Quebec's identity as a sine qua non condition for the existence of Canada. For more on this topic: <https://socialistproject.ca/bullet/1411.php>

namely the Province of Ontario, formerly the Province of Upper Canada, and the Province of Québec, formerly the Province of Lower Canada.

In the eyes of the Constitution of 1867, the relationship between Canada and England is one that closely associates the Dominion with the Crown. The Union or Marriage is one that would “[...] conduce to the welfare of the Provinces and promote the interests of the British Empire” (Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.), prg. 3) and the constitution of the new sovereign state would be similar in principle to that of the United Kingdom.

Before the creation of the Confederation, fierce opposition within the Dominion started in the Province of Lower Canada, namely Quebec. Quebecers would be against formation of the Province of Canada, in other words the fusion of Upper and Lower Canada into one Province, hence repealing the corresponding *Act of Union*. That was done by a radical group of young francophones acting under the banner of *Parti rouge* and the leadership of the Dorion Brothers. This political group not only failed to prevent the realization of the Confederation Act of 1867, it conceded ‘defeat’ by espousing the principles of the Confederation and by acknowledging its political and institutional legitimacy. This was done via the acceptance of a key political position, that of the new country’s attorney general and ministry of justice function assumed by one of the founders of the *Parti rouge*, namely Antoine-Aimé Dorion, the eldest of the Dorion brothers.

It is also worth-mentioning in this respect that, prior to the 1848-foundation of the *Parti rouge*, in what is today called the Province of Québec, a series of insurgencies shook the Provinces of Upper and Lower Canada. They are known as the Rebellions of 1830s. These Rebellions, which still divide Canadian historians as to their long-term effects, were mainly rooted in the shortcomings of a political system imposed by the British rule in Lower Canada, in conjunction with a widespread economic distress that fell upon the region in the early 1830s.

More specifically, the growing French Canadian middle class in Lower Canada would gradually occupy key political positions within the Lower Canada's legislative assembly. This class would also benefit from the leadership of the newly emerged French professional elite, which shaped a national consciousness for the francophone population. Under this leadership, the francophone majority was destined to antagonize the Lower Canada's British minority, whose economic base and financial strength would rapidly expand as a result of the growth of the timber trade, which was under British control.

Socio-economical differences among the French and the British in Lower Canada, as well as accusations of political mismanagement by the British rule in the region, in association with a pressing need to restrain the power of the Roman Catholic Church and its hold on every aspect of the political, social, and personal life of the citizens, brewed tensions between the two communities while raising aspirations of a suppressed majority, which suffered long exclusion from the region's decision-making processes. The *Patriote Party*, founded by Louis-Joseph Papineau, embodied the nationalist claims of the francophone majority.

The 1837 and 1838 insurrections, as the British would call it, or Rebellions, as the francophone would prefer to name them, were the incarnation of the claims stated above and were ignited by the economic distress of the early 1830s, during which French Canadians, mainly farmers, would almost starve to death. During the same period cholera, brought in from the British Isles, via the massive influx of British and Irish immigrants not only put French Canadians public health at risk but also altered considerably the demographical landscape of urban centers, such as Montreal and Quebec city, by shifting the scale toward the British side, thus making francophones a minority in what used to be the latter's turf.

Although the 1830s Rebellions were not successful from the francophone point of view, since they were swiftly suppressed by a very-well organized response on the part of the British troops, their effects have been long-lasting. It is suggested that these rebellions acted as a catalyst since they fast-forwarded the realization of the

*Act of Union*, which resulted in the fusion of the Province of Upper and Lower Canada into one Province, named 'Province of Canada'. It is worth-noting that the Confederation Act of 1867 was made possible by these rebellions, which, despite their nationalist foundation, never challenged or put into question the role of the Crown, thus paving the way for a confederated form of governance that would aspire to being more transparent. In other words, according to the official political and historical Canadian discourse, the French Canadian insurrections of the 1830s would satisfy a basic claim, also shared by the Anglophone middle class both in Lower and Upper Canada, namely the introduction of a 'responsible government'.

Against this background, and without underestimating other insurrections or independence claims within the Dominion of Canada, launched by other 'minorities' or 'entities' in other regions of the Dominion's territory, one should understand the conditions under which modern nationalist/separatist claims re-emerged in Quebec, especially since the 1950s and 1960s.

## **2.2. Quebec in the modern and post-modern era and the question of separatism**

The 1950s and 1960s mark a renewal in Quebec's separatism interest. The separatist movement re-emerged in the midst of a booming economy as a result of the Second Industrial Revolution that swept North America, predominantly the United States. Although second in line behind the US, Canada greatly benefited from the industrialization process as accomplished via the introduction of fully automated systems and the assembly-line.

The new dynamic was evident in a host of sectors of the Canadian economy, some of which were more traditional than other. This was the case of farming, extremely popular in Quebec for traditional as well as geographical reasons, of meat packing, which is closely related with farming, and the automobile industry. Quebec and Ontario were the main beneficiaries of the industrial revolution *à la canadienne* for two main reasons: both provinces had already established industrial structures; both were involved in and had access to the extraction of natural resources (coal, forestry, oil and gas as well as metals), which fueled the industrial machine.

The industrial revolution greatly impacted the country's geographical and demographical landscape, especially with regard to the traditional definition of urban vs. non-urban communities, thus creating a new dynamic between them. Large-scale factories, capable of producing massively, on the basis of the Henry Ford model, created countless jobs and produced everything from cars and airplanes, to appliances, chemicals and other consumer goods. As stated in the Canadian Encyclopedia:

[In the 1950s] Industrial labor constituted the largest segment of the male working population, one that was privileged by state policies that encouraged the male breadwinner ideal. By the 1960s and 1970s, approximately 30 per cent of the Canadian working population was in a union.<sup>40</sup>

It is within the context of a euphoric economic and social environment that new political forces emerged in Quebec.<sup>41</sup> The euphoria and economic prosperity of the province resulted from a rapid change performed in Quebec's society during the 1960's. This profound transformation was labelled as the 'Quiet Revolution' (Révolution tranquille), a name coined by an anonymous writer of *The Globe and Mail*, one of the most important Anglophone Canadian newspapers.

The advent of the Liberals in Quebec's politics, following the June 22<sup>nd</sup>, 1960 elections, with a majority of 51.5 per cent of the popular vote and 51 seats in the Quebec Parliament, introduced a new economic, political, and social era in the province. The Lesage government was elected on the promise of swiping reforms and under the slogan "It is time for change", a motto that resonated profoundly with

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<sup>40</sup>For more information on this topic, see

<http://www.thecanadianencyclopedia.ca/en/article/industrialization/>

<sup>41</sup>These political forces went by the name of *Rassemblement pour l'Indépendance nationale* (RIN), which began as a citizens' movement on September 10, 1960 and became a political party in March 1963. Another pro-independence movement was the Front de libération du Québec (FLQ) as well as the Mouvement Souveraineté-association or MSA. The most important of all these parties/movements is the Parti Québécois, which was created in 1967 through the merger of the RIN and the MSA.

the francophone middle class society of Quebec, which tried to create a niche of itself.

In a period of two years, the Lesage government introduced cutting-edge reforms in all areas of Quebec's political, economic, and social life, starting with the creation of a public hospital network, which laid the foundation for what is proudly called today in Canada 'a universal healthcare system', entirely funded and managed by the province and where all citizens have equal access. On the social plane, the Liberal government managed to limit the anachronistic influence of the Catholic Church and its role in society by commissioning the "Parent Report". The Report recommended a series of reforms, which consisted, primarily, of the creation of a Department of Education, in an attempt to limit the role of the Church in the province's educational system, especially the public school system, which was under the control of the Catholic Church, and of the creation of "a unified, democratic, and modern school accessible to the entire population".<sup>42</sup>

Establishing an up-to-date educational system in Quebec was one of the pressing demands of the emerging middle class of the baby boomers (especially in the urban areas), which, in the 1960s, had reached adolescence and had pressing educational needs that could not be met by Quebec's underperforming and anachronistic educational system. Additionally, on the social level, one of the most important pieces of legislation introduced by the Liberals in Quebec was Bill 16, which abolished married women's legal status as a minor while introducing an important breakthrough, that of the pension plan.

On the political level, another innovation of the Lesage's government is also worth-mentioning, namely a legislation passed to lower the voting age from 21 to 18. But the most important action, which carried considerable political, institutional and constitutional weight, was performed at the economic level. One of the Liberals main concerns during their mandate was to put public finances in order. To achieve

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<sup>42</sup> See more on this topic at: <http://thecanadianencyclopedia.ca/en/article/quiet-revolution/>

this they worked toward executing a multi-faceted plan, which ranged from raising loans to boosting the provincial budget to performing nationalizations of strategic companies such as private electrical companies. The government decided to call for new elections to ensure a renewal of the citizens' vote of confidence. The 14 November 1962 elections were won by the Liberals by a larger majority (56.6 per cent and 63 seats) than the 1960 elections on the platform of nationalization. Capitalizing on a comfortable win, the Liberals proceeded with the nationalization of all private hydroelectric companies, now under the name of Hydro-Québec, which became one of the largest Crown Corporations in North America.

Nationalization ensured a series of other reforms in the work place, where francophones were now able to work entirely in their language, but more importantly, to develop the necessary technical, managerial and professional know-how in French. Standardized pay across the province, as well as taxation and benefits, including financing, were further harmonized all over Quebec, which eliminated unnecessary economic discrepancies and subsequent injustices. There was a considerable boost in the province's economy via nationalization. The benefits of this financial booming frenzy were to be managed by *Caisse de dépôts et placement du Québec*. This was a major step toward transparency in public finances, better management, and a centralized administration of the province's pension plan.

In an attempt to detach Quebec from its dependency upon the Federal Government, Lesage opted out of some 30 joint programs, in other words programs whose cost was shared by the provincial and the federal government. Pension plan, taxes and healthcare were among the 30-so programs. The semiology of this decision is important. On the one hand, Quebec wanted to send the message of a progressively self-sufficient government that would no longer be a financial burden to the federal government. On the other hand, this was a clear message that Quebec was aiming at achieving independence. However, in an attempt to calm federal anxieties, especially those coming from the English part of the country, Lesage agreed to the

patriation of the Canadian Constitution on the basis of a legal formula accepted by the other 10 provincial governments.

The said formula, known as the Fulton-Favreau formula, named after the two federal ministers who introduced it, was meant to be a key legal tool that defined necessary conditions and processes under which the Canadian Constitution could be amended. The question of the amendment of the Canadian (i.e. federal) Constitution had become prominent following the adoption of the Statute of Westminster<sup>43</sup>, which made Canada an independent state. The Constitution Act of 1867 did not include provisions to amend the Constitution simply because Canada was considered a British colony and as such it would not control the Constitution.

The adoption of the Statute of Westminster posed a significant legal problem, because, in accordance with the said Statute, Canada was no longer a British colony but an independent country possessing, however, a Constitution that would recognize otherwise. According to the Fulton-Favreau formula, the Parliament of Canada could repeal or amend any provision subject to some restrictions, namely “the power of the legislature of a province, the rights and privileges of the government of a province, the assets or property of a province, the use of English or French, and education.” (Bélanger, 1998, p. 9-11). For these provisions a unanimous consent of the provinces was required. For other provisions, the minimum requirement was a majority of 2/3 of each province’s legislature. This percentage would have to represent at least 50 per cent of the population of the province.

Other conditions were also defined by the said formula, which seemed to have satisfied most of the provinces with the exception of Quebec. One reason for this was that Quebecers feared situations where provisions affecting their province *alone*, or some but not all provinces, would be imposed upon them by the English-

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<sup>43</sup> “The Statute of Westminster was a British law, passed on December, 11, 1931. It specified the powers of the Canadian Parliament as well as the ones held by the Commonwealth Dominions vis-à-vis the powers of Motherland. Via this law, England granted its Commonwealth colonies (former colonies) full legal freedom, with the exception of the areas they chose to remain subordinate to Britain.



speaking confederates at a majority of votes without the possibility of veto. As Bélanger claims, such acts would have been perceived as “injurious to the integrity of [Quebec’s] culture, its system of laws and its autonomy” (*Idem*).

During the Quiet Revolution, Quebec underwent profound revamping. As Bélanger states, it is during this period that Quebecers realized the progressive capacity of their economy and their society. It was a period of change and deep reforms, which boosted the citizens’ desire for “[...] enlargement of their self-government, either in the form of more power for their province or in the form of independence.” (*Ibid*)

In the 1960s and 1970s, political change was also reflected in Quebec’s political parties, the most important of which was the Parti Québécois (hereafter PQ), founded in 1967 by René Lévesque. The said party won the November 15, 1976 elections by an overwhelming 41 per cent of the popular vote and secured 71 seats in Quebec’s National Assembly. Despite being elected on a purely nationalistic platform, once in power the PQ promised to postpone any move toward independence until a referendum were to be held to consult the Quebec people on the issue.

The referendum proved to be disappointing for the leaders of the PQ. On May 20, 1980, the Quebec electorate rejected the idea of ‘sovereignty-association’, a milder version of that of ‘independence or secession’ of the Province of Quebec from the rest of Canada, by an overwhelming majority of 60 per cent of the voters. This percentage included the majority of the French-speaking population of the province.

There have been many discussions as to the reasons for such an unexpected result. It was difficult to interpret the people’s clearly expressed desire not to sever the ties with motherland. Some would venture that the result was due to PQ’s submissiveness vis-à-vis the central government, one that could easily be compared with to submissiveness of a good housewife. Some politicians, such as Lyse Payette,

would mainly associate 'no' voters to female homemakers, thus accentuating their submissive character.<sup>44</sup>

The real reasons behind the 'yes' defeat needs to be associated with the deep economic recession of the 1981-82, which translated into an exceptionally high unemployment rate, particularly in Quebec. During this period, the union movement in Quebec went under fire for insisting on an anti-capitalist rhetoric, which seemed out of place given the economic environment of the time. The Unions in Quebec, which were the main supporters of the 'Yes' campaign, failed to reassure citizens in emotional and financial distress as to the benefits of breaking-free from the federal government.

Another reason is that, while the 'no' campaign was underway, the Canadian Prime Minister, Pierre Trudeau, a true Quebecois from Outremont, Montreal, and a very popular politician at the time, promised his fellow Quebecers that he would renew the Canadian Constitution. This would translate into re-considering the way powers were distributed between federal and provincial government. In other words, Trudeau promised the 'patriation' of the *British North America Act* from Britain to Canada, thus transferring the latter to the authority of the Canadian Parliament. The said patriation would also mean the introduction of a new Constitution coupled with a *Canadian Charter of Rights and Freedoms*.

The new *Constitution Act* was introduced in 1982 and was voted by all provincial governments with the exception of Quebec, then governed by the PQ under the leadership of his founder René Lévesque. The new Constitution Act not only patriated the highest law of the country, namely the *British North America Act*, from the British Parliament to Canada's federal and provincial legislatures, thus putting some kind of an end to the country's colonial past and dependency. It allowed for the drafting and implementation of a *Canadian Charter of Rights and Freedoms*, under which French was recognized as the official language of Quebec. Under the

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<sup>44</sup>See more at <http://www.thecanadianencyclopedia.ca/en/article/separatism/>.

same Charter, it was further consolidated that Canadians were able to enjoy the right to use Canada's official languages, and the right of French or English minorities to an education in their respective languages.

Additionally, thanks to the 'notwithstanding clause' (Section 33 of the Charter) provinces could legislate contrary to what is done at the Federal level, despite the political difficulties associated with implementing the said clause. Although difficult in use, Section 33 of the Charter was activated by the Province of Quebec in these cases which pertained to limiting the use of English-language signage with the province territorial authority (Bill 101, Bill 178 and Bill 86) on the basis of protecting French language as an integral part of the identity of the province or in such cases as promoting French-language education at the expense of English-speaking schools.

It is important to repeat that Quebec is the only province which has not ratified the *Constitution Act of 1982*. However, the said constitution is the law of the land and has nation-wide application regardless of the lack of formal consent on the part of the Quebec government. Quebec's refusal to acknowledge the said constitution resulted in a growing discontent among Canadians who became progressively tired of constitutional matters. Because of this endless debate over the so-called 'distinct society', Quebec was alienated from the rest of Canada and this growing isolation brought the PQ back into power. Quebec's new Premier, Jacques Parizeau, promised a new referendum to proclaim the province's sovereignty. But the latter should come after having followed a series of negotiations with the Federal government to form a new economic and political partnership.

The referendum, which began under the leadership of Parizeau but ended under the stewardship of Lucien Bouchard, the leader of the Bloc Quebecois (hereafter BQ), took place on the 30<sup>th</sup> of October 1995, after having been delayed for over six months. Quebec voters were asked to vote "yes" or "no" to the following question: "Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill respecting the future of Quebec and of the Agreement signed on 12 June 1995?"

During the second referendum the “no” prevailed only marginally (50.6per cent to 49.4per cent). For the second time in the province’s recent history, Quebec voters rejected the idea of being separated from the rest of Canada. But 1995 was not 1980.<sup>45</sup> The Canadian political, social, and economic landscape, especially in Quebec, had evolved considerably. Once again politicians as well as academics tried to interpret the results of the second referendum. Among the various explanations offered<sup>46</sup> was the way the question was formulated in the referendum. As one can easily deduct from the referendum question stated above, the question itself was long and complicated, hard to understand and be properly pondered by the average voter.

Additionally, the question presupposed a deep knowledge of key legislative texts and political agreements thus increasing the difficulty of the average voter to fully grasp the significance of the referred documents and to appreciate the depth and breadth of their political and legal ramifications. More specifically, the ‘Bill’ referred to in the question was Bill 1, *Loi sur l’avenir du Québec* (*An Act respecting the future of Quebec*). The ‘12 June 1995 Agreement’ referred to the text of the Agreement made between the PQ and the *Action démocratique du Québec* (hereafter ADQ). The unfortunate wording of the referendum question shifted the balance in favor of the ‘no’ response, despite numerous polls, which showed clearly that, at the beginning of the campaign, ‘yes’ had a considerable head start.

Another possible explanation for the ‘no’ answer could be found in the demographic make-up of Quebec’s voters, especially the younger generation. More educated than their parents, these young voters were becoming progressively more urban and cosmopolitan. They would view themselves as citizens of the world, and Canada, rather than monolithically citizens of Quebec or uniquely French-Quebecers although most of them would place their Quebec identity before all the others.

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<sup>45</sup>For more on this topic, read <http://www.thecanadianencyclopedia.ca/en/article/quebec-referendum-1995/>.

<sup>46</sup>Read an interesting article on this topic at <http://www.bbc.com/news/magazine-29077213>.

Several important factors weighed-in as well. With a higher-than-average unemployment rate, compared to Ontario and other provinces of Canada, the growing segment of Quebec's economy feared economic and financial instability following a separation from the Federal Government. Independence would risk interrupting the constant flow of money, in the form of direct transfer payments and/or subsidies, with dire consequences for the poorer segments of the province's population. Finally, the traditional dichotomies between a business-trade-oriented English-speaking minority and the French-Canadian working class ceased to exist when more and more French-speaking entrepreneurs would take over businesses. Traditionally long-standing dilemmas, largely exploited by the nationalist camp, would seem less relevant in light of new economic challenges raised by international trade and globalized economies.

The result of the second referendum cannot be viewed as a separate instance but should be evaluated in relation to the first referendum. It is not our goal to provide an in-depth analysis of the referenda as such. Instead, we are interested in viewing the question of Quebec's failed attempts to secession from the point of view of Constitutional and international law.

### **2.3. The Canadian Federal Response: the Supreme Court of Canada Ruling**

The Canadian government was quick to respond to what could potentially become a major political and constitutional crisis within the Canadian political life. Following the 'no' vote in the second referendum, be it narrowly expressed by Quebecers, Prime Minister Jean Chrétien assigned to academic Stéphane Dion the task to formulate a new strategy that would get Canada out of the political and constitutional deadlock. The so-called 'two-pronged' strategy devised by Dion comprised a "Plan A" and a "Plan B".

"Plan A" consisted of a series of measures that would swing francophone Quebec public opinion toward federalism. The 'Trojan' horse of this approach was the passage of a resolution in the House of Commons declaring Quebec to be a 'distinct

society'. "Plan B" would comprise more 'coercive measures', such as an advisory opinion by the Supreme Court of Canada "on the legality both under the Canadian constitution (domestically) and internationally of the **unilateral** secession of Quebec from Canada."<sup>47</sup>

As far as the term 'distinct society' is concerned, it should be noted that it is a Canadian invention, which pretty much amounts to pure euphemism, given that it carries no legal weight. More specifically, the term was initially introduced by Quebec's Premier Jean Lesage in the 1960s to denote Quebec's specific features that make it different from the rest of Canada.<sup>48</sup> In this chapter we will not attempt a full historical analysis of the emergence of this term. We will content with the following. First, it is important to highlight that nowhere in the Constitution of Canada does the expression "distinct society" appear, despite Quebec's wishes to see this description incorporated into the Canadian constitution.

Second, and by far more important, is the fact that, in the aftermaths of the 1995 Quebec referendum, the Chrétien government sought a viable solution to an imminent political and institutional (i.e. constitutional) crisis by introducing a resolution in the House of Commons to recognize Quebec as a "distinct society". In the context of this resolution, Canadian (namely federal) institutions would have to take note of this recognition and adjust their conduct accordingly. In doing so, he appointed Dion to act on it.

Called to decide upon Dion's plan, the House of Commons voted to pass the motion based on which Quebec were to be considered a 'distinct society'. The motion passed by 265 'yeas' and 16 'nays' on a total of 308 MP (that is the number of seats in the Canadian House of Commons at the time). Despite their greatness, these numbers hide a considerable divide, especially among Liberals, on the question of Quebec's distinctiveness. Many, like Dryden, considered that this was nothing more

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<sup>47</sup>For a concise yet global analysis of this issue, see "Federal Response and Supreme Court Ruling", paragraphs 1 and 2, at <http://www.thecanadianencyclopedia/en/article/separatism>.

<sup>48</sup>For a comprehensive historical analysis of the term 'distinct society' ("Société distincte" in French), see <https://bdp.parl.ca/content/lop/researchpublications/bp408-e.htm>

than a game of semantics that belittled the very issue of national identity. Distinctiveness was to be understood on three levels: laws, the language and culture. In Hogg's<sup>49</sup> view, Quebec's 'distinctiveness' carried little significance and scarcely any legal weight (since motions are not legally binding in Canada) and would only provide official recognition that Quebec is the only Francophone-based province of Canada (other provinces have francophone enclaves within their territorial borders but these are linguistic and cultural minorities and not the founding majority as is the case in Quebec). It also affirms that civil law is practiced in Quebec as opposed to the rest of Canada, where common law applies; and that, because of its cultural and linguistic specificity, Quebec would have a more important say in questions pertaining to immigration, by privileging immigration flows from French-speaking countries and their ex-colonies.

In response to those who feared that the "distinct society" clause would open the Pandora's box, by increasing the 'appetite' of other provinces for preferential treatment, or that a preferential treatment within the interpretative limits of 'French distinctiveness' within the borders of Quebec would create injustices for the allophones, Hogg argues that, in the first case, the clause only affirmed what was already a fact, namely that Quebec differs from other provinces in the aspects mentioned above.

In the second case, Hogg referred to the role of the *Charter of Rights and Freedoms*, which would limit aberrations made on the pretext of 'distinctiveness'. That could potentially be the case in decisions made on behalf of the Quebec government that would risk altering the multicultural identity of the Canadian society and the rights of the Aboriginals.

As part of 'Plan B', mentioned earlier in this chapter, the Government also sought the opinion of the Supreme Court of Canada on the legality of a unilateral secession of Quebec from Canada as a result of Quebec's decision to initiate the procedure to

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<sup>49</sup>More on Peter W. Hogg, *Meech Lake Constitutional Accord Annotated*. Carswell 1988.

support a third referendum on independence. On August 20<sup>th</sup>, 1998 the Supreme Court of Canada, whose authority of the matter Quebec did not recognize, unanimously declared that, under domestic and constitutional law, “the Quebec government could not initiate legal steps toward secession”. (The Canadian Encyclopedia, Separatism, para. 2).

The real problem, however, consisted in interpreting the meaning of two key concepts in a referendum: “clear majority” and “clear question”. The Supreme Court of Canada decided that this would be a question for the politicians to solve. Whatever the given definitions, in the case of a “clear majority” at a referendum conducted with a “clear question” for the voters to answer by ‘yes’ or ‘no’, both the federal government and the other provinces of Canada would have to negotiate with Quebec ‘in good faith’. The real question remains what would be the object of the said negotiations since the Court itself ruled that a unilateral decision of secession is unconstitutional.

Following the Supreme Court of Canada ruling, Bill C-20<sup>50</sup>, also known as the ‘Clarity Act’ was drafted to define the terms under which a ‘yes’ vote in a referendum would constitute a ‘clear majority’ based on a ‘clear question’. The Bill was assented to 20<sup>th</sup> of June 2000. By reading the said Bill, two things become evident: first, in Canada, the decision to secede is in the hands of the legislative branch of the Government; and, second, legal and constitutional matters restricts considerable the field of application of the said Bill, thus making it virtually impossible for a province to secede, given that in the case of secession the consensus of all provinces of the federation is required.

The passing into Law of the Bill signaled the difficult period for the leaders of the PQ and the BQ in Quebec. Despite their rhetoric for Quebec’s sovereignty, nothing was done by Quebec politicians to deliver on their political promise.

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<sup>50</sup> For the complete text of the Bill, see Annex.



#### **2.4. Understanding the Supreme Court's decision from a constitutional and an international legal point of view: The Court's opinion**

When convened to give its opinion in reference to the Secession of Quebec, the Supreme Court of Canada was asked to answer three questions:

- i. Under the Constitution of Canada, can the National Assembly, legislature of Government of Quebec effect the secession of Quebec from Canada unilaterally?
- ii. Does international law give the National Assembly, legislature of government of Quebec the right to effect secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature of government of Quebec the right to effect the secession of Quebec unilaterally?
- iii. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec, which would take precedence in Canada. (Reference re Secession of Quebec, p. 218)

It is important to note, that from the point of view of the *amicus curiae*, the component of the international law weights slightly heavier than that of the constitutional law, given that two of the three questions pertain to the conformity of secession with international law.

The Court, after having established his authority to pronounce opinions on the matter, in accordance with Section 101 of the *Constitution Act, 1867* and Section 53 of the *Supreme Court Act*, both of which grant the Supreme Court of Canada the reference jurisdiction, concluded that any claim on the part of the *amicus curiae* regarding the court's inability to deal with Question 2, in particular, and Question 3 (by extension) falls flat. This is because, as stated in prg. 20 of the opinion, despite the fact that the Supreme Court of Canada is not an international court, its national status does not preclude it from giving an opinion on the said reference insofar as

the said opinion is not a binding one, namely one that would be used by other states or international tribunals when considering similar questions. Instead, in its capacity as a national court, the Supreme Court has jurisdiction to provide an advisory opinion to the Governor in Council on “legal questions touching and concerning the future of the Canadian federation.” (R.C.S., p. 235, para. 20)

Finally, with respect to the Court’s authority to consult international law rather than domestic law despite the Court being a domestic court, the concern of the *amicus curiae* was found groundless on the basis of legal precedence. The Court stated other advisory opinions issued in the past, where international law was consulted because it was deemed necessary to “determine the rights or obligations of some actor within the Canadian legal system” (Idem). In the Court’s opinion, the recourse to international law could answer questions pertaining to federal or provincial territorial rights (on the land or the sea).

It is also worth-mentioning that the Court’s authority to discuss and interpret international law with reference to Question 2 is primarily invited by the way the question *per se* was formulated. In other words, it was within the spectrum of the Court’s jurisdiction to consider international law as applied in domestic law in its attempt to determine the legal rights and obligations of the National Assembly, legislature or government of Quebec as institutions that exist as integral part of the Canadian legal order but which, in their capacity as national institutions, are asked to take decisions, such as Quebec’s secession, that would be governed by international law. As the Supreme Court of Canada stated: “In these circumstances, a consideration of international law in the context of this Reference about the legal aspects of the **unilateral secession** of Quebec **is not only permissible but unavoidable**” [Our emphasis]

It is in this context that the Supreme Court of Canada was asked to address the international law component of Question 2. It was the Court’s opinion that, once international law had been invoked by the question itself as a consideration, it had to be addressed. The Court was quick to distinguish, from the very beginning,

between, on the one hand, the speculative nature of Question 2, namely any prediction as to how the law (international law in this respect) would react after the fact (a unilaterally proclaimed secession) and, on the other hand, the existence or non-existence of a positive right to unilateral secession under international law. The Supreme Court of Canada stressed that the Reference questions, as far as the interpretation of international law is concerned, are “[...] directed only to the legal framework within which the political actors discharge their various mandates” (R.C.S., p. 276, prg. 110) and not to speculations as to how international actors will react inasmuch as the Court could not speculate, under Question 1, “[...] about the possible future course of political negotiations among the participants in the Canadian federation” in the case of a unilateral secession of Quebec from a constitutional point of view.

Considering the different points raised by international law, which, by all admissions, does not grant entities that form a sovereign state the legal right to secede unilaterally from the ‘parent’ state, the Court considered the absence of specific authorization for unilateral secession. International law, as interpreted by the Court in its justification, is neither denying nor confirm the unilateral right to secession. Instead, it implicitly denies the said right unless special circumstances are satisfied, as is the right of a people to self-determination. Another important aspect is territorial integrity, which is highly valued and protect by international law. There is a dual consequence stemming from this position: first, secession has to satisfy conditions laid out by domestic law; second, unilateral secession is, by and large, incompatible with domestic constitution(s). Consequently, international law would shy from recognizing unilateral secession, unless the principle of self-determination of people(s) applied. In order for the latter to apply, there are some conditions which require definition, namely what constitutes a ‘people’ or ‘peoples’ and what is the extent of the right of ‘self-determination’ per se.

The right to self-determination is nowadays no long a simple ‘conventional’ (i.e. as defined by conventions) right. It has attained the status of a general principle of international law given its widespread legal recognition. It is as important as the

rights shared by nation-states, as well as the obligations stemming from the said right. In its opinion, the Supreme Court of Canada was very careful to enumerate all international Charters, declarations and international legal documents supporting the right to self-determination of people or peoples. From all the documents enumerated to that effect, the Court concluded that

“[...] international law expects that the right of self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible a right of secession may arise.” (R.C.S., p. 281. para. 122)

As mentioned above, the right to self-determination applies to “people(s)”. This translates into the following: for a group or entity to be able to proclaim its right to self-determination, it is imperative, from a legal point of view, that the said group or entity be elevated to the status of “people(s)”. However, while the status of “people(s)” constitutes a *sine qua non* condition to self-determination, international law has failed to specifically define what constitutes a “people”.

It is the Court’s explicit intent not to attempt to provide a definition of the term “people” with respect to Quebec’s people mainly because such an attempt could be construed as dangerous act or an aberration, especially vis-à-vis the existence of other “peoples” within the province of Quebec, namely the aboriginal population, and their respective human rights, including that of self-determination. More specifically, although Quebecers share a number of characteristics pertaining to that of “peoples”, namely a common language, a culture and for a considerable part of the population common lineage, not all citizens of the province share these features. For this reason, among other, the Court decided not to determine whether the people of Quebec, based on the definition provided herein as instructed by international law, could encompass the entire provincial population or a portion

thereof. In the same vein, the Court would not examine the position of aboriginals or other populations as “<sup>51</sup>peoples” within the province of Quebec.

In its advisory opinion, the Court denies the legal claim of unilateral secession based on the principle of people’s self-determination. This is because, the Court came to the conclusion that, according to international law, for a group to claim self-determination two conditions need to be satisfied: that of the group as “people” and that of the “people” being qualified as “oppressed”. International law defines clearly the conditions of oppression of a people as follows: “[...] when “a people” is governed by a colonial empire; when “a people” is subject to alien subjugation, domination or exploitation; possible when “a people” is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.” (R.C.S., p. 295, pgr 154). In all other cases, “a people” is required and expected to attain self-determination within the framework of the state within it exists.

Reaching the conclusion that the people of Quebec does fall under the categories stated herein, because they are not currently under the governance of a colonial empire, because they are not oppressed in any way, but, instead, had been given meaningful access to government to “[...] pursue their political, economic, cultural and social development” (Idem), “[...] the National Assembly, the legislature or the government of Quebec do not enjoy the right at international law to effect the secession of Quebec from Canada unilaterally”. (Ibid)

Finally, as far as the Canadian constitutional component is concerned, it was the Court’s opinion that the Canadian Constitution “[...] is not a straightjacket” (R.C.S., p. 293, pgr. 150). A discussion on the unilateral right to secession would have to invite a substantial mobilization of the country’s legal community to investigate in greater

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<sup>51</sup> The Court’s position ascribes to the demands for consistency with regard to defining a “nation” and to any subsequent right to secession. As Millard (2008, p. 89) suggests, the demand for consistency is a “rhetorical favor”. Quoting Mohanan, Bryan and Côté as to their basic hypothesis, namely that “If Canada is divisible, then Quebec must also be divisible” and, subsequently, “Quebec must accord to minorities within the province the same rights and privileges that it asserts on its own behalf against Canada”, Millard claims that such a position affirms that Quebec’s claims for sovereignty do not fall under the primary right claims and sovereigntists would have a hard time using this theory to support their demands for independence.

length and depth all the elements that form the country's constitutional authority. The latter is not limited to the written text of the Constitution but extends to an "[...] entire global system of rules and principles [...]" (Idem, p. 292, para. 148), including customary practices, jurisprudence, and legal expectations stemming from the existing constitutional framework. These fundamental principles comprise democracy, federalism, constitutionalism, the rule of law and the respect for minorities. The said constitutional framework is shaped by over 100 years of coexistence of Canadian confederated people in provinces and territories throughout Canada and their subsequent interdependence.

A unilateral proclamation of independence risks violating well-entrenched constitutional rights of the rest of the Canadian people, who needs to be consulted on the matter in the context of a "principled negotiation process" within the existing constitutional framework. In a democratic society as that of Canada, constitutional (democratic) rights cannot and should not be divorced from constitutional obligations. For the Canadian constitutional order to be able to continue and endure the test of time, it needs to be aware of the federation's claims for territorial integrity without turning a blind eye to the expression of a "clear majority" in Quebec to secede from the parent state. If this is the case, negotiations should be initiated without "[...] conclusions predetermined by law on any issue." (R.C.S., p. 294, para. 151).

With respect a political decision to secede or not and its consequences, the Court's advisory opinion is very clear: the Court was asked to clarify the legal framework within which political decisions are to be made "under the Constitution".

"The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because the reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiations are political, the courts, appreciating

their proper role in the constitutional scheme, would have no supervisory role.” (R.C.S., p 294-5, para. 153)

## **2.5. Quebec’s attempts for independence in light of constitutional and international law: some critical considerations**

Canada’s Clarity Act and the Supreme Court of Canada’s decisions are of significance if viewed not only from the domestic point of view but also from the international point of view. They follow two major failures, namely the Meech Lake Agreement and the Charlottetown Agreement.

The Meech Lake Accord, named after a lake in Gatineau, Quebec (near Ottawa), where negotiations between the federal and the provincial governments took place, was a failed accord whose saga extended from 1981 to 1990. Following the patriation of the Canadian Constitution from Britain, which was accepted and ratified by all provinces with the exception of Quebec, the Mulroney government attempted to launch a deal to gain the consent of the province of Quebec. The said deal was articulated in three parts. These three parts reflected a Quebec’s two-fold proposal: the first chapter of the said proposal concerned the distinctiveness of Quebec. The second chapter was a potpourri of other matters. The Meech Lake Accord three-fold proposal recognized Quebec as a ‘distinct society’ within the Canadian Federation. In return, Quebec was to recognize the rights of the Anglophone minority within Quebec, while francophone minorities outside Quebec would also gain recognition. The second part of the Accord would extend the realm of provincial jurisdiction over matters that were relegated to the federal government. For instance, province would have to possibility to opt out of programs financed by the federal government (such healthcare and pension plans) but for which federal conditions for financing were considered burdensome. Additionally, the joint federal-provincial jurisdiction over immigration matters and new immigrant settlements were given constitutional status under the said agreement. The third part of the Accord’s proposals concerned constitutional amendments. The agreement would change the procedures leading to amendments whereby a series of changes in specialized matters, namely changes to

the Senate and the creation of new provinces, required the unanimous consent of the Parliament and the legislatures of the provinces. The negotiations following the Meech Lake Accord discussions reflected the general sentiment of the general public but also Canadian politicians' unwillingness to put state matters before provincial interests and personal political ambitions. Despite the original approval of the Canadian public opinion to the terms of the Accord, prolonged discussions, extensions to deadlines given for provinces to ratify the Accord as well as dissent among the ranks of the federalists (Pierre Trudeau although retired criticized Mulroney for selling the Federation out the provinces) resulted in the colossal failure of the Accord. Surprisingly, the said failure did not originally come from the Quebec camp but the latter certainly contributed, toward the end, at sealing the accord's death sentence.

Under the dark shadow casted by the Meech Lake Accord failure, the Progressive conservative government under the leadership of Brian Mulroney decided to amend the Canadian Constitution and receive Quebec's approval to the Constitution Act of 1982. A new round of negotiations began in 1992, with four appointed bodies working in parallel and in collaboration to produce a final report. The said report, entitled "A Renewed Canada" resulted in the so-called Charlottetown Accord, named after the capital city of PEI (Prince Edward Island) on August 28, 1992. The Accord would deal with the following topics: legislative power and division of jurisdiction between the federal and provincial governments, the federal-provincial spending distribution, the question of self-government for Aboriginals, Quebec's distinctiveness and Parliamentary reform. Under the first title, legislative division of power, the Accord aimed at harmonizing policies in a number of key areas such as telecommunications, labor and training, regional development and immigration. Provinces would have exclusive jurisdiction over cultural matters, with the exception of the CBC (Canadian Broadcasting Corporation) and the National Film Board, which remained under federal control. The Accord abolished the Disallowance clause, under which the federal Cabinet could dismiss any provincial legislative Act, within one year of its adoption by provincial parliaments. Additionally, in the terms of the Accord, the Federal Parliament's declaratory Power, known as "Advantage of



Canada” was placed under provincial consent. In line with the Meech Lake Accord text, the new accord would guarantee the provincial opt-out clause from federal programs, concerning healthcare, social services, education, etc., provided provincial programs complied with national standards. Under the Federal-Provincial spending chapter of the Accord, the so-called “social charter” was introduced to promote environment protection, medicare, welfare, education, free flow of goods, services, standards of living, etc. As far as Parliamentary reforms were concerned, the Accord proposed reforms in the Senate to ensure the infamous triple-E, i.e. equal, elected and effective. In other words, the Senate would have an equal number of senators from each province; all members would be elected either by the legislature of each province or by the province at large and the Senate’s work would become effective by reducing some of its powers. In the House of Commons, the number of seats would be increased and, in order to guarantee fair representation of the provinces, a limitation was introduced based on which a province could not have fewer seats than any other province with a smaller population. Special provision was made for Quebec, which would have at least one quarter of all the seats in the House regardless of its population. The Charlottetown Accord met with the approval of all 10 provinces. But the Mulroney government sought approval by the citizens at federal level by submitting it to a national referendum. Some provinces, however, had already held referendum legislation of their own and decided to participate to the national referendum as well. Chaos ensued when 54.3 per cent of the Canadian voters opposed the accord. In Quebec the disapproval rate was higher (56.7 per cent of the casted votes). The Charlottetown Accord failure signaled the end of the Constitutional Reform in Canada. While the need is still present, especially since the House of Commons introduced and approved, in 2006, a motion recognizing Quebec as a ‘nation’ within Canada, Quebec has not yet officially consented to the 1982 Constitution.

As mentioned earlier, Clarity Act of 2000 in conjunction with the Supreme Court’s decision to devolve to the legislative branch of government the question of what follows a ‘yes’ referendum when having to define issues of ‘clear majority’ and ‘clear question’ is in line with what Kohen calls an “aversion” on the part of existing States

to the concept of secession at all times. (Kohen, 2006, p. 3) This “allergic” reaction is not merely terminological as Kohen suggests. It resides on the fact that “States are not willing to allow even a potential consideration that secession is a situation governed by international law, even after the success of a secessionist State.” (Kohen, 2006, p. 4)

As far as secession as a process is concerned, it is clear that in Quebec’s case, from the Canadian federation point of view, constitutes an attempt to resolve internal conflicts (with or without international participation)<sup>52</sup> with reference to constitutional law and domestic legislation. This was done in the case of legislation passed by Canada’s House of Commons on 15 March 2000 following the Supreme Court of Canada’s advisory opinion. (Kohen, 2005, p. 15-16)

It is the opinion of theorists such as Patrick Dumberry (in Kohen, 2006, 450-452) that the Canadian’s Court opinion and its subsequent legacy, from the point of view of the international law, are generally positive. This is because the opinion clearly defines the circumstances under which “secession in a non-colonial context may be allowed under international law” (Ibid, p. 450). It therefore creates an important judicial precedent and a useful reference in negotiating future disputes on questions of legality of secession.

Second, as Dumberry highlights, the importance placed on negotiations to be held “in good faith” by all parties involved creates, within the international community, standards of practice of secession processes to be applied worldwide while informing the international law on the matter. This is all the more important if one is to reflect on the violence often associated with secession movements and the suppression of rights of several minorities in the process (idem).

The Court’s advisory opinion failed, however, to clarify the particularity of the case of Quebec with regard to the effectivity of secession. As Dumberry states (in Kohen,

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<sup>52</sup>There was no such participation in the case of Quebec.

2006, p 436), the Court decided that any unilateral secession runs against international law only to acknowledge later in its opinion that 'it is true that international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation'.<sup>53</sup> One is to understand that, as far as the Quebec's claims to secession were concerned, the Supreme Court of Canada dealt mainly with the legality of the matter rather than its possible effectivity. But this restricted view "[...] should not in any way undermine the general soundness of the Court's opinion" (Ibid, p. 451) This is because the Supreme Court of Canada in its *Reference* managed to substantiate the lack of legality of Quebec secession under constitutional (domestic) law and the absence of legal basis under international law.

As far as the Clarity Act is concerned, Dumberry claims that it is irrelevant from the point of view of international law. In the words of Dumberry (in Kohen, 2006, p. 452):

To the extent that a referendum would result in the clear expression by the people of Quebec of their will to secede from Canada, the unwillingness of the federal government to undertake negotiations, or even the interdiction to do so under the Clarity Act, would not prevent Quebec from eventually becoming an independent State. As previously observed, secessionist entities do have an obligation to negotiate their secession with the parent State. Yet the absence of any negotiations with the federal government prior to the effective secession of Quebec would not, in itself, prevent it from being internationally recognized by third States. In that sense, the Clarity Act can only prevent Quebec from achieving secession legally under Canadian Law; it cannot in any way block accession to sovereignty if it chooses to follow such a path.

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<sup>53</sup> *Secession Reference*, para. 141

This case is a typically manifestation of the tension created on the international sphere as a result of an intricate connection established “by nineteenth century doctrine between recognition and statehood” (Crawford, 2007, p. 14). According to this author, the tension results for the conviction “that recognition is at some level a legal act in the international sphere and the assumption of political leaders that they are, or should be recognize or not to recognize on grounds of their own choosing” (*Ibid*). This however sounds very dangerous because it suggest that decisions of recognition of statehood, as a result of secession movements or not, and the subsequent rights of peoples and territories “[...] will depend on arbitrary decisions and political contingencies.” (*Ibid*)

As far as the domestic law is concerned, the Supreme Court’s decision with its 1998 Reference sets out the basic framework whereby a province can secede. The conditions for secession must respect the rule of law, constitutionalism, federalism and the democratic process in politics. This translates into a constitutional amendment that can only be achieved following negotiations between the seceding province and Ottawa (namely the federal government) as well as with “all other participants”, in other words, minorities whose protection, based on the Reference, is “an underlying constitutional principle”.

However, from a constitutional point of view, it is suggested by Millard (2008, p. 87) that the Reference failed to address what follows in the event the negotiations do not materialize. The solutions currently available by the existing constitutional framework are very limited: Quebec would remain a province of Canada. In this case, Quebec would be forced to unilaterally declare its independence, which, in turn would give Canada substantial leverage of reaction. As Millard suggests, the international community would become increasingly hesitant to recognize a “[...] putative country created in defiance of the path-breaking legal regime developed by the Reference.” (*Idem*) More importantly, though, Quebec’s defiance would not have to be met by force by the federal government. The latter would content in applying federal law within Quebec’s territory and exercise jurisdiction, especially in areas considered to be part of federal property, namely federal-built infrastructures

such as international airports, border crossings, etc. (Ibid) Although Ottawa may not be willing to apply such measures, justice, as perceived in the terms described in the Reference, among other legal documents, might demand from Canada “[...] to enforce the rule of law against an illegal secession that seeks to deprive large numbers of recalcitrants of their citizenship.” (Millard, 2008, p. 87)

On a different note, if one is to consider the partition of Quebec as a moral right, then an injustice against Quebec should have been committed. In light of the injustice theory, Daniel Latouche agrees with the advisory opinion of the Supreme Court of Canada that the constitution extends beyond the written text and the *Charter of Rights and Freedoms* to encompass the spirit of the law and additional jurisprudence. In line with this Latouche’s argument, Millard examines the claim of injustice from the point of view of the sanctity of contracts and the failure of a party to uphold its promise. More specifically, it is argued that “the moral power of a genuine, historical (as opposed to apocryphal) contract rests on the insight that ‘promising is surely as close to being an indisputable ground of moral requirement as anything is’” (Simmons as stated in Millard, 2008, p. 91). In Locke’s view, violating the terms of a political authority is sufficient reason for a revolution, namely for breaking the bonds of a political union.

The hypothesis of Quebec’s moral right to sever its ties with Canada lays on the assumption that Canada’s political authority, as expressed in its original constitution, was “quasi-federal” with a “[...] certain centralist bias” (Millard, 2008, 91). These were the terms agreed in 1867 but, later, provincial rights were progressively added to the mix. Quebec have always claimed that, subsequent to the 1867 Constitution, “Canada was founded on an implicit contract, according to which Quebec’s distinct ‘national’ identity was both reflected in and upheld by the sanctity of provincial autonomy” (Silver as paraphrased by Millard in Millard, 2008, p. 92). Silver (1979, p. 218) is of the opinion that:

“Lower Canada [i.e. Quebec] wanted to be separated as much as possible from the other provinces, to have an autonomous French-

Canadian country under the control of French Canadians. Conservative propaganda [however] made Confederation attractive by stressing, and even exaggerating, the powers which the provinces would have, and by minimizing those of the federal government. It emphasized the separateness and sovereignty of the provinces.”

It is the Quebec’s opinion that the promise of the 1867 constitution never materialize. Instead, the current constitution limits Quebec’s movement on key issues and central areas of provincial jurisdiction, such as education and the historical veto during procedures that would allow Quebec-friendly constitutional amendments. Similarly, Quebecers view the Charter of Rights and Freedoms as a restrictive formula to Quebec distinctiveness as a nation. In Latouche’s opinion, federal government’s refusal to accept the specificity of Quebec opens widely the doors to “the principle of duality into its institutions”.

Contrary to what Laforest considers the Quebecers’ mistrust in the current constitutional system, the fact that Quebec, following the 1995 referendum and the failure of the Meech Lake/Charlottetown agreements, still seeks constitutional reforms is consistent with the province’s refusal to formally endorse the process of 1982, which altered the terms of the federal union.

It is true that under the current Constitution, Quebec enjoys rights that are not necessarily the ones enjoyed by other provinces. Quebec has a substantial zone of autonomy for self-governance. It is considered a distinctive society and can exercise its power to express the said distinctiveness. Despite all that, the Constitution remains silent as to the 1867 implicit promise, that is, of recognizing its unique identity as a unit based on its nationality. In light of the hypothesis stated above, Quebec’s claim to independence would be ascribed to a remedial action of an injustice that the province still endures.

As Pelletier (in Oliver et al., 2017, p. 273-4) states the amendment of Canadian Constitution has proved to be extremely arduous, especially in the light of the 1982

procedure, which as rejected by Quebec and only implemented bilaterally. It is concluded that Constitutional reform in Canada is particularly difficult because the 1982 patriation complicated constitutional amendments in addition to other constraints of legislative, reglementary and judicial nature. However a reform of the Canadian constitution is not only possible but necessary because it will recover, among other things, the credibility of the federal system while diffusing tensions harbored by some of its federated founding members.

## CHAPTER 3: THE CASE OF SCOTLAND AND THE UK

### 3.1. Scotland and the Road to Independence

As announced in the introduction, this study is a comparative analysis of two attempts of secession in Canada and in Scotland, although the two cases are quite different. Whereas Canada was originally a British Colony and today keeps just a symbolic tie with the UK through the Crown, as discussed in the previous chapter, Scotland, for its part, was an independent polity since the Early Middle Ages, but it has been subject to English and then British rule, starting from the beginning of the Eighteenth century with the Act of Union 1707.

Brutus of Troy, founder of Britain, had two sons: Locrinus, who inherited England, and Albanactus, who was given Scotland. This popular English folklore myth was refuted by the Scots who replaced it with their own version: Scotland was founded by a Greek, Goídel Glas, and his wife Scota, a descendent of the Pharaoh. Both myths are proofs of an underlying discourse, partly historical partly fictional, vis-à-vis the perception of the Scottish identity from the point of view of the Scots and the English.

Whichever the true origin of Scotland, the history of England and Scotland is a series of watersheds over the right of succession to the Scottish and British thrones. The Wars of Scottish Independence (First War 1296-1328 and Second War 1332-1357) were difficult periods in the history of Scotland, which had been invaded by England, once directly and once indirectly, and which had a significant ending, that of preserving and confirming Scotland's status as an independent state. We shall not attempt to provide a detailed historical overview of the coming into being of Scotland. Instead, we will deal mainly with Scotland's status following the 1707 Treaty of Union, which resulted in the formal union of England and Scotland despite the Scottish resistance, let by the Jacobins, which extended as far as 1746. In 1800, The Union of Great Britain expanded to Ireland, thus forming the United Kingdom of Great Britain and Ireland.



Under the Treaty of Union, the two separate kingdoms would merge into one thus forming a United Kingdom under the name of 'Great Britain' (Article 1 of the Treaty of Union). The legislative power was given to the Parliament of Great Britain whereby Scotland would be represented by 16 Lords and 45 Members of Parliament and its Parliament was abolished. Trade, transactions, and other key financial functions would be made possible thanks to a common currency, through the 1707-1710 Scottish recoinage Scottish and British peers would have the same rights in a trial of peers. One of the key elements of the Treaty is that Scotland managed to preserve the continuation of its separate legal system.

The Scottish legal system, most commonly known as Scots law, is a unique mixture of civil law and common law. It is one of the three legal systems found in the United Kingdom, along the English law and Northern Ireland law. Scots law is the result of incorporating and fusing together different legal traditions, which in turn stemmed by the co-existing of several nations and races, namely the Gaels, who occupied most of Scotland's territory, the Britons and Anglo-Saxons, usually located in southern enclaves and the Norse in Scotland's Northern islands. Feudalism, introduced in Scotland during the 12<sup>th</sup> century, brought in new legal influences, especially Anglo-Norman and Continental. The presence of civil law is the result of Roman law influences, which prevailed in Scottish laws.<sup>54</sup>

The Union was followed by a period of dissent, which, from a chronological point of view is to be associated with two major events: the 1885 establishment of the Scottish Office and the creation of the post for the Secretary of Scotland; the 1886 Irish Home Rule Bill, which created a devolved assembly for Ireland with the mandate to legislate in specific areas allowed by the central (British) government. In the words of Mitchell (2014, p. 5) this was the beginning of a "[...] trend to

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<sup>54</sup> Nowadays, Scots law acknowledges four legal sources, namely legislation, passed by the Scottish Parliament, the United Kingdom Parliament, the European Parliament (and its main treaties and conventions such as the Treaty of the European Union or the European Convention on Human Rights), the Council of the European Union, and the United Nations with their related treaties and conventions; legal precedent, legal academic writings pertaining to specific legal issues, and custom.

administrative devolution in which the delivery of services, if not the basic policy line, was increasingly organized differently in Scotland.”

The devolution itself would come much later, that is, after the First World War and even more so in the 1990s. Contrary to the Irish, the Scottish people did not immediately or ostensibly object central rule, despite various demands expressed as early as the 1930s. It could be said that, feeling the stress of two World Wars, Scotland would not actively pursue its quest for home rule in the context of a fragile international environment. Things changed considerably in the 1960s. With the cold war raging and the fear of Communist expansion hanging over the Western world as a Damocles sword, imperialism, of any kind was stretch to its limits and claims for independence would emerge in various *loci* of the world. In the spirit of the times, and anticipating major changes deemed necessary for the United Kingdom, the British Conservative Government Prime Minister in a speech addressed to the Member of the Parliament of South Africa put his seal of approval to the beginning of the end of British rules in most of its colonies. The speech, known in history under the name “Winds of Change” would acknowledge that “The wind of change is blowing through this continent [South Africa]. **Whether we like it or not, this growth of national consciousness is a political fact.**” (Harold Macmillan, 1960) [Our emphasis]

In the 1980s’, following the defeat of the referendums on devolution in 1979, the Labour Party was deeply divided on the question. While its leader Neil Kinnock would recognize Scotland’s claims to devolution, he would oppose the same right for Wales. The impetus came when John Smith, a long-standing supporter of devolution, in the summer of 1992 made the Scottish and the Wales devolution case into one of his government’s priorities. The Tony Blair government signaled a series of actions that would ‘stifle’ devolution discourse within the Labour Party, on the one hand, and would ‘slow down’ devolution process, on the other hand. Major step-backs in the case of Scottish devolution included, among other things, the elimination of descent within the Labour Party, the increasing presence of the business world in the

political decision-making process<sup>55</sup>, and the commitment to hold referenda on devolution proposals.

The 1997 *Partnership for Britain's Future* document, co-authored and co-signed by the Labour and the Conservative party leaders, also known as the Crook-Maclennan pact, set out the conditions and processes (i.e. constitutional principles) for constitutional reform leading to the devolution of Scotland and Wales, should the Labour Party win the general election. In the few months that followed the Labour Party win and its coming into power, two referenda took place, one in Scotland and one in Wales, whereby the 'yes' vote won, with a larger majority in Scotland than in Wales. This signaled the beginning of a new era for Britain and Scotland, the details of which will be discussed later in relation to our analysis on Scotland as a nation and the 2014 referendum.

### **3.2. Scotland and the case in favor of 'Home Rule'**

'Home rule', which is a milder version of independence, is a purely British political invention and one of the historical components of an overall political tradition in Scotland. As Keeting and McEwen (2017, para. 7) suggest that, as part of the said tradition,

[...] home rule aimed to transform the United Kingdom into a family of self-governing nations combining local parliaments with an overarching one at Westminster. This has long being the preferred option in Scottish political opinion, but for over a hundred years was resisted by unionists in both Conservative and Labour parties (although both did contain home rule wings). Only at the very end of the twentieth century did the Gladstonian vision prevail, albeit without England.

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<sup>55</sup> The Tony Blair government removed Scottish Parliament power to "initiate some form of public ownership" thus allowing business, especially big ones, to have a 'say' in the Scottish nation's intent to put forth devolution proposals and to negotiate upon the said proposal with the central government.

Home rule is nothing sort of devolution. In the United Kingdom, as is the case of other parts of the world, devolution is the process of devolving power from a central government (central rule) to lower levels of government, the ones that exist at regional and/or local level. In Deacon's view (2012, p. 2-3), the advantages of devolution, as put forth by its proponents, are bidirectional, namely they benefit both the central and the centralized level of government. More specifically, if one is to interpret Deacon's taxonomy, one could claim that the said advantages fall under four major categories: political reality, national identity, democratic governance, administrative efficiency.

More specifically, devolution acknowledges a political reality, namely that a political and administrative "[...] regional tier of administration already exis[ts]" (Deacon, 2014, p. 3). This is particularly true in the case of the United Kingdom, where government departments (offices) already existed in Northern Ireland, Scotland and Wales. Some would also say that it is political realism to recognize the rights of an entity and its capacity to self-government instead of compromising the Union itself. Ireland example speaks volume to that effect. Therefore we tend to agree with the proponents of devolution that separatist pressures can be alleviated by allowing greater degree of independence through de-centralization of political authority jurisdiction. As Deacon (Idem) reminds us, "[i]n 1992, the failure to allow (**Home Rule**) devolution for Ireland earlier, despite constant demands, led to the separation of the Southern Ireland (Eire) from the rest of the United Kingdom." [Deacon's emphasis] Lest we forget that, in the eyes of the proponents of devolution within the United Kingdom, Home Rule is a fairer and more accurate expression of political representation and the people's will. Keating (2014 & 2017), McEwen (2017), Deacon (2014) and others never fail to repeat the following paradox: over the past fifty or so years, during general elections, the electorate of Ireland, Scotland, and Wales had never elected a conservative majority in Westminster. The 2017 U.K. general elections in Scotland, held on June 8<sup>th</sup>, 2017, ensured a third term for the Scottish National Party (SNP). During these elections, the Conservatives came second, thus overtaking the Labour Party as the main opposition party. The increase of the Conservatives party in popularity may have come as a surprise given that,

during the 2016 EU Referendum, which signaled the departure of Britain from the European family, Scottish vote for ‘Remain’ at a rate of 62 per cent of the casted votes.

One could easily deduct that the Scottish were constantly and repeatedly governed by Conservative central governments, which were elected by the majority of English voters. In the same vein, the decision for the Brexit, orchestrated by the ultra-conservative, anti-European faction of the British political spectrum, including the Conservatives who are now in power, has been a claim outspokenly expressed in England. Ireland and Scotland have constantly been pro-European. This has resulted in political and constitutional complications, given Scotland’s strong will to remain an active and full-fledged member of the European Union once Great Britain exits the Union. These are two typical, or rather flagrant, cases of misrepresentation for which devolution could be an effective remedy.

If one is to go beyond the limited scope of British politics, devolution (and or independence for that matter) is currently in keeping with voices within the European Union for further regional freedom. The European Union has relegated considerable power to regional bodies, thus allowing regions to take active and meaningful part in its decision-making process. The most prominent example of this is the European Committee of the Regions or CoR, which brings together 350 members of regional and locally elected representatives from the 28 member-states. Divided into 6 commissions, CoR covers competencies in the following areas: employment, vocational training, economic and social cohesion, social policy, health, education and culture, environment, climate change and energy, transport and trans-European networks, civil protection and services of general interests to the public.<sup>56</sup>

As far as national identity is concerned, devolution, in the context of the United Kingdom is a direct acknowledgment on the part of central government of the

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<sup>56</sup> For more information on the role, mission and scope of the CoR, visit its website at <http://cor.europa.eu/en/about/P.es/index.aspx>.

specificity of the British Isles. The latter are made of regions and nations with differences as well as similarities. Devolution, in the form of various degrees of Home Rule status, acknowledges differences not as a dividing factor within the British society as a whole, but rather as an element of diversity, which is enriching for the Union.

The element of democratic governance is closely associated with political reality. More specifically, the issue of misrepresentation can be overtly undemocratic especially if, under the given system of political representation, the majority of United Kingdom's population is governed by an administration stemming from a decision reflecting primarily the wish of one of its constitutive parts. To put it simply, it seems rather unfair for a whole country to be bound by the decision of the majority of one of its nations, when all rest of the country's nations were, at a national level, against the said decision. In this case, devolution would allow a return to democratic stability, thus ensuring that decision-making is in the hands of the regional/national majority and positive as well as negative effects of self-governance are assumed by the people who are actually responsible for them. This will result, on the one hand, in growing satisfaction among all nations and regions, and, on the other hand, in assuming increasingly one's share of responsibility in one's political fate.

Finally, administrative efficiency is often claimed by the proponents of devolution as one of the many considerable benefits of Home Rule. In Deacon's view "[In Westminster]... The Houses of Parliament are already overcongested with legislation. There is little time for effective scrutiny of primary or secondary legislation there. Devolution allows the nations to spend greater time creating, scrutinizing or shaping legislation to suit their own circumstances" (Deacon, 2014, p. 3-4). One could easily deduct that this type of micro-management, namely managing at a smaller and more concentrated scale, can be far more efficient. Direct community/citizen involvement to both the legislative and the executive branch of government proves to be real democracy in action. It also allows dealing with what affects most directly the community/nation at hand by separating the local/national

level from the federated/united one. The division allows for more advanced strategic planning on areas that seem to be too large or cumbersome for a centralized government to handle (i.e. economic development and tourism). Finally, de-centralization of public administration usually translates in more effective prioritization of 'national/regional' needs, given the geographical, economical and demographical specificity of each region and its changing/evolving needs.

That being true, for local administration to be effective it needs to be given the power and/or the means to acquire the necessary capacity to perform the task it was designed to perform. In other words, efficiency is not a quality in itself. It depends on efficacy and the latter is one of the pre-requisites of proper devolution. Home Rule can work only if proper infrastructure, on all three levels of government, are in place to ensure smooth transition from the central to the local and when provisions are made to guarantee proper coordination of central administration with local ones with bidirectional feedback in the spirit of collaborative action instead of a dominating and/or separatist attitude.

The claims between Home Rule and independence seem to have found a middle ground of expression not only among separatists but also among unionists, who seemed to have accepted the new set of dispensations associated with the 1999 Scottish devolution. This middle ground formula, known under the name of 'devo-max' calls for further Home Rule. It is based on three principles. "The first is a post-sovereigntist conception of authority, in which Westminster supremacy is challenged. Second is control for more taxation powers<sup>57</sup>. Third is Scottish control over large areas of welfare policy". (Keating & McEwen, 2017, p. 8)

As Keating and McEwen discuss, this devo-max formula translated into Westminster controlling the areas of defense and foreign policy while Holyrood controlling the rest. But in a globalized/internationalized world, where state entities belong to supra-state bodies and report to them, be it partially, the frontiers between

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<sup>57</sup> See argument in 3.3.

domestic and foreign policy are blurred and clear lines are difficult to draw. How would a United government be in the position to shape defense policy guidelines when a great part of the infrastructure, created, used and mobilized to that effect, is under the control of 'national governments' and when financing the said policy would mean funding operations through taxation, which is to be further devolved to the 'national' level?

From a purely constitution point of view, the devolution of powers to Scotland is described by and defined in three different Acts: the Scotland Act of 1998, the Scotland Act of 2012 as well as the Scotland Act of 2016. The 1998 Act was considered to be the most important piece of legislation to have been passed in UK since the European Community Act of 1972.

### **3.3. Defending the case for 'Central Rule'**

As in case of the proponents of devolution, those who stood against it had their own set of arguments to put forth. These arguments could fall under the following five categories: (un)democratic governance, national rift, administrative (in)efficiency and mismanagement, political nepotism, and lack of accountability.

Democracy, or a version of it as is perceived by the supports of the 'no' campaign, is used by the opponents of devolution who claim that "In Scotland, Wales and London, less than half of the population endorsed devolution. The combined majority either voted 'no' or did not vote at all." (Deacon, 2014, p. 4) This constitutes an undemocratic interpretation of a political reality that does not account for the British population as a whole. Those in favor of the union have no say to the powers they will have to devolve to lower levels of government. Once again, it is the minority who decides for a majority without taking into full account the consequences of the said decision.

The national rift political card is one of the major arguments of the devolution opponents' camp. Using the metaphor of the popular saying 'appetite comes with



eating', opponents of the devolution consider that devolution fuels separatist claims with an ultimate goal of seeking independence. This would mean the end of the United Kingdom as we know it, thus creating a national rift and operating an irreparable blow to the infamous British national and cultural Identity. Devolved institutions, such as the Scottish Parliament, become breeding grounds for separatist movements to grow strong and louder by providing them with institutional venues upon which to voice their dissenting discourse. This is how many viewed the Scottish National Party commitment to independence and its ascending path to power as the majority party at Holyrood.

Those in favor of a centralized administration, have a hard time visualizing the devolution of powers and authorities to lower, local, regional or national levels of administration. Their main objections evolve around two axes: cost and discrepancies due to national/regional variations in the standards of public service inception, administration and management. As far as the first element is concerned, de-centralizing governments comes with the additional cost of having to build them at the national/regional level (namely new infrastructure such as buildings, salaries and other associated running costs for the devolved bodies). Of course, overspending in building the Scottish Parliament did nothing but fuel the opponent of devolution discourse as to the financial burden of Home Rule.

The second axis of the administrative inefficiency/mismanagement argument is closely related with the administration of public-service delivery. The services offered under this umbrella have a direct impact on people's daily living. They range from education and welfare to public transports and healthcare, including services targeted to seniors, and cultural affairs. Moving away from the United Kingdom standard to an unknown 'national' standard can be rather difficult to accept<sup>58</sup>. First,

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<sup>58</sup> A typical example of discrepancies (or differences) is to be found in the education system and more specifically in University tuition fees with Scotland having one of the world's most expensive university systems. This is true for UK students (other than Scots) who are asked to pay an average of 9,000 pounds (2012-13 rates) on four-year-run degree programs. Home students (i.e. Scots) are to pay no fees at all. Scotland creates a preferential-treatment policy for home students and so does Wales, whereas in England and Northern Ireland home students and other UK students are treated equally. For Scottish separatists, this would be considered as a reasonable claim of the Scots as part of

because there is a shift toward the unknown and people have a natural aversion to uncertainty. Second, if Scottish were to manage better public-service delivery than the English or the Welsh, discrepancies would ensue, which in turn could deepen the rift among the citizens of the Union, thus creating inequalities. Discrepancies, inequalities, and differentiation in the type of access to services and the quality of the latter are some of the elements of undemocratic rule. Additionally, who is to say that inequity in overall provision of service across the United Kingdom would not lead to migration flows from the less prosperous entities to the more socially-engaged ones thus altering considerably the demographical, ethnic, and political make-up of Britain?

This very last point transitions smoothly to the ‘political nepotism’ argument put forth by unionists. More layers of government translate into more politicians governing both local/national and the Union level. As Deacon (2017, p. 4-5) points out: “People living in the areas with devolved government are now represented by as many as five different layers of government (town council, county council, regional assembly or parliament, Westminster Parliament and European Parliament).” This multiplication of authorities, tasks, roles and jurisdictions suggests that more people are employed for doing same or similar tasks.

This has multiple implications, starting with the emergence of new political elites who will lobby in order to advance the interests and goals of the group they represent at the expense of other groups. It also means duplication of roles and areas of authority and expertise. This is particularly dangerous insofar as the above-mentioned levels of government have not established clearly the scope of their role and mission and their respective limitations so as to avoid confusion. Duplication of roles/tasks and subsequent overlapping of jurisdiction can also encourage certain

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Scotland’s special educational tradition and the freedom it enjoyed for centuries on this domain. For non Scots this could be interpreted as an injustice which depends inequality as far as access to higher education is concerned. This discrepancy promotes class inequality as well as inequality among the home and non-home students.

levels of government to 'buck-pass' responsibilities to other layers. Finally, 'territoriality', in the form of 'turf wars' among institutional bodies, can result in conflicts (including conflicts of interest) among layers of government, which in turn will produce delays, enhance bureaucracy and result in total chaos in the administration of public services.

This is a typical example of lack of accountability. Lack of accountability being an element of undemocratic governance, it usually surfaces in reported cases of mismanagement of funds. However, it is far more complicated a political issue than the financial question alone. It has to do with a government perception of transparency in all aspects of political life. As far as Scotland is concerned, the issue of taxation and financing from Westminster are at the heart of the accountability debate and this is due to the fact that devolution is not a process that happens overnight. Instead it is an evolving process which depends on the rhythm of evolution of political structures.

### **3.4. Scotland or the case of a 'stateless nation': Between Scottishness and Britishness**

Scotland is one of the clearest examples in Europe of a 'stateless nation'. Its national status has hardly ever been contested (unlike, say, Catalonia) in spite of it not being an independent state since the Union of 1707". (Keating and McEven, 2017, p. 5). Scotland considered a 'nation' has always being a constant factor in British politics and the formation of the United Kingdom. What changed, however, over the years, as was actually expected, was the identity of the Scottish and the British.

As far as Scottish identity is concerned, it has been said to have been evolving from historical to cultural and/or, at times, intensely political or in a combined form thereof. From a historical point of view, it is worth-noting that Scottishness is closely associated with Britishness, since the values and the culture upon which the latter rested, especially during the 16<sup>th</sup>, the 17<sup>th</sup>, and the 18<sup>th</sup> century, emerged in

Scotland<sup>59</sup> and were inspired by the colonization process initiated by Britannia and the Anglican-Christian tradition. As Linda Colley mentions in her book entitled *Britons: Forging the Nation 1707-1837*, Britain was a multination state bound together during the 18<sup>th</sup> and the 19<sup>th</sup> century under a set of common goals, namely the need to defend Britannia against other nations, namely 'Catholic' France; the importance of commonly and collectively expanding the British Empire all over the known world; the primacy of preserve a shared religion, that is, the Protestant faith with its associated values (including work values such as commerce, etc.) and the Protestant cultural tradition (Colley quoted by Deacon, 2014, p. 15-16).

Within this context of Britishness, that is, in a borderless free-trade area, under the power exerted over the British subjects, and by using a single currency, the Scottish identity was shaped bearing always the branding of the intense feeling of a nation left without its own state and with the assurance that traditionally key areas of Scottish distinctiveness, such as education, law, and the Church, in other words the 'infamous trinity of Scottish civil society' remained intact and would still do to date.

Any attempt to define culture and identity is however in many aspects an exercise in futility. There are valid reasons for this. First, there is no such a thing as a unified, constant and universally accepted definition of culture or identity and subsequently of cultural identity. This explains Bayart's tirade "on the illusion of cultural identity" (Bayard, 2004)<sup>60</sup>. Second, identity, culture and cultural identity are fluctuating notions, which are constantly changing and being re-shaped over time. In this respect, Britishness as defined during the 18<sup>th</sup>, the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> century was based on the values of Empire, war and religion, whereas both

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<sup>59</sup> The famous song *Rule, Britannia* was written by the Scottish poet James Thomson (1700-48).

<sup>60</sup> For an interesting analysis on how the kilt, as a mode of collective cultural "hallucination", became a political symbol thus "[allowing] a restive province to forge a political consciousness at the same time that it was negotiating its relationship to the center of the kingdom", read Jean-François Bayart's *The Illusion of Cultural Identity* (2004, p. 205-6). Further in the same p.e, we read: "From this point of view, regional costume served simultaneously to condense conflicts and to precipitate compromises. The abolition of the legislation regarding distinctive dress in 1782 was celebrated in Scotland as a victory of the Celtic tartan over Saxon trousers. But this success was made possible only through the British Army, and it was systematized by the modern textile industry, which marked the kilt with the cultural guarantee of the Highland Society of London and the political approval of Queen Victoria."

Britishness and Scottishness are complex identities shaped upon a new, different set of values, that is, freedom, democracy and fair play. These are universal values with major political repercussions, thus proving that identity can be universal but also political and as such can influence political decision-making values and processes.

Finally, an identity has always been and will also remain the sum of multiples identities within a person and/or a nation, which are at the same time antagonistic to one another as well as complementary. A contemporary Scottish can also identify oneself as a British and a European (as well as a global citizen or a citizen of the World) and the hierarchy of this classification (in other words which identify comes first and when) is the result of a multitude of complex political, psychological and circumstantial factors. Scottishness cannot remain intact when one of its constitutive parts, namely Britishness, is undergoing major transformations. As the academic Anthony Heath noted, today's Britain still copes with the loss of the Empire and subsequent loss of its power of influence in the global scene. Some would even go as far as venture a scenario whereby Brexit is seen as an act of regaining control of one's destiny by breaking free from the 'European Empire' to attempt rebuilding a new British Empire. The post-cold-War environment has resulted in the dismantlement of powers thus creating new centers of influence that extend beyond the "Old World". Equally, globalization of the media and the subsequent dominance of the American culture and its values diluted British cultural values. Finally the decline of the monarchy, as the binding element of the kingdom's subjects, has transformed the notion of patriotism while reinforcing English, Welsh and Scottish nationalism.

It is in this context that one needs to understand and analyze Scottish identity as one of the fundamental factors feeding independence claims up until the 2014 referendum for independence and its political repercussion to the future of the United Kingdom and that of the European Union. Before doing so, we would like to underscore a major difference between the two cases compared in this thesis, namely Quebec and Scotland. Whereas identity, especially national identity, and cultural distinctiveness were not the consensus among political parties in Canada, in

the Scottish case Scottishness is shared by both the unionists and the nationalists. As a result:

“[i]dentity appeals in the Scottish [referendum] campaign did not [...] take the form of a stark division between ‘us and them [as was the case in Quebec] [...]. It was more a matter of each side seeking to reconstruct the nation of Scotland or Britain with substantive social values, where the relevant values were largely the same in both camps. (Keating & McEwen, 2017, p. 18)

### 3.5. Scotland and the 2014 Referendum: Constitutional implications?

On September 18, 2014, Scottish voters went to the polls to decide the fate of their nation. They were presented with a simple question “Should Scotland be an independent country?” to which they were asked to answer with ‘Yes’ or ‘No’.<sup>61</sup> The outcome of the referendum, which mobilized the whole country for over a year, will forever change British and Scottish political make-up. In an impressive turnout election (84.6per cent of registered voters cast their ballot), the highest in United Kingdom’s electoral history (which included both elections and referenda) the “No” answer prevailed by 55.3per cent of the votes against 44.7per cent of those in favor of independence.

A total of close to 4.3 million people went to the polls. Eligible voters were considered all British citizens, residing in Scotland, citizens of other Commonwealth countries who were resident in Scotland as well as European Union citizens residing

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<sup>61</sup> During the preparation of the question to be put to vote, the Electoral Commission has tested two other formulations, namely “Do you want Scotland to be an independent country?” YES/NO and “Should Scotland become an independent country?” YES/NO. These three formulations were tested for clarity and impartiality by the Electoral Commission. It should be noted that the segment of the question “independent country” remained unchanged in all three formulations. The Electoral Commission noted that “[...] participants in its researched demonstrated an unusually high and consistent understanding of what they were being asked, noting that ‘Almost everyone had a clear understanding that “independent country” meant Scotland being separated from the rest of the Union.’” (European Commission, 2013, p. 15 cited in Keating & McEwen, 2017, p. 10)

in Scotland, members of the House of Lords who were resident in Scotland as well as Service/Crown personnel serving in the UK or overseas, in the British Armed Forces, or with Her Majesty's Government who were registered to vote in Scotland. The voting age was lowered from 18 to 16. (Scottish Independent Referendum, 2014, *Administration*, n.d. para. 2) The campaign for independence was led by 'Yes Scotland' whereas the one in favor of the union was led by the group entitled 'Better Together'. Although the issues put forth during the campaign were numerous and very important (they would range from agriculture, control of the border, defense and immigration control to nuclear weapons, welfare and healthcare, citizenship, democracy, economy, the monarchy to the relations with the European Union) we would focus on the European Union component and the legal implications of this referendum vis-à-vis at the British and European level.

Before analyzing the legal aspect of the result of the referendum, two points need to be made. First, it is important to remind the reader of the options following each possible outcome of the referendum. If the 'Yes' vote were to prevail, the British government committed into entering negotiations that would lead to an independent Scottish country. If the unionists were to prevail, Scotland would remain part of the United Kingdom with further powers being devolved to the Scottish parliament on the basis of the Scotland Act.

Second, it is vital to note that the referendum may have resolved the issue of polity and independence in Scotland; it has yet to answer the nation's constitutional question. We recognize that such a statement can be misleading, given the outcome of the referendum. Constitutional reform would have been expected had Scots had voted for their independence. But, for the sake of argument, it is important to hypothesize on the following: first, the presence of an interim constitution as presented in the November 2013 White Paper, entitled *Scotland's Future*; second, an important fact of the referendum itself was that it engaged into a debate focusing solely and sovereignty and political power, relegating any constitution-making concerns to a distant future. This could be explained in two different ways: the drafting of a Scottish Constitution was conditional to a 'Yes' vote. Nationalists were

more concerned with the overwhelming pressure of more immediate arguments of the referendum debate that needed to be addressed more urgently.

Despite the hypothetical nature of a permanent Constitution for the new Scottish country, the question of an interim Constitution in the form of the White Paper mentioned above is of an interest internationally with respect to the making of new constitutions and the role the citizens have in the shaping of the said constitutions. As becomes apparent from the Proposed Interim Constitution for Scotland, the document “[...] would also enshrine a range of radical new provisions, including social and economic rights.” (Tierney in Keating & McEwen, 2017, p. 138). The draft interim constitution would deal with issues of equality of opportunity and a life free of discrimination; access and entitlement of public services that would guarantee a standard of living that would secure dignity and self-respect; protection of the environment and the sustainable use of Scotland’s natural resources; a ban of nuclear weapons based in Scotland; control on the use of military force and the role of the Scottish Parliament as per the use of the said weapons; the nature, role, status and scope of the local government; children’s rights; healthcare, welfare, pension and the other social rights as well as series of economic matters, such as the right to education and a Youth Guarantee on employment, education and training. (Ibid)

These elements, which via various constitutional processes were to be included in a final form of a future Scottish Constitution, had independence prevailed during the 2014 referendum, are being challenged by experts as promoting an extremely detailed mode of constitutional codification. The arguments against such a model are, according to Tierney, six-fold. The debate would evolve around issues of legitimacy of such a Constitution, judicial supremacy, rigidity, stifling the political debate, marginalization of the political powers of citizens; creation of a constitutional battleground (Tierney in Keating & McEwen, 2017, pp. 147-8). In his analysis, Tierney suggests that such a restrictive framework of constitutional codification deprives future generations of Scottish to exercise their democratic right



of shaping their future and rethinking their political and social values. He also argues that

By placing so many detailed policy commitments in a constitution and then ensuring that acts of the Scottish Parliament could be struck down by courts, insofar as they are incompatible with these commitments, would serve to hand the authority to resolve disagreements which are currently matters of political deliberation to a small unelected group which is arguably both unsuited and, in democratic terms, unentitled to determine these issues. (Idem, p. 148)

Another argument is that Scottish Constitution, as envisioned by its creators, would substitute a good, workable and heavily proven tradition, that of the UK Constitution, for a more rigid one. The United Kingdom is known to have one of the most flexible constitutional systems in the whole world maybe because it allows a considerable space to its unwritten form and a concomitant privilege recognized to the Westminster Parliament to assume the role of 'sovereign law-maker'. Tierney argues that it is within the leeway offered by both the unwritten and customary law that referenda such the one held by Scotland were made possible. Most importantly, though, under the current constitutional framework, the UK and Scottish Parliaments have not only the right to debate, define, and negotiate competing political and moral values, but, primarily, the possibility to revisit their decisions, in light of new information and changing circumstances, to amend or repeal any given legislation. (Ibid)

We believe, however, that contrary to current trends, inspired by pressures placed upon politicians, legislators and everyday citizens, to compose, amend and complement constitutions so as to make them all the more regulatory in nature, we share the opinion of many constitutionalists, as expressed in Tierney, that a constitution is above and foremost a template, a canvas of fundamental and universally acknowledged principles. Once these principles are inscribed in the

Constitution they transform, through the process of reification, to use Tierney's words, "[...] into a moral principle that transcends transient policy choices; [they are] extolled as a metaphysical value, the merits of which are rendered unimpeachable and to which citizens are called upon to plight unswerving allegiance." (Tierney in Keating & McEwen, 2017, p. 149)

Finally, over specification of the principles enshrined in a Constitution suggests lack of confidence in the maturity of the people who is to bide allegiance to the said constitution. It is however the same people, who were considered mature enough to organize, vote in, and implement the decision of a referendum such as the one organized in 2014. Is the constitution's role to protect citizens from ignorance or poor judgement, thus infantilizing the country's population? Or is it beyond and shred of doubt the ultimate written expression of what is morally feasible in the past, the present as well as the future? It is suggested that such a constitution would promote micro-managing all aspects of political and moral life and their corresponding values, thus dividing the country into losers, unable to partake in the composition of the constitution, and winners, simply because they prevailed at a given political circumstance and now, having the power in their hands, are able to shape the country based on their own preferred model. Such an attitude is profoundly undemocratic because it perceives the constitution for the point of view of a partial and sectarian vision of national identity. Instead, the constitution should have a transcending character and a vision that encompasses, negotiates and brings together all aspects of national and cultural identity irrespectively of their complexities and conflicting nature. (Ibid)

This whole discuss may seem hypothetical. Its value however resides in a series of facts. First, restrictive constitutional visions are on the rise all over the world and are frequently combined with separatist movements and their awakening as of late. Second, in Scotland the result of the 2014 referendum demonstrated that Scots would rather remain within the U.K. family. That, however, does not preclude separatists from re-stating their claims for independence. In such an event, constitutional changes will automatically initiate a series of reactions given the

interdependence of national constitutions and supra-national ones, as is the case of European and international law. It is in this respect that the constitutional debate is still to be launched in the case of Scotland.

### **3.6. Scotland and the 2014 Referendum: The debate around the European Union and the European legal framework**

The Scottish attitude toward the European family has not always been what it is today. It has rather fluctuated over the years, namely since 1973, especially in light of the Common Agriculture and Fisheries policy, feared by the Scottish who had claims in the North Sea. However, compared to the rest of the United Kingdom, Scots have always been, overall, less Eurosceptic than their British counterparts.

During the 2014 referendum, both camps, namely 'Yes Scotland' and 'Better Together', were pro-European, in the sense that, for the nationalists, remaining into the European Union could not, should not, and would not be contested by the Scots and the Europeans alike whereas, for the unionists, staying within the British family would, automatically, guarantee the existing Scotland's status within the European Union as part of the United Kingdom.

One should, however, go beyond the Scottish rhetoric of both campaigns. In the case of the proponents of independence, the pro-European discourse was highly optimistic, because it would fail to address the European legislative vacuum, which currently exists as far as the admission, or re-admission of a country seceding from a member-state is concerned. As various constitutionalists point out, there are no clear provisions in the various European Treaties for cases such as Scotland.

Unionists, for their part, opted for an alarmist discourse by over-stressing the said vacuum and the lack of precedent with regards to dealing, at the European level, with secessionist movements within member-states of the European Union. This argument was used repeatedly to scare voters by describing a gloomy, rather

uncertain, transition period that could follow a decision for the creation of an independent Scottish state, and which risked to end up by excluding the new Scottish country from the European family. Additionally, the financial burden associated, on the one side, with any re-admission in/re-negotiation process with the European Union and its delegated authorities, and, on the other side, with the loss of net financing, in the form of European programs and/or subsidies, as a result of Scots decision to secede from the United Kingdom was used as a lever to influence voters on the unforeseen, rather disastrous, circumstances of a move toward independence.

The debate as to the European future of a new, independent Scottish country, and the controversy, especially at the level of the European Union political elite, as well as of the spokespersons of the European member states, needs to be positioned within two conflicting yet complementary notions: that of Europe and the principle of the nation. As Keating remarks (Keating in Keating & McEwen, 2017, p. 102-3), Europe being a supranational entity, it was originally founded on the Gaullist principle of intergovernmental nation-states coming together to cooperate in matters of mutual interest while maintaining sovereignty. This was the infamous *Europe des Patries* dogma. However, this principle evolved over the years and the subsequent European Treaties to a vision whereby sovereignty would become progressively shared. In light of these fundamental European principles 'stateless' nations, such as Scotland, present an interesting case from a legal and territorial point of view. If Scotland were to become an independent state, would its status as a nation-state allow her a place within the European family on the basis of the above-mentioned Gaullist principle? If not, what would be the principal basis of rejecting such a claim under the Gaullist and the supranational ideal, especially since the current trend within the European Union is decentralization by progressively devolving more authorities and funding to smaller states and the regions? As Baldersheim and Keating (2015 as cited by Keating in Keating and McEwen, 2017, p. 102) clearly believe "Europe gives small states a large internal market, restrains the predatory behavior of large countries, and provides a common regulatory framework."

That being said, the response of the European Union to the announcement of the 2014 Scottish Referendum was almost unanimously in favor of the 'Better Together' campaign, although it was presented in varying nuances depending on the source from which it was originated. More specifically, José Manuel Barroso, then president of the European Commission, and Herman van Rompuy, then president of the European Council, openly declared that the Scottish membership to the European Union would be 'a difficult proposition'. Joaquín Almunia, then European commissioner, responsible for economic and monetary affairs, having tenure in the two Barroso Commissions, had demonstrated unbecoming impartiality, given his role within the Commission, by supporting Scottish unionists. It is possible that his view was heavily influenced by the Catalan situation in Spain, which has currently re-emerged, in dramatic tones, to remind European Union of all the brewing independence movements within its vast territory. When Jean-Claude Juncker became the new European Commission's President, and despite the fact that he had no allegiance to the British who opposed and even tried to block his nomination to the presidency of the European Commission, he said that this complicated matter was to be resolved between Scotland and the U.K. He did not fail however to add that the European Union had no intention at the time to enlarge, within the next five years. One needs to remind readers that Juncker's comment was mainly referring to the enlargement process of Balkan States.

But the situation between Scotland and the Balkan States, namely Kosovo, is not comparable. Neither is the case of Greenland, and its relationship to Denmark and Scotland. For, in the first case, Kosovo was not recognized as a state by the Republic of Serbia, whereas the United Kingdom had committed in recognizing Scotland as an independent state had 'yes' prevailed during the 2014 Referendum on the basis of the Edinburgh Agreement. As far as the second example/semi-precedent is concerned, namely Greenland's decision to exit the European Union while keeping its ties to Denmark, this is a case where an entity/state severs its ties with the Union and not the other way around.

The legal debate as to whether newly formed states, emerging following a secession process from a member-state and recognized as such by the parent state, remains alive within members of the European Union and an unresolved issue, as has been already discussed in p.es 22-24 of the present analysis. It is still debatable whether, in the view of Weiler (2014) Scotland, by declaring its independence, forfeits its right to the European Union. It is equally debatable, from a legal point of view, if Scotland can preserve its European citizenship, because it is already a member of the European Union, by the intermediary of the United Kingdom, given that, based on the fact that current treaties consider European citizenship to be conditional to national/state citizenship. Consequently, Scottish European citizenship stems from the British citizenship and not the other way around or independently from one another.

Additionally, it is not yet resolved, at least on a hypothetical level, given that the 'No' vote prevailed in the 2014 Referendum, whether new states as the one that could emerge in Scotland were to re-define their connection to the European Union under a new admission process, under articles 49 or 48 of the Treaty, or through an internal admission/re-admission process as claimed by the European Free Alliance, a coalition of '45 staleness nations, regions, and traditional minorities'. We need to remind readers that, under the Lisbon Treaty, a member can leave the Union but there is no provision for the other way around. Keating (2017, p. 116) reminds us that, in the case of East Germany, the latter gain its European Union status after having joined Germany. In other words, European citizenship ensued German citizenship.

Until recently, the Scottish case was viewed as a complicated yet not unsurmountable one. It was considered (Keating, 2017; Edward, 2014; Tomkins, 2014) as more straightforward than the Catalan case, simply because, if Scotland were to become an independent state following a referendum, United Kingdom would agree to it whereas Spain remains adamantly opposed to it. In view of later developments, namely the U.K.'s decision to exit the European Union, a stateless Scotland has decreased chances of staying within the European Union. Brexit would automatically translate into a void the European citizenship for all nations under its

umbrella. If Scotland were to pursue a future within the European Union, it would stand more changes had it launched another independence campaign. The latter would be far more difficult, because the United Kingdom would hardly agree to such a process, under current circumstances, namely in the process of Brexit negotiations.

The scenario described above presupposes that the Brexit takes place, but this is still for discussion. Whatever the case, and despite legal gaps in the European Treaties, Europe has always demonstrated an advanced negotiation capacity, a sincere willingness and a remarkable adaptability, better yet flexibility, to account for newly emerged situations, fluctuating tendencies and modified statuses. We strongly believe that new separatist/independence claims will further modify the European landscape and, as a result, European Union would have to find new ways and legal means to respond to new realities if it is to remain a supranational ideal.

### **3.7. Is there a federal future for Europe in the wake of Scottish Independence claims and other European secession movements?**

It was suggested above that Europe has demonstrated flexibility in dealing with crises and an amazing capacity in inventing solutions to complicated issues. But what if Europe considered a more efficient, reliable way to finding permanent solutions to problems and to dealing with (i.e. appeasing) constant tensions?

It can be said, of the butt, that federation, or the ‘F-word’, as Andrew Duff said it, is back in town. For some, it is the middle way between independence and the current status quo. The federalist European re-awakening could be in line with aspirations for a more united Europe with member countries that feel more free and independent than they do now. Borell<sup>62</sup> (2015, para. 3) identifies two key elements of the federal pact: the first is a common set of rights and freedoms that all citizens enjoy regardless of their state of origin. These rights need to be protected by a

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<sup>62</sup> Duff, A. (22 February 2015). *Is a Federal Europe Possible?* Retrieved from: <https://www.thenewfederalist.eu/is-a-federal-europe-possible>

federal court and to be enshrined in a federal constitution. Second, citizens must have the right to federal authorities, which in turn, would draw their legitimacy from citizenry. In that respect, European Union as we know it today is a federal-to-be structure or a quasi-federal one. But is not a federal structure *per se* because basic federal elements are yet to be decided and achieved.

Supporters of the federalist cause in Europe and for the European Union would like to ensure that there is democratic legitimacy for all European institutions in the areas of primary sovereignty, taxation and international relations. Currently, European states still hold on to their respective sovereignty as well as their right to impose and collect taxes. As far as a common international policy for Europe, it is limited to the sphere of foreign affairs and defense but lacks the impetus of negotiation on all aspects of human activity at the international level as one voice. Most importantly, though, failure to decide upon a much-needed European Constitution demonstrated national states' unpreparedness to secede a considerable part of their prerogatives.

In this respect, those who consider full federalism to be a distant possibility for the European Union have in mind all the above as well as the all increasing Eurosceptic movement in all its possible colors and expressions, Brexit being only one of its many forms. Opt-out policies, exceptions, as well as national preference clauses as opposed to European precedence paint a gloomy picture for the possibility of a federated Europe. However, the need for such a structure is more pressing than ever: European countries, taken separately, are nothing but almost insignificant entities compared to emerging power such as China, Brazil, India, and even Turkey.

In the words of Borell, the missing key ingredients to be able to have a federated Europe are the following: common legislation of the basis of qualified majority and co-decision methods; a pan-European constituency; a supra-national European Commission elected by European Parliament and the Council of Europe; a European Parliament able to produce binding legislation and to impose taxation policies at the EU level; a limited role for the European Council to that of collective chief of State;



creation of solidarity mechanisms for unemployment, minimum wage, social protection, protection of the elderly and adequate health insurance for all; a single, strong European voice in matters of international affairs and security.

The following demonstrate that, in the midst of one of the worst economic recessions ever felt, and given the political instability on the international level, the main concern for a state would not be how to preserve *acquis* or seek independence from other state but, rather, to work toward achieving Europe's federal destiny. It is in this destiny that self-governance could be achieved and prosperity gained. It seems that this is a lesson learned by the Canadians as a whole, despite remaining grievances. It is a bet that needs to be won by the Europeans.

## CONCLUSIONS

This thesis aimed to be a comparative analysis of two secession cases: Quebec and Scotland. Both independence campaigns have failed to produce the desired effect for reasons that were discussed previously and would be summarized, in this section, from a comparative point of view.

Our choice of topic is based on the following similarities: both Quebec and Scotland are *nations* that are currently (as in the case of Scotland) or used to be (as in the case of Quebec) under the British rule and the power of the Crown. Both entities present all the characteristics of *peoples*, because they have been treated as *nations*<sup>63</sup> and have been subsequently recognized as such by the “Constitutions” of the countries into which they belong. Additionally, both cases represent states that attempted to achieve independence via referenda. But the said referenda did not produce the ‘desired effect’, if by ‘desired effect’ is to be considered to goal of supporters of independence. Most importantly, though, from the international law

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<sup>63</sup> It is important to note that there is no legal, sociological or other unanimously accepted definition of “peoples”. It is understood that members belonging to a “people” share characteristics such as ethnicity (common origin), language and/or religion. It is equally important to underline, that when dealing with the issue of self-determination, the UN Charter does not provide an answer as to what constitutes a ‘people’ nor does it lay down the content of the principle. Contrary to ‘people’ the notion of ‘nation’, there have been attempts to define the concept from a legal as well as sociological point of view. More specifically, the Black's Law Dictionary defines a nation as follows: “A people, or aggregation of men, existing in the form of an organized jural society, usually inhabiting a distinct portion of the earth, speaking the same language, using the same customs, possessing historic continuity, and distinguished from other like groups by their racial origin and characteristics, and generally, but not necessarily, living under the same government and sovereignty.” For Benedict Anderson, nation is an ‘imagined community’ whereas for Paul James ‘abstract community’. In other words there is nothing concrete about such a community but the material conditions that allow for a congregation of men to live together and to imagine a shared future. 20<sup>th</sup> century sociological theory recognizes two types of nation: on the hand there is the famous ‘civic nation’, for which the principal model is France; on the other hand there is so-called ethnic nation, exemplified by the German peoples. The first type of nation is not based on purely ethnic origins, language or religion but primarily on the common pact to live together as one nation. The German example lies upon the principles of common language, religion, culture, history and ethnic origins, namely what would be consider some of the basic characteristics of ‘peoples’ to which the desire to live together is present but only secondary to the ethnic element of the union. Hence the fact that ethnic nations are mainly nations of ‘peoples’ ethnically bound together.

point of view, both cases represent nations which did not consider the option to proceed unilaterally with the proclamation of an independent state, thus going against the will of the country to which they belong and leaving it up to the international community to recognize (or not) their status as an 'independent state'. Finally, as far as similarities are concerned, Quebec and Scotland share a legal system, which is a mixture of common law and civil law. Equally, given the liberties both entities enjoy within the countries in which they belong, it is hard to defend secession, especially once declared unilaterally, on the 'remedial theory' basis. This is because, there are no serious violations of basic human rights of the respective populations that would justify, from the perspective of the international law, the right to self-determination as a remedial action of breaking free from a suppressive state.

Despite these apparent similarities, there are considerable differences between the two cases. For once, Quebec is a province within a federal state and enjoys strong protection of its linguistic and religious rights under the Canadian Constitution. Scotland, on the other hand, has only been recently recognized as a region (Scotland Act of 1998), with some degree of authority and with most of the competences falling under the central government jurisdiction, i.e. the U.K. government and legislature.

That said, the two entities and nations compared herein are located in different geographical positions and as such they have different needs and different contexts that define them. Contrary to the case of Scotland and Catalonia, both of which are peoples/entities operating within states that have a membership relationship with the European Union, Quebec has a clearly North-American orientation and currently lacks significant ties with the European Continent from where its people originated. Additionally, the issue of origin and ethnic make-up is highly debatable for all cases, since there is, and has never been, such a thing as ethnic purity. Finally, the case of Scotland differs from that of Quebec insofar as the said entities and their respective peoples live and operate under different political and administrative frameworks,

which they define their own being and frame the context upon which they can act and state claim independence claims.

Another major difference between Scotland and Quebec is their legal/constitutional status within the country in which they belong. Although both entities come from similar traditions, Scotland is part of a unitary government, whereby national government dominates state governments, including the Scottish one. The latter, as well as every other regional government within the U.K., have some authority but no constitutional authority. Quebec, on the other hand, has only as ceremonial connection to the Crown and exists within a federated state. The latter allows the former considerable degrees of autonomy, including constitutional authority to legislate in specific areas.

Stressing on the differences between the two cases, especially from a constitutional point of view, and based on what was already demonstrated in Chapters 2 and 3, it is important to make a clear distinction between Quebec, which attempted to secede unilaterally from the Canadian Federation, and Scotland, which, first, sought approval from the UK government so as to ensure legitimacy of the whole process and, then, proceeded with a referendum for its independence.

Our comparative analysis aims at demonstrating the limits as well as the possibilities of constitutional law in dealing with secessionist or independence claims. As a consequence of this position, it will be argued that, in the case of Quebec, which is a province of Canada, constitutional reform based on a federalist-inspired model managed to deal rather effectively with secessionist threats.<sup>64</sup>

Contrary to what happened in Quebec, unionist governments, such as the governments of the United Kingdom and Spain, failed to control secessionist movement and/or to recognize national/regional specificities. All things being equal,

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<sup>64</sup> It is a truism to state that Canada is a federation whose federalist 'persuasion' has evolved over the years from a centralized model to a more decentralized one and then back again to a more centrally-controlled form of government.

it is important to bear in mind that the reasons for a specific model of governance (federalism vs. unionism) are political, cultural, historical as well as circumstantial and they need to be taken into account in all analyses.

The ambition of this thesis is to initiate a discussion around the role of constitutions when dealing with national, regional, ethnic specificities (entities and peoples), as means for ensuring peaceful co-existence and prosperity. We are not in any position to provide definite solutions, from a legal (i.e. constitutional) point of view. Such a thing would be highly presumptuous. Instead, we are simply launching the debate by suggesting that constitutions, which would allow for a federally-inspired philosophy of governance, by incorporating provisions that take into consideration regional and ethnic diversities of various entities existing within a given state, can become a legal basis for allowing some form of self-governance in areas that are of interest to the said entities. At the same time, such a system would help maintain the supra-national level of government, which will work as the “glue” that binds together members of the federation by guaranteeing their well-being. It is our view, however, that any given constitution cannot and should not be a detailed document that regulates every single aspect of a nation’s political and social life. A constitution is a blueprint that is broad enough to allow for the legislative power to accommodate evolving needs and adjust to new realities.

As far as the case of Quebec is concerned, it is obvious that, during the last decades, the secessionist movement has subsided considerably. This was due, to a large extent, to the constitutional reforms instigated by some key Supreme Court interventions. By general admission, the new generation of Quebecers, or Québécois, to be more exact, is less concerned with a ‘Sovereign Quebec’ than the previous generations. Instead, there is more talk about progress and prosperity, especially in times of recession, than of self-determination. More specifically, according to a Léger Marketing Poll conducted in March 2017, the support for sovereignty among Quebecers is at a historical low of 36 per cent. Additionally, in another poll, published in the *Montreal Gazette* on March 18, 2017, 64 per cent of surveyed Quebecers said they would vote “No” in a referendum. Earlier than 2017,

and more specifically, in October 2016, during a poll conducted by Angus Reid Institution<sup>65</sup>, with the collaboration of CBC, 64 per cent of surveyed Quebecers agreed that the question of sovereignty is settled in Canada.

In our humble opinion, this shift in attitude is due, to a large extent, to the success of the Canadian federalist model and the assurance provided by the two orders of government that they can control each other more effectively, thus increasing the degree of political accountability in both directions<sup>66</sup>. Moreover, in the case of Quebec's nationalism, the Canadian Federation, and its institutions, mainly the Supreme Court of Canada, has been a major factor in keeping the country united. It is thanks to the Canadian Federation that Quebec rights were recognized, protected and preserved. It is the nature of the Canadian federal model itself that allows for national/ethnic distinctiveness to be expressed and flourished but appeasing tensions that may arise. There is, of course, the counter argument according to which there may have not been such a strong Quebec nationalism had Canada opted for a unitary government. In our view this an assumption that may not hold true, given all the cases of unitary government faced with independence/separatist claims.

The Canadian Federation is a typical application of a federal model.<sup>67</sup> It is important to underline that, from a historical point of view, in the case of Canada, a federated union emerged as a response to the 'survival issue' the colonies of British North America were faced with by factors that were externally imposed upon them. In

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<sup>65</sup> Angus Reid Institution (October, 3, 2016) "What Makes Us Canadians: A study of values, beliefs, priorities, and identity.". Retrieved from: <http://angusreid.org/canada-values/>

<sup>66</sup> This is achieved despite persistent political discontent, especially from the part of Quebec, with regard to the 'Clarity Act'. It should be said that partisan rhetoric for the purpose of winning election does not always ring favorably with public opinion, which can quite often oblivious to 'populist debates' and more concerned with everyday pressing matters.

<sup>67</sup> As is widely accepted, from a theoretical point of view, federalism refers to the division of jurisdiction and authority between at least two levels of government. In other words, a federal system of government has at least two orders of government (a single national government or federal government and multiple regional governments, also known as 'provincial' or 'state' governments), whose division of power is recognized by and defined in a written, federal constitution, which cannot be amended unilaterally, and whereby revenues and revenue sources are divided in such a way to ensure that each order of government has certain areas of authority, which are equally set out by the federal constitution.

1867, the decision of the Province of Canada, New Brunswick, and Nova Scotia to unite federally was a political solution to a series of external constraints. First and foremost was the 'instinct of survival' of British North America, apprehensive of American expansionism to the north, fueled by the American Civil War and justified by diplomatic and/or border incidents. It was during the same period that British imperialism was undergoing radical changes, with Britain progressively reducing its obligations and responsibilities vis-à-vis its colonies. The new status quo and the relationships with Motherland had resulted in considerable loss of revenue for the colonies. This is because the end of the 'British Preferential System' translated in significant loss in the share of British markets and exceptions from the tariff protection. It is in this particular context that the Canadian Federation came into being to counter external 'threats' and to ensure the peoples' survival.

From a constitutional point of view, the Canadian federation has oscillated from a more centralized form to a more decentralized one and then back to a more centralized system of government. This change followed evolutions in the needs and priorities of the country as well as in the country's relations with the outside world. The changes also followed a modification in philosophy as to the degree of control the central or federal government should have over provincial governments and, inversely, the need to protect local or regional interests to the extent that one region's or one province's freedom does not materialize at the expense of those of another region or province.

The move from the center to the periphery and back to the center is also a direct consequence of the means available to manage and administer large geographical areas, both from the point of view of quality and quantity. In the case of Canada, the benefits of a more centralized government, at the first stages of the federation, were consistent with ensuring a more effective administration of larger geographical areas, which literally extends from ocean, to ocean to ocean. Inversely, the move from a more centralized form of federal government to a more decentralized one was the result of Canada's ability to effectively control its vast and diverse territories with the help of new technologies, namely communications and transportation.

Equally, it can also be argued that the very means that allow a national government to devolve a greater number of powers and authorities to the lower order, namely provincial and/or state governments, can also be the reason to centralize power, if the means in question are mainly in the hands of the federal order.

On the basis of the Canadian Constitution, provinces, such as Quebec, have 16 enumerated powers (Section 92 of the Act). From these powers, some of the most important ones, which were devolved to the provinces, include legislative control over healthcare (hospitals and asylums), charities, municipal institutions, prisons, property and civil rights. Most significantly, though, provinces have an exclusive right over education. This right has been one of the most pressing claims of Quebec, because it considered the educational system to be the foundation of French-distinctiveness and the best means to achieve the conservation of French culture and the expansion of the French language. From a federalist point of view, this is one of the basic reasons why Quebec, once recognized as nation and for its distinctiveness would have a hard time justifying future claims for independence.

Canadian provinces, including Quebec, also enjoy concurrent powers over agriculture and immigration. By concurrent powers one is to understand powers that are shared between provincial governments and the federal government. In other words, both levels of government are permitted to legislate in these areas by sharing a jurisdiction where both levels may enact laws.

As far as Quebec is concerned, this is also an important element to its identity. Although bound by federal restrictions regarding immigration (such as quotas), Quebec is free to impose its own conditions on the admission of newcomers, namely the French-language pre-requisite and/or the preference given to immigrants from French-speaking countries. This constitutes a very powerful tool in the hands of the Quebec government for it can not only control the demographics of the newcomers but also ensure that Francophones and francophone culture prevails in the region. This policy has a counter-balancing effect to the most recent trend of bilingualism.



Financial and other imperatives made it necessary for Québécois to become fluent in English as well as in French to be able to be more competitive.

One power that has been under review many times by the Canadian judiciary is taxation. Under the current Constitution, provinces have limited taxation powers that regard, primarily, direct taxation. Most provinces currently collect the following taxes: income tax, corporate tax, sales tax, licensing and other fees. Taxation can be an important factor for citizens who would like to live in provinces with low income tax rates but adequate provision of goods and services. In 2017, Quebec had the lowest income tax indexing rate in Canada.<sup>68</sup>

The federal government, for its part, reserves exclusive rights in the following areas: regulation of international trade and commerce, with some considerable powers over inter-provincial trade, postal service, Census and Statistics Canada, the military, defense policy, navigation, shipping, sea, costal, and inland fisheries, Indian Affairs and reserve land, criminal law, and others. The federal government has very wide powers in terms of taxation and can raise taxes by any means necessary (income tax, corporate tax or indirect taxation).

Finally, on the most important issues, namely the Constitution Amendments and the Division of Powers, the Canadian federalist model has demonstrated its capacity to adapt in order to respond to new challenges, especially by means of jurisprudence derived from the Supreme Court of Canada. Since the patriation of the Canadian Constitution, there have been several minor amendments to the latter, especially those referring to provincial schooling in Quebec and Newfoundland and Labrador. The most important case is the one following the 1995 Quebec referendum, when Jean Chrétien, then Prime Minister of Canada, although he did not officially alter the constitution, gave provinces the right to veto over proposed constitutional amendments.

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<sup>68</sup> Gouvernement du Québec (2016). *PARAMETERS OF THE PERSONAL INCOME TAX SYSTEM FOR 2017*  
Retrieved from: [http://www.finances.gouv.qc.ca/documents/Autres/en/AUTEN\\_IncomeTax2017.pdf](http://www.finances.gouv.qc.ca/documents/Autres/en/AUTEN_IncomeTax2017.pdf):

In the post-1982 constitutional era in Canada, only minor constitutional changes took place, most of which concerned social benefits and resulted in transferring more powers to the federal government.<sup>69</sup> One can hypothesize that this transfer of powers from the lower order of government to the highest is done in order to ensure reducing financial discrepancies among provinces and, by extension, guaranteeing comparable standards of living for all Canadian citizens regardless of the province they live in.

Certainly there have been historical reasons for such a re-distribution of powers. They were war-related (World War II) and recession-driven and aimed at reducing poverty. In this context, unemployment insurance became an exclusive federal power and old-age pensions became a concurrent power, with newly added powers in favor of the federal government from 1964 onward.

Another area Canadian federalism excelled was on the issue of unilateral constitutional amendment. The 1945 decision on the part of the federal government to allow for the Constitution to be amended unilaterally (by the federal government) in areas of purely federal concern was modified, following appeals, in 1982 via the adoption of new constitutional amending formulas. These formulas can be read as a sign of political maturity and trust in the federalist model that, although imperfect, have proven to be effective and widely approved. In the context of these formulas the rights of each level of government in the Constitution Amendment process are clearly stipulated.

The principles of mutual respect and reciprocity are taken into consideration by requiring some level of consent from one or more provinces should they be affected by proposed constitutional amendments.<sup>70</sup> We would like to underscore that the

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<sup>69</sup> The said modifications ranged from strengthening Aboriginal rights, changing apportioning number of seats in the House of Commons, making the English and French communities equal in New Brunswick, to allowing secular schools to replace church-based education, replacing denominational school boards with boards organized on linguistic lines, abolishing denominational quotas in Newfoundland religious classes, granting Nunavut representation in the Senate of Canada, etc.

<sup>70</sup> The 1982 Patriation of the Constitution in 1982 included an amending formula, which was adopted in sections 38 to 49 of the 1982 Constitutional Act.

opinion of the Supreme Court decision on the case of Quebec should be read in light of the amending formulas of the Canadian Constitution.<sup>71</sup>

For some these amendments may not have gone far enough in allowing more powers to lower levels of government in changing the Constitution. They could however be interpreted as a good mix, which will allow for all levels of government to work efficiently and without unnecessary complications, delays of possible deadlocks imposed by any province and/or the federal government. In our view, they demonstrate a country's ability to accept the importance of a supra-provincial/supra-regional authority, namely the federal government, as the guarantor of its fundamental rights, freedoms, and *acquis* and as a vehicle for change in the form of trusting the lower levels of governments and their direct representatives to care for their immediate and more particular needs. It also suggests that the Canadian federal system is evolving to meet new challenges and to respond to constantly emerging needs.

Contrary to what applies in the case of Quebec, within the Canadian Confederation, Scotland is one of the four regions that make up the United Kingdom along with England, Wales, and Northern Ireland. Within the unitary sovereign state, which is

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For an amendment to be passed an identical resolution has to be adopted by the House of Commons, the Senate and two thirds or more of the provincial legislative assemblies representing at least 50 percent of the national population.

"This formula, which is outlined in section 38 of the Constitution Act, 1982, is officially referred to as the "general amendment procedure" and is known colloquially as the "7+50 formula". [...] If a constitutional amendment affects only one province, however, only the assent of Parliament and of that province's legislature is required. Seven of the eleven amendments passed so far have been of this nature, four being passed by and for Newfoundland and Labrador, one for New Brunswick, one for Prince Edward Island and one for Quebec. This formula is contained in section 43 of the Constitution Act, 1982." Source: Wikipedia. *Amendments to the Constitution of Govenrment*. Retrieved from:

[https://en.wikipedia.org/wiki/Amendments\\_to\\_the\\_Constitution\\_of\\_Canada#Amendment\\_formula](https://en.wikipedia.org/wiki/Amendments_to_the_Constitution_of_Canada#Amendment_formula).

<sup>71</sup> It should be noted that, on the basis of the fundamental principles of the Canadian federalist model, Canadian Courts can affect change in the division of powers between the federal and provincial governments. Canadian courts interpret the Constitution whenever conflicts arise. Courts are called in to rule on disagreements between the various levels of government over issues pertaining to the division of powers. The Courts' decisions can impact greatly on how the federal system works in Canada. Nowadays, the most significant court in this respect is Supreme Court of Canada.

the United Kingdom, three of the four regions, namely Scotland, Wales and Northern Ireland, have gained some powers through the process of *devolution*.

The powers that have been delegated to the three countries mentioned above are known under the name of 'excepted matters', and they differ from one region to another, whereas the ones that remain under central jurisdiction, namely the prerogative of the UK government, are called 'reserved matters'. The 'reserved matters' are divided into two major categories: general reservations and specific reservations.

The matters falling under general reservations are the Constitution, including the Crown, the Union with England, Northern Ireland and Wales, the UK Parliament, the High Court of Justiciary (for criminal matters), the Court of Session (for matters pertaining to civil law), registration and funding of political parties, international relations (including international development, trade and international regulatory law), Home Civil Service, National defense and matters of treason.

Under the Specific reservations category there are 11 different headings which cover specific areas of social and economic policy reserved to Westminster. These headings, known as 'Heads' are the following (in the order they are presented in the Constitution): A. Financial and economic matters (including, of course, fiscal, economic and monetary policy); B. Home Affairs (including among other things data protection, firearms, elections, national security, emergency powers, etc.); C. Trade and industry (including business law, competition, imports & exports, telecommunications, postal services, etc.); D. Energy (all sources of energy natural or others, i.e. nuclear); E. Transport; F. Social Security (pensions & child support); G. Regulation of the professions (especially healthcare professionals, solicitors, auditors, etc.); H. Employment (including the protection of workers); J. Health and Medicine (human genetics, etc.); K. Media and Culture (BBC, etc.); L. Miscellaneous (from judicial salaries to control of weapons of mass destruction and outer space policy and research).

Finally, The legislative power, that is, the power to make laws that apply to all four regions, is reserved to the UK Parliament. However, it is the very principle of devolution that allows regional parliaments, such as the Scottish one to approve laws, i.e. to legislate on matter that pertain to issues of a more local interest. Since 1998, through several Acts of Parliament by the UK Parliament, the Scottish Parliament gained authority and power to introduce new laws on a wider range of issues. These are the devolved matters described above. But, as devolution does not mean independence, Scotland is still part of the United Kingdom, which means that Westminster has ultimate power. The UK Parliament retains power to legislate on any matter, including devolved ones, but will not do that without the consent of the Scottish Parliament. Until now, there have been no instances whereby the UK Parliament had knowingly legislated on devolved matters since devolution without the express consent of the Scottish Parliament.

The devolution of powers to Scotland is described by and defined in three different Acts: the Scotland Act of 1998, the Scotland Act of 2012 as well as the Scotland Act of 2016. The 1998 Act was considered to be the most important piece of legislation to have been passed in UK since the European Community Act of 1972. The 1998 Act was introduced by the Labour Party following the 1997 referendum. It provides for the creation of a Scottish Parliament though reaffirming Westminster's absolute Parliamentary sovereignty over Scotland. It also introduces the creation of an executive power, most commonly known as the Scottish Government. The Act defines, among other things, the scope of the legislative power of the Scottish Parliament by means of statutes and clauses that are not amenable to amendments as well as all the rights 'reserved' to the UK Parliament.

One of the provisions of the said Act relates to the powers delegated to the Secretary of State for Scotland. In the spirit and letter of the Act, the Secretary has the power to instruct the Scottish government not to make decisions that could run contrary to international treaties and their subsequent obligations and, inversely, to act, if needs be, in such a way as to ensure compliance with international obligations.

One of the most important aspects of this Act is dispute resolution over competencies falling under the legislative and the executive authority of the Scottish system. The ultimate instance of appeal is the Supreme of the United Kingdom. Most importantly, however, the Act makes provisions for future adjustments of the powers vested in the Scottish Executive and the Scottish Parliament conditional to an agreement and by means of an Order in Council.

On the basis of the 1998 Act, all powers that do not fall under the 'reserved matter' category are devolved to Scotland. These powers include the areas of agriculture, education, the environment, health, local government and justice. The 2012 Act, which received Royal ascent on May 1<sup>st</sup>, 2012, namely before the 2012 Edinburgh Agreement, was considered a victory of the Scottish cause, since it expanded, be it marginally, the powers devolved to Scotland. Whereas direct taxation remains a British prerogative, the Scottish government is now able to raise or lower taxes by 10p in the pound. Should a change like that be introduced, it should apply equally to all taxation brackets. At the same time, Scotland now as a limited power with regards to indirect taxation, namely stamps duty, or property tax, as in the case of landfill tax. But the most important power delegated in Scotland is the latter's ability to borrow money, if only for an amount that cannot exceed slightly over 2 billion pounds per year.

With the Scotland Act of 2016, Scotland managed to increase its powers in some fields pertaining to the following areas: fiscal policy<sup>72</sup>, transportation, employment,

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<sup>72</sup> As far as fiscal policy is concerned, it is important to note that both parties in the negotiations spent a whole year debating and negotiations Scottish fiscal powers. This is because, under the new act, Scotland was to receive part of the VAT revenues as well as income taxes, generated within the Scottish territory. For this reason the block grant, also known as Barnett formula, namely a mechanism created by the UK Treasury to adjust, automatically, money allocated to Scotland, Wales and Northern Ireland to reflect changes in expenditures allocated to public services in England, England and Wales or Great Britain, had to be re-negotiated to reflect these new sources of revenues given that in 2013-14, alone, the said formula applied to about 82per cent of the total budget approved by the Scottish Parliament. In the context of these negotiations, the Scottish Government proposed any future adjustment of the 'block grant' be indexed, i.e. calculated on the 'per capita index' given that the Scottish economy was not progressing as fast as the UK average.

welfare, social policy, and housing<sup>73</sup>. One innovative change found in the Scotland Act of 2016 is the recognition of the Scottish Parliament and Scottish Government as permanent constitutional arrangements. This means that none of them can be abolished unless a decisions stemming from a referendum stipulates so.<sup>74</sup>

Despite gradual changes toward greater degree of devolution, it is clear that Scotland enjoys far less autonomy than Quebec. This explains why Scots keep insisting in considering the option of another referendum to break-free from the UK. These claims became more all the more pressing in the aftermath of the June 2016 UK Referendum to leave the EU. The 'Leave' answer prevailed by 52 per cent of the votes. At the same time in Scotland, the electorate was overwhelmingly voting in favor of 'Remaining' within the European Union (62per cent of registered votes).

Following the result of the said referendum, the Scottish Government published a draft bill to initiate procedures for a second Scottish independence referendum. The draft bill received legislative consent. For such a referendum to be legally binding it would have to receive the approval of the UK Parliament. But on May 16, 2017 Theresa May said it was not appropriate time for such a discussion, when the UK needed to present a united front instead of division. After the 2017 UK National election, during which the SNP remained in the first choice of the Scots but lost considerable part of its power to the Conservatives, Nicola Sturgeon decided to postpone the discussion over at least autumn 2018, on the premise that the outcome of Brexit negotiations would become clearer.

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<sup>73</sup> In the framework of the categories mentioned herein, Scotland was given the right to cash 50 per cent of the VAT raised in Scotland, to control some taxes, such as the Air Passenger Duty, to set income tax rates and brackets on the income coming from non-saving and non-dividend sources. As far as the other categories were concerned, Scotland got legislative control over road signs, speed limits, rail franchising, etc. Important powers were devolved in the air of welfare and housing, disability allowance, carers' allowance, attendance allowance and other social policies. Finally a major step was made toward devolving the abortion law from the 'reserved matter' to the 'excepted matter' jurisdiction realm.

<sup>74</sup> Section 63A of the Amended Scotland Act 1998.

Brexit triggered a series of political and legal actions on the part of the Scottish Government, given that the latter is adamant to remain within the European family after UK leaves the Union. The Sturgeon administration expressed its willingness to establish links with the European Union on the model of the EFTA (European Free Trade Association) and the European Economic Area (EEA).

From a constitutional point of view, the compliance with the European Law clause, pertaining to any legislation in policy areas devolved to Scotland could mean that the UK could not leave the European Union unless such an obligation was removed from the Constitution. Some analysts considered this to be a possible solution to Scotland's search for a legal means to stop UK's withdrawal from the European Union. However, such a 'veto', can be overridden by UK Parliament because it is founded on parliamentary convention and not on constitutional rights. In UK's unitary form of government/regional state, it is the central's government prerogative to ask devolved government/parliaments to disregard the observance of EU law and not the latter's option to block British Parliament's decisions. This was equally confirmed by a Supreme Court decision, which stated that devolved governments cannot veto in that matter.

The analysis provided above clearly demonstrated two cases that are very different in their current search for independence, or lack thereof. It was suggested that, in Quebec, public opinion seems to be more at ease with the current status quo, mainly because the federated state is a factor of stability and prosperity. In Scotland, on the other hand, a faction of Scottish politicians seems to pursue dynamically the independence card, despite public polls, which show that the public opinion remains divided on the subject and rather reluctant to separate from the UK under circumstances that are extremely unclear and fluid. This is particularly true in the case of Brexit, especially since negotiations between the UK and the EU are proven to be more complicated and more time-consuming than originally expected. In the



face of uncertainty, it is believed that a referendum for independence would complicate matter further.<sup>75</sup>

On the European Union camp, it is clear that secessionist questions are not favored, regardless of the conditions that give rise to them. We are currently going through a post-cold-war phase of the European history, where regional, national or ethnic claims are dealt with more *sang froid* and less emotional load than in the previous decades. Instead, other matters come to the forefront and concern the discrepancies between the sluggish 'South' and the more prospering 'North'. Massive migratory flows, as a result of the Syrian War, the world on terror, and economic suffocation in the countries of the African Continent, change the list of EU immediate priorities.

The Catalan referendum—held on Sunday October 1<sup>st</sup>, 2017 and violently suppressed by the Spanish government, which refused to recognize not only its result but the fact that the referendum ever took place—is suggestive of how some EU countries envision nation-states (especially regional ones) within the European Union. It should be note, all the same, that the Spanish Government's attitude vis-à-vis the said referendum was in line with Spanish Constitutional Court's decision to accept the request put forth by the Spanish Government to suspend the one of the two laws approved by the secessionist majority a week before the referendum.

Contrary to Quebec, who has been financially weaker than Ontario, Alberta and British Columbia, but still more robust than other Canadian provinces, Catalonia and Scotland are among the most prosperous regions of the countries they belong into. This is why Catalonia, as a counter-attack to the Spanish central government implementation of the Constitutional Court's decision, decided to suspend weekly transfers to the Spanish Treasury financial accounts, a measure that was established as a type of 'an insurance policy' on the part of the central government, which wanted to ensure that money public money were not used to finance secession

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<sup>75</sup> On this topic, see also Closa, C. (2017). *Secession from a Member State and Withdrawal from the European Union*. Cambridge: Cambridge University Press, especially pp. 1-11 & 48-68.

campaigns. In response to the Catalan action, the Spanish Government immediately proceeded with taking over control of most of Catalonia's invoice payments.

Claiming, however, independence on the premise that such entities cannot be forever Spain's or UK's "contributors" is hardly a valid reason from legal point of view. In the same vein, their financial robustness is not sufficient a reason to ensure that such entities will be able to prosper independently.

These and many other issues bring to the forth the following question: Could a more decentralized form of federal governance be a future alternative to secessionist claims and subsequent political upheaval? And if yes, what about Canada, which is already a federal state and which experimented with various degree of federalism (from a more centralized to a more decentralized and vice-versa)?

It is our view that, beyond promoting any federalist or other model, a plausible approach to dealing with the core problem of secessions and independence insurgences, everywhere in the world, is to acknowledge 'evolutionary' facts that are neither North-American- nor European-specific. More specifically, ethnic nations are more of a chimera than a reality. Although racial purity never existed, today's ability to travel and to do business at a global level, with the help of immense technological advancements, signals the death of the illusion of 'ethnic states'. New states or political formations are multi-ethnic, pluri-linguistic, and pluri-cultural by nature. Consequently, constitutions should reflect these new forms of human associations.

If states and/or other political formations raise to a maturity level sufficient enough to acknowledge as Haljan says that "[...] a constitution is [in itself] that institution by which we identify, articulate and apply the commitments representative of our common-holding as association (2014, p. 81).", then there is hope that substantiated independence claims can be satisfied and all members of the said 'association' can feel free and safe enough to accomplish their commonly defined goals and aspirations. This translates into putting faith into the capacity of the constitutional law itself. The latter presupposes that peoples, via their representatives,

demonstrate sufficient maturity in themselves to mobilize the possibilities offered to them by their respective constitutions.

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## ANNEX

Herein is the text of the Bill in its integrity:

**WHEREAS the Supreme Court of Canada has confirmed that there is no right, under international law or under the Constitution of Canada, for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally;**

**WHEREAS any proposal relating to the break-up of a democratic state is a matter of the utmost gravity and is of fundamental importance to all of its citizens;**

**WHEREAS the government of any province of Canada is entitled to consult its population by referendum on any issue and is entitled to formulate the wording of its referendum question;**

**WHEREAS the Supreme Court of Canada has determined that the result of a referendum on the secession of a province from Canada must be free of ambiguity both in terms of the question asked and in terms of the support it achieves if that result is to be taken as an expression of the democratic will that would give rise to an obligation to enter into negotiations that might lead to secession;**

**WHEREAS the Supreme Court of Canada has stated that democracy means more than simple majority rule, that a clear majority in favour of secession would be required to create an obligation to negotiate secession, and that a qualitative evaluation is required to determine whether a clear majority in favour of secession exists in the circumstances;**

**WHEREAS the Supreme Court of Canada has confirmed that, in Canada, the secession of a province, to be lawful, would require an amendment to the Constitution of Canada, that such an amendment would perforce require negotiations in relation to secession involving at least the governments of all of the provinces and the Government of Canada, and that those negotiations would be governed by the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities;**

**WHEREAS, in light of the finding by the Supreme Court of Canada that it would be for elected representatives to determine what constitutes a clear question and what constitutes a clear majority in a referendum held in a province on secession, the House of Commons, as the only political institution elected to represent all Canadians, has an important role in identifying what constitutes a clear question and a clear majority sufficient for the Government of Canada to enter into negotiations in relation to the secession of a province from Canada;**

**AND WHEREAS it is incumbent on the Government of Canada not to enter into negotiations that might lead to the secession of a province from Canada, and that could consequently entail the termination of citizenship and other rights that Canadian citizens resident in the province enjoy as full participants in Canada, unless the population of that province has clearly expressed its democratic will that the province secede from Canada;**

**NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:**

House of Commons to consider question

1. (1) The House of Commons shall, within thirty days after the government of a province tables in its legislative assembly or otherwise **officially releases the question that it intends to submit to its voters in a referendum** relating to the proposed secession of the province from Canada, consider the question and, by resolution, set out its determination on whether the question is clear.

Extension of time

(2) Where the thirty days referred to in subsection (1) occur, in whole or in part, during a general election of members to serve in the House of Commons, the thirty days shall be extended by an



additional forty days.

#### Considerations

(3) In considering **the clarity of a referendum question**, the House of Commons shall consider whether **the question would result in a clear expression of the will of the population of a province on whether the province should cease to be part of Canada and become an independent state.**

Where no clear expression of will

(4) For the purpose of subsection (3), a clear expression of the will of the population of a province that the province cease to be part of Canada could not result from

(a) **a referendum question that merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or**

(b) **a referendum question that envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada.**

Other views to be considered

(5) In considering **the clarity of a referendum question**, the House of Commons shall take into account the views **of all political parties represented in the legislative assembly of the province** whose government is proposing the referendum on secession, **any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government is proposing the referendum on secession, and any other views it considers to be relevant.**

No negotiations if question not clear

(6) **The Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada if the House of Commons determines, pursuant to this section, that a referendum question is not clear and, for that reason, would not result in a clear expression of the will of the population of that province on whether the province should cease to be part of Canada.**

House of Commons to consider whether there is a clear will to secede

2. (1) Where the government of a province, following a referendum relating to the secession of the province from Canada, seeks to enter into negotiations on the terms on which that province might cease to be part of Canada, the House of Commons shall, except where it has determined pursuant to section 1 that a referendum question is not clear, consider and, by resolution, set out its determination on whether, in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.

Factors for House of Commons to take into account

(2) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account

(a) **the size of the majority of valid votes cast in favour of the secessionist option;**

(b) **the percentage of eligible voters voting in the referendum; and**

(c) **any other matters or circumstances it considers to be relevant.**

Other views to be considered

(3) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account the views of all political parties represented in the legislative assembly of the province whose government proposed the referendum on secession, any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any

formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government proposed the referendum on secession, and any other views it considers to be relevant.

#### Constitutional amendments

3. (1) **It is recognized that there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally and that, therefore, an amendment to the Constitution of Canada would be required for any province to secede from Canada, which in turn would require negotiations involving at least the governments of all of the provinces and the Government of Canada.**

#### Limitation

(2) **No Minister of the Crown shall propose a constitutional amendment to effect the secession of a province from Canada unless the Government of Canada has addressed, in its negotiations, the terms of secession that are relevant in the circumstances, including the division of assets and liabilities, any changes to the borders of the province, the rights, interests and territorial claims of the Aboriginal peoples of Canada, and the protection of minority rights.**

Source: <http://www.canadianlawsite.ca/clarity-act.htm>

Parts in bold are highlighted by us.