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Sumário:

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Resumen:

FOR OVER 500 DAYS FROM THE REFERÈNDUM D'AUTODETERMINACIÓ DE CATALUNYA: WHAT SCENARIOS TO EXPECT AT THE END OF THE PRECARIOUS "CALM AFTER THE STORM"?

AD OLTRE 500 GIORNI DAL REFERÈNDUM D'AUTODETERMINACIÓ DE CATALUNYA: QUALI SCENARI ASPETTARSI AL TERMINE DELLA PRECARIA "QUIETE DOPO LA TEMPESTA"?

Andrea Previato[364]

Abstract: Relations between Catalonia and Spain in recent years have been characterized by a succession of accusations, clashes and constitutional fractures. The culmination of this institutional conflict, which culminated with the unilateral declaration of Catalan independence on 27 October 2017, determined for the first time in the recent Spanish constitutional history the application of the art. 155 C.E., as well as the call for new general elections in Catalonia. Today this conflict, although the tones have subsided, is still unresolved. Also in relation to the establishment of a new parliamentary majority in the Spanish Parliament, this essay aims to indicate possible and hypothetical solutions to the question, not without first addressing a brief report on the main recent events of the Catalan secessionist project.

Keywords: secession; right to decide; right to self-determination; referendum; federalism.

Sommario: Le relazioni tra Catalogna e Spagna negli ultimi anni sono state caratterizzate da una serie di accuse, scontri e fratture costituzionali. Il culmine di questo conflitto istituzionale, culminato con la dichiarazione unilaterale dell'indipendenza catalana del 27 ottobre 2017, ha determinato per la prima volta nella recente storia costituzionale spagnola l'applicazione dell'arte. 155 E.V., nonché la richiesta di nuove elezioni generali in Catalogna. Oggi questo conflitto, sebbene i toni si siano attenuati, è ancora irrisolto. Sempre in relazione all'istituzione di una nuova maggioranza parlamentare nel parlamento spagnolo, questo saggio mira a indicare possibili e ipotetiche soluzioni alla domanda, non senza prima affrontare un breve rapporto sugli eventi più recenti del progetto secessionista catalano.

Parole chiave: secessione; diritto di decidere; diritto all'autodeterminazione; referendum; il federalismo.

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1. INTRODUCTION

From October 2016 until today there remains in Europe a question that, although not monopolizing the media attention as some time ago, is still far from a concrete and definitive solution: that is, the Catalan political-institutional crisis.

Catalonia, renowned for being one of the driving regions of Europe, is currently going through a crucial historical moment, to whose outcome, and this is a certain fact, nothing will ever be the same again. The political-institutional conflict, with important implications also social, which contrasted the former Catalan government, personified by the former President Puidgemont (former leader of the PDeCAT party), and the Spanish government, moreover supported by a strong parliamentary majority of different political extradition , reached a level of clash and hostility such as to come about, even without an official recognition, that which until a few years ago appeared only a mere utopia: that is, the creation of an independent and sovereign Catalan State. A dream, that of a free, sovereign and independent Catalonia, which, however, as it is right to reiterate right now, has remained so.

The facts that have followed each other perpetually, enriched from month to month by continuous twists and turns, have been there to witness a reality that is in some ways surreal and aberrant, an inevitable consequence of an absolute and constant lack of dialogue and collaboration between two factions at stake: on the one hand, the Generalitat de Catalunya supported by independent political and civil forces; on the other, the Government of Madrid, embodied in its firmness by the figure of Rajoy, followed by the minority socialist-led government of Pedro Sanchez.

Considering that among the same historians there is no unanimous agreement on the real origins of the independence movement and on its actual reasons, nevertheless 10 July 2010 can rise, at least in the most recent Catalan history, symbolically as the true turning point of the renewed independence project. Beyond the annual celebrations and mass demonstrations on the occasion of the Diada Nacional de Catalunya, the popular procession that took place the day after the famous Tribunal Constitucional sentence (STC 31/2010 of 28 June), allowed the motto "*Som a nació, nosaltres decidim*", screamed and sung by over a million people, passed and resounded for the first time even outside national borders, laying the foundations for

what - according to the hope of the Catalan independentists - would have to become a matter of international law.

2. OVERVIEW OF THE STAGES OF THE CATALAN SECESSIONIST PROCESS[365]

2.A THE AUTONOMIC MODEL AND THE CATALAN STATUTE OF AUTONOMY OF 2006

Before analyzing the reasons underlying both opposing parties, as well as any solutions, at least more satisfactory, than the conflict in question, it is necessary to first introduce a chronological account of the most relevant circumstances that triggered the controversial Catalan referendum of 2016.

Leaving aside the older independent Catalan intentions, among which the one dating back to the early 1930s[366] (in which the then president of the Catalan Generalitat, Lluis Companys[367], had unsuccessfully proclaimed the Catalan State of the Spanish Federal Republic)[368], it is right to develop the present investigation starting from the current form of State in force since 1978, that is the day after the end of the dictatorship of Francisco Franco. Well, from a perspective of territorial distribution of power, the Spanish Constitution has outlined a constitutional framework based on the model of the autonomous state[369].

What is it about?

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[365] For a complete but concise historical account of the main phases of the Catalan question, see A. BOIX PALOP, El conflicto catalán y la crisis constitucional española: una cronología, in El cronista del estado social y democracia de derecho, n. 71-72, 2017, p. 172-181

[366] Please refer to a summary historical account a P. VINYES I ROIG, L'acció de govern del primer ajuntament republicà de Barcelona (1931-1934), in Revista online de Tot Història Associació Cultural, 2017, Available :http://catxipanda.tothistoria.cat/blog/2017/02/10/laccio-de-govern-del-primer-ajuntament-republica-de-barcelona-1931-1934-per-pau-vinyes/

[367] For more information on the figure of Lluís Companys, see J. M. ORTIZ-ARILLA, L'aprenentatge d'un líder: Lluís Companys, periodisme i política (1908-1925), in Comunicació: revista de recerca i d'análisi Vol. 33 (2), 2016, p. 87-111

[368] Please refer to the text of the "PROCLAMACIÓ DE L'ESTAT CATALÀ: GENERALITAT DE CATALUNYA, 6 D'OCTUBRE DE 1934" Available: http://joancomorera.cat/documents/d2.pdf

[369] M. ARAGÓN REYES, La construcción del Estado autonómico, in Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol, n. 54/55, 2016, p. 75-95; od anche E. E. FERNÁNDEZ, El Estado Autonómico en España a los 25 años de Constitución, in Derecho constitucional para el siglo XXI: actas del VIII Congreso Iberoamericano de Derecho Constitucional, 2006, p. 4285-4344; apud J. TUDELA ARANDA, El fracasado éxito del Estado autonómico. Una historia española, Ed. Marcial Pons, 2016, p. 332 – 364; od anche F. BALANGUER CALLEJÓN, Lo Stato autonomico spagnolo: la stagione delle riforme, in Convegno "I cantieri del federalismo in Europa", 2007, p. 1 - 37

This model is implicitly derived on the basis of both the art. 2 which, in addition to the indissoluble unit of the Spanish Nation, also recognizes and guarantees the right from the autonomy of the nationalities and the regions that comprise it, as well as the provisions of Title VIII regarding the territorial organization of Spain. These constitutional provisions favored a constant process of political and institutional decentralization, which was expressed in the recognition of seventeen Comunidades autónomas, each endowed with its own political autonomy[370]. However, despite the undoubted progress towards one of the most advanced decentralized political systems in Europe[371], the circumstance that the Spanish Constitution has de-constitutionalized the form of state, by not fixing the "*autonómico modelo*" textually, has generated uncertainties and clashes with respect to to this model. In fact, the Constitution limited itself to establishing principles and procedures aimed at initiating a process of restructuring of power capable of leading to the adoption of different political models, including the autonomic model[372]. Ultimately, the constitutional design had led to a "State composed of strongly inhomogeneous territorial realities, with the consequent choice of a differentiated regionalization model, characterized by a certain flexibility, as it allows all the Communities to access the superior form of autonomy with the

[370] In order to dispel any doubts about the model of state that would have been adopted after the Constitution came into force, the Autonomic Agreements of July 31, 1981, which had oriented the structure of the State towards a generalization of the formula of the Communities, took over Autonomous and a homogenization of the political autonomy of the latter. Therefore, the autonomous map was approved, the calendar for the elaboration and approval of the Statutes of Autonomy, as well as defined the competences of the Communities, the representative and governing bodies of the same and the calendar of transfer of competences by the State. In these terms E. GIRÓN REGUERA, Esperienza e prospettive del regionalismo in Spagna, p. 1- 20, paper disponibile al seguente link: http://www.crdc.unige.it/docs/articles/Emilia.pdf

[371] A. ROJO SALGADO, La riforma in senso federalista del modello spagnolo delle autonomie. Il miglioramento delle relazioni intergovernative, in Le istituzioni del federalismo, n. 1, 2006, p. 65 - 96

[372] "[The regional model], in reality, if it is a preconstitutional modon, because the generalization of the so-called" provisional "autonomy regimes before the Constitution conditioned on drafting and included on subsequent development. And of a subconstitutional model, because the The Constitution does not create the Autonomous State: it does not constitute the Autonomous Communities, n delimits on territory, nor set its organization, nor determine its powers. These "constitutional" decisions if you have a subsequent moment, by dilating the constituent procedure, by the deeds of three actors: the local representatives, which must manifest on voluntarily, in the Congress of the Deputies, which deserves the so-called "constitutionality block", and the Constitutional Court, to the corresponding role of supreme interpreter of the constitutional text a through its jurisprudence. "In these terms E. FOSSAS ESPADALER, ¿Qué federalismo para España?, in El cronista del estado social y democrático de derecho, n. 73, 2016, p. 26 - 35

aggravated procedure pursuant to art. 151 of the Constitution, and leaves ample room for the statutes in determining individual competences"[373].

Also, the choice to recognize also to Andalusia the possibility of resorting to the procedure of which in the art. 151 although it was not among the historical communities, it represented the first political fracture of the new State of Spain. In fact, also other territorial realities (Valencia, Navarra and Canary Islands) had expressed their preference towards this "*rapid*" constitutive path, nevertheless the central Government then in office (led by UCD), with the support of the Socialist party, even if not to grant them also this procedural method, he had preferred to grant them a particularly high level of competition, through the relative laws for the transfer of functions (Valencia and Canary Islands) and the use of the first additional provision of the EC (Navarra). All this had created an "open system" about the form of Spanish state, with consequent loss of control over the development of territorial planning. And in fact, in relation to the adopted (decentralized or centralized) perspective, this model was marked by a marked flexibility, since the absence of a defined and rigid constitutional framework allowed to satisfy the requests of greater political and regulatory autonomy (a leitmotiv of the historical community), than the centralized ones aimed at a greater national homogenization[374].

[373] S. MANZIN, La Catalogna chiede più soldi (ma non solo). La proposta di modifica dello Statuto catalano e la nuova stagione del regionalismo spagnolo, in Federalismi.it, n. 18/2005, p. 1 – 9
With respect to the methods with which to constitute an autonomous community, in addition to the aggravated procedure pursuant to art. 151, the ordinary procedure pursuant to art. 143. The latter provided that the neighboring provinces and neighboring provinces, with common historical, cultural and economic characteristics, the island territories and the provinces of historical-regional importance "the possibility of accessing self-government by establishing themselves as autonomous communities". This article required the exercise of the initiative for all the Provinces and two thirds of the Municipalities, whose population has the majority from the electoral census of each Province, and after the approval of the regional Statute by organic law. Vice versa, the art. 151 provided for a more onerous procedure, since the Comunidades had to satisfy complex procedural requirements. In the first place the exercise of the initiative for the Provinces and three quarters of the Municipalities was requested, as well as the ratification of the majority of the voters of each province through popular referenda. Secondly, the approval of the regional statute that had to be approved also through a new referendum and for the Parliament by organic law. Well, the historical regions (Catalonia, Basque Country and Galicia) together with Andalusia, had adopted this second modality. The greater distinction between the two proceedings rested on the fact that the art. 151 did not allow to recognize only the minimum competences indicated in the art. 148, as the art. 143, but “prefigured a faster / faster way that allowed the Autonomous Communities to immediately access a higher level of autonomy, they could directly assume all the desired competences, that is, the broadest sphere of competences, exceptions made only for exclusive competences of the State expressly referred to in article 149, paragraph one ”. In these terms E. GIRÓN REGUERA, Esperienza e prospettive, op. cit., p. 3 - 4
[374] J. CAGIAO Y CONDE, Un sassolino nella scarpa. La Catalogna come chiave della crisi del modello territoriale spagnolo, in Federalismi.it, n. 17/2018, p. 1 - 36

It was inevitable, therefore, that the current profound institutional crisis was only a matter of time, since such an unstable and inhomogeneous territorial model could not have lasted much longer.

Entering into the Catalan question, the first strong political tensions followed one after the publication of the Catalan organic law n. 6, of 19 July 2006, with which the Catalan Parliament concluded its project to reform the Catalan Statute of Autonomy, dating back to 1979. This reform[375], approved with 73.23% by the Catalan electoral class through a previous referendum, had made significant changes to the original text. First of all on a symbolic level, since in the preamble Catalonia had defined itself as a "national entity". Also, with respect to a substantial profile, in addition to incorporating in Title I a Charter of Rights as an expression of rights and limits to political autonomy[376], Title IV had re-formulated a new regime of competences in an expansive perspective, obviously all in one favorable perspective for the autonomous demands of the Catalan community. This statutory request of greater autonomy had represented the formal act of translation of the dissatisfaction manifested by some Comunidades autónomas (in the concrete case of Catalonia) compared to an abusive tendency of state legislation to determine principles all too often detailed and punctual, with consequent manipulation unfavorable to the normative space recognized to autonomous realities. Nevertheless, the hopes for a reformed division of competences between the State and the Autonomous Communities oriented towards greater regulatory decentralization, as well as tax, had provoked criticism and dissatisfaction with the Partido popular that raised, as in the case of the Catalan Statute, an appeal of unconstitutionality before the Tribunal Constitucional. A long waiting period elapsed between the promotion of the appeal and the resolution of the Tribunal's sentence, symptomatic of the complexity and delicacy of the question under consideration.

375 M. CARILLO, Il nuovo Statuto di autonomia della Catalogna, in Giurisprudenza costituzionale, fasc. 4, 2007, p. 3297 e ss.

376 “Without a doubt the inclusion in the statutes of declarations of rights constitutes a radical novelty that approximates our system of protection of freedom to the federal models”. In particular, secondo l'autorevole parere di R. CANOSA USERA (The declaration of rights in the new statutes of autonomy, in Theory and Constitutional Reality, n. 20, 2007, p. 61-115), l'incorporazione nella riforma statutaria I gave a dichiarazione dei diritti aveva rappresentato the volontà of the Catalan Generalitat of Avviare a general process of the customary riforma oriented to the graduale configurazione di un Stato federale.

2.B THE SENTENCE N. 31/2010

If with Judgment 31 of June 28, 2010 (hereinafter also STC 31/2010) the Tribunal Constitucional had formally annulled only one article of the Catalan Statute of Autonomy, nevertheless it had declared the unconstitutionality of some precepts contained in other thirteen articles, and prescribed a "constitutionally compliant reading" of twenty-seven other provisions[377]. First of all, among the most significant findings to highlight, we must mention the censorship made in the Preamble about the reference of Catalonia as a "nation", stating that juridically the only "nation" recognized by the Constitution is the unitary Spain considered, as well as established by art. 2 Const. And also with respect to the substantive contents of the Catalan legislative project, the position of the constitutional court had confirmed this conservative line of the "indissoluble unity of the Spanish nation", also validated on the basis of an excessive recourse to the technique of conformal interpretation[378]. In fact, the criticisms raised by the Catalan institutions with respect to the Court's decision, despite their undoubted position of partiality with respect to the case in question, were objectively founded if compared with a previous ruling by the judging body (STC 247/2007), having also the object of the Statute of a Comunidad autónoma: that of the Comunidad Valenciana. In the case in point, the aforementioned sentence (always ascribable to the thematic area of territorial organization and the division of powers), had recognized a precise function of the Statute: that is, that of being able to reshape the areas of state competence in favor of the autonomous Communitiès , provided it is within the legal limits set by the art. 149.1 Cost[379]. In fact, this "attributive" function had favored the development at the constitutional doctrine of a new theory of the

[377] L. ANDREOTTO, La sentenza del Tribunale Costituzionale spagnolo sullo Statuto di autonomia della Catalogna, in Rivista dell'Associazione Italiana dei Costituzionalisti, n. 0/2010, p. 1- 15

[378] E. B. GALLARDO, Titolo VI dello Statuto di Autonomia della Catalogna: Riflessioni sulla sentenza della Corte Costituzionale spagnola del 28 giugno 2010, n. 31, in Innovazione e diritto, 2010, p. 148-149

[379] E. ALBERTÍ ROVIRA, La sentencia 31/2010: valoracion general de su impacto sobre el estatuto y el estado de las autonomías, in Revista catalana de dret públic, 2011, p. 11- 64; od anche J. TORNOS MÁS, La sentencia del Tribunal Constitucional 247/2007 y el sistema constitucional de distribución de competencias entre el estado y las comunidades autónomas, in REAF, n. 7, 2008, p. 79-105

autonomous State, including a greater regulatory room for the Autonomous Communities[380].

However, with the STC 31/2010 the Constitucional Court had justified its decision motivating it on the impossibility for the Statute of autonomy to be able to determine the division of the subjects of state competence with respect to those recognized decentralized. First, it had ruled that state jurisdiction also exists with respect to matters that, in principle, would have been constitutionally assigned to the territorial community's competence where there was some "national interest", in addition to highlighting the state reserve in matters of convocation of referendum consultations"[381]. Secondly, with respect to the disciplines of concurrent competence, he had confirmed the legitimacy of potential and possible state interventions both with respect to the issuing of intrinsically "detailed" standards, and with respect to the continuous exercise of wide regulatory powers, declaring unconstitutional in this regard all those statutory precepts of contrary warning[382].

Well, the doubts and the perplexities raised regarding this sentence[383] had been remarkable, to such point that the Constitucional Court was even accused of having acted with the "función de legislador posítivo". Thus, such image damage was achieved that even today the constitutional court failed to fully redeem.

2.C THE DETERMINING ROLE OF THE CATALAN INDEPENDENT CIVIL SOCIETY: A DOUBLE-EDGED SWORD FOR THE MAJORITY PARTY PDECAT

Therefore, with respect to the controversial sentence of the Tribunal Constitucional which had represented in all respects a setback for the Catalan autonomy instances, the Generalitat of the then president Arturo Màs was at a crossroads. Accept the contents of the ruling, consequently renouncing the far-

[380] G. FERNÁNDEZ FARRERES, Estado Autonómico y Tribunal Constitucional: reflexiones sobre la vinculación del legislador estatutario a la Constitución y a la Jurisprudencia Constitucional**,** Asamblea, in Revista parlamentaria de la Asamblea de Madrid, Nº. Extra 1, 2006, p. 335 e ss.
[381] L. MADDALENO, La proposta di legge catalana sulla competenza in materia di referendum, in ECLI European and Comparative Law Issues, 2014, pag. 6
[382] L. ANDREOTTO, La sentenza del Tribunale Costituzionale, op. cit, p. 1 - 15
[383] C. VIVER I PI-SUNYER, El Tribunal Constitucional¿"sempre, només... i indiscutible"? La Funció Constitucional dels Estatuts en l'àmbit de la distribució de competéncies segons la STC 31/2010**, in** Revista d'estudis autonòmics i federals, n. 12, 2011, p. 363-402

reaching statutory reform projects, as well as starting a process of recomposition of the political and social conflict that in the meantime had been generated with the new central executive, with popular leadership and chaired by Rajoy. Or continue with the reformatory project, enhancing and even supporting that ideal of a sovereign and independent Catalonia, albeit often conceived by the PDeCAT party more as a provocation for greater political autonomy than as a real goal.

It is pointless to question oneself further on which path the Catalan Generalitat has chosen, also and above all in light of the facts of 27 October 2017.

In fact, on this date that already belongs to the history books, the Catalan Parliament will come to approve (with 70 votes in favor, 10 against and 2 blank files) a declaration of independence of Catalonia, thus adhering to those popular demands that on the chimera of a Catalan Republic had occasionally occupied squares and places symbol of the city of Barcelona.

But what were the main reasons that pushed the Catalan institutions to continue to the end with the project of independence, achieving a breach of the constitutional legal order? There is no doubt that the ten-year diffusion of the verb "secessionista" had created an ever stronger bond between the Catalan institutions and that part of civil society favorable to the recognition of a "derecho a decidir", such as to remove from the decision-making circuit any political maneuvering space alternative to secession[384]. And in fact, the majority Catalan political forces, which had founded their own strength also and above all thanks to the awakening of the popular Catalan pride, found themselves therefore forced in some way to translate that secessionist dream evoked several times.

2.D THE STEP FOLLOWING SENTENCE 31/2010: THE POPULAR CONSULTATION ON INDEPENDENCE ON 9 NOVEMBER 2014

In the aftermath of the Catalan early elections of 2012, the new parliamentary majority composed of the *Convergència i Unió* party (predecessor of the PDeCAT party) ve from Esquerra Republicana de Catalunya (ERC) had reached an agreement

[384] The Catalan people, more than on the independence itself, insisted on the legitimate recognition of the c. "Derecho a decider". Please refer to S. FORTI e P. LO CASCIO, Catalunya Calling: La questione catalana, la Spagna e la crisi europea, in Rivista di Studi Mediterranei, n. 3, anno II, 2016, p. 1-7

which had resulted, on 23 January 2013, in a resolution of the Catalan Parliament, called "*Declaration of sovereignty*" and the right to decide of the people of Catalonia, officially aimed at initiating the independence process.

The Catalan institutions had decided in this way to formally resume the path of autonomy, thus unblocking the impasse created following the sentence 31/2010. And indeed, this declaration was characterized by a constant appeal to the concept of "*derecho a decidir*", understood as a necessary precondition for implementing the right to self-determination of peoples[385]. An appeal that had officially decreed the introduction of secessionist intentions within the political program of the Catalan Generalitat. Therefore, from January 23rd 2013 the Catalan political line changed strategy: from the resolutions of greater autonomy fixed with the 2006 Statute it passed to those associated with a sovereign and independent Catalonia.

On the other hand, the reaction of the central Madrid executive, objected to in diametrically opposed positions with respect to secessionist intentions, was not long in coming. By challenging the controversial resolution before the constitutional court, the Madrid executive once again expressed its position of absolute closure about the Catalan issue. A position also shared by the constitutional court itself which, once the appeal was admitted, had ruled for the unconstitutionality of the art. 1 of the Resolution, given the latter's words: "the people of Catalonia have, for reasons of democratic legitimacy, the character of a sovereign political and juridical subject". Also, with respect to the question about the c.d. "*Derecho a decidir*", the Court had indeed offered some openings to the Catalan authorities, although it had specified that this right could never have authorized any referendum question with respect to the secessionist theme. In fact he had specified at the outset that the "*derecho a decidir*" could not be associated with any pretended sovereignty of the Catalan people, given that the latter did not exist within the Spanish constitutional order. However, based on the principles of democracy, pluralism and legality[386], it had equally developed a hypothetical

[385] "In agreement with the democratic will expressed by the majority of the Catalan people, the Parliament of Catalonia begins the process to promote the right of the citizens of Catalonia to collectively decide its political future". The Declaration of sovereignty and the right to decide of the people of Catalonia is available at the following link https://www.vilaweb.cat/noticia/4076902/20130124/dichiarazione-di-sovranita-e-diritto-di-decidere-popolo-della-catalogna.html

[386] M. BARCELÓ I SERRAMALERA, Referendum e secessione. La vicenda della Catalogna, in Federalismi.it, n. 1/2015, p. 1 - 9

constitutionally compliant application of this right, recognizing it as one of the various faculties attributed to the Catalan Parliament. The latter in fact could have presented to the Court a constitutional revision project, with the Spanish Parliament obliged to take into consideration any legitimate constitutional revision proposal promoted by an *autonomous Comunidad*, even if involving the recognition of a possible secessionist referendum[387]. And in fact, it was evident the reference (among other things expressly mentioned in the sentence) to the Canadian experience with respect to the c.d. "Quebec question". In fact, the constitutional court therefore recognized in the context of a constitutional review process, arising from the necessary collaboration between the central Government and the Catalan institutions[388], the only legitimate and effective expedient suitable to balance the secessionist instances with the constitutional principle of indissoluble unity of the Spanish nation.

However, the Catalan Parliament, ignoring the Court's wish to proceed through a legitimate constitutional review process, had adopted a new law, No. 10/2014, relating to the "non-referendum popular consultations and other forms of citizen participation". With it, through which it had unilaterally legitimized the promotion of the instruments of popular participation on the basis of the faculties recognized by the art. 22 of the Statute[389], also specified that they could not assimilate either to the referendums regulated by the Constitution, nor to the consultative referendum governed by the Catalan law n. 4 of 2010, because the conditions were different[390]. First of all, the first difference concerned the electoral class, as the right to vote was also extended to minors under the age of 18 who were at least 16 years old, as well as to legal residents in Catalonia for more than three years even if they were citizens

[387] G. CONTI, La Catalogna tra secessione e Costituzione, Working paper, in Diritticomparati.it, 2017, Available: http://www.diritticomparati.it/la-catalogna-tra-secessione-e-costituzione/

[388] Along the lines of the Quebec case, the Tribunal Constitucional also identified an obligation to negotiate between the interested parties in order to reach a constitutional conciliatory reform of both instances. Please refer to T. DE LA QUADRA-SALCEDO Y FERNÁNDEZ DEL CASTILLO, La obligación de negociar en la opinión del Tribunal Supremo de Canadá de 1998, in El Cronista del Estado Social y Democrático de Derecho, n. 55, 2015, p. 4 - 13

[389] Art. 122 - POPULAR CONSULTATIONS of the Statute of Catalonia: "The Generalitat has exclusive power over the definition of the legal regime, the procedures, the procedures, the implementation and the convocation by the Generalitat itself or by the local authorities, in the context of of their own competences, of surveys, public investigations, participatory assemblies and any other instrument of popular consultation, without prejudice to the provisions of article 149.1 of the Constitution ".

[390] The study of law n. 10/2014, as well as the elements of differentiation of the instruments of public participation with respect to the legal instrument of the consultative referendum, was drafted by the Statutory Guarantee Council (body established with the 2006 Statute) in Opinion No. 19 of 2014

of EU states or third parties; also, secondly, these forms of consultation were characterized only by a mere reconnaissance function aimed at knowing the orientation of citizenship on the themes of public life, and therefore did not operate the limit of "*significant importance*" that art. 92 of the Constitution requires for the promotion of a consultative referendum.

Thus in this context, within the legal framework established by the aforementioned statutory law, the Catalan Generalitat had promoted a non-referendum consultation on 9 November 2014, despite both the constitutional court (on 25 March 2014) and the Spanish Parliament[391] (on 8 April 2014) they had respectively suspended ipso iure any legal effect pursuant to art. 161.2 of the Constitution (and subsequently, with sentence 138/2015 the Court had proceeded to declare its definitive unconstitutionality[392]). In addition, the relative law proposal always promoted by the Generalitat aimed at transferring the competences for the convening of a referendum had also been rejected[393]. This consultation, which in spite of everything had involved over two million Catalan citizens (who had been questioned regarding the issue of independence through the ambiguous formulation of two questions: *¿Quiere que Cataluña se convierta en un Estado?* And, if so, *"Quiere que sea independiente?"* Was therefore characterized by a mere symbolic value, as it was deprived of any legal efficacy by the above-mentioned Tribunal Constitucional pronunciation. In the same way, the overall results of the consultation, in addition to detecting an import presence

391 The Catalan institutions had tried in vain to start some negotiations with the Government of President Rajoy in order to regularize the proposition of a referendum recognized on the basis of the art. 92, which provides exclusive state jurisdiction in relation to the authorization of a referendum convocation. In a second moment, the Catalan Parliament had again tried a new attempt under the pretext of favoring a collaboration with the legislative body of Madrid, presenting a bill concerning the delegation of state competence in referendum matters pursuant to art. 150.2 Const. However, even this last effort had proved vain, given its parliamentary rejection by a wide margin. For further information, see a L. FROSINA, Profili giuridici e aspetti problematici dei referendum di secessione: un'analisi comparata, in Nomos: quadrimestrale di teoria generale, diritto pubblico comparato e storia costituzionale, n. 3/2017, p. 23-24

392 For a complete chronological and substantial analysis of the various rulings of the Tribunal Constitucional with respect to the Catalan issue up to 2016, please refer to A. BAR CENDÓN, El proceso independentista de Cataluña y la doctrina jurisprudencial: una visión sistemática, in Teoría y Realidad Constitucional, n. 37, 2016, p. 187-220

393 Please refer to "Spain: the government rejects the Catalan referendum" press article available at the following link: https: //www.lettera43.it/it/articoli/politica/2014 04/09/spagna-il-governo-boccia -the-referendum-Catalan / 114480 /

in terms of numbers, had shown a strong will adhering to the Catalan independence process, as a percentage higher than 80% was expressed favorably[394].

So what were the consequences that followed the experiment of this consultation?

2.E THE 2015-2017 TWO-YEAR PERIOD

The first immediate effect resulting from the consultation was the entry into the scene of the Fiscalia general, which on 21 November 2014 had presented a complaint against the President of the Generalitat, accusing him of the crimes of serious disobedience, abuse of power, embezzlement and usurpation, in relation to the organization of the participatory process of November 9th. Therefore, the Catalan question had overcome the mere political sphere to break even within the jurisdictional framework.

What did all this cause? Had it suspended, or at least slowed, the course of the Catalan secessionist process? Absolutely not.

And in fact, in response to the accusations made against him, Arturo Más had re-launched the intentions of the "*constitutional clash*" by presenting a new operational plan: the c.d. hoja de ruta. That is, early dissolution of the Catalan Parliament and the calling of new elections, with the presentation of the joint secessionist front in a single list (called *Junt pel sí*), in order to prepare a joint action regarding the process of creation of the State of Catalonia[395].

On 27 September 2015, therefore, new elections were held in which the secessionist parties, as already mentioned, had all gathered in the Junt list for the sake of exclusion, with the exception of the Candidature of Popular Unity (CUP) party. This unified list will triumph with the absolute majority of the seats, without however achieving the one relative to the votes (with Junt for si at 39.9% and the CUP for 8.2%, the secessionist block had reached the overall percentage of 48%), with consequent differences with respect to the results and the wishes deriving from the results of the

[394] L. FROSINA, Dopo la consultazione popolare del 9 novembre (9-N) quali scenari si aprono per il futuro politico della Catalogna?, in Nomos: quadrimestrale di teoria generale, diritto pubblico comparato e storia costituzionale, n.3, 2014, p. 1-15

[395] L. FROSINA, Profili giuridici e aspetti problematici, op. cit, p. 1 - 37

popular consultations of the previous year[396]. At the end of the three months of negotiations, the new parliamentary majority elected Carles Puidgemont, former mayor of the city of Girona, as President of the Generalitat.

Well, in the limited period of time between January 20, 2016, the day of the parliamentary election session of Puidgemont, and October 1, 2017, the historic date on which the controversial referendum on the independence of Catalonia will be implemented, the tensions arising from the institutional conflict Catalan will reach such levels of hostility as to turn - in some cases - into genuine clashes between civil society and the police, almost at the limit of a "civil revolution"[397]. On the political level, in fact, in this time frame both the Catalan institutions and the central constitutional bodies (above all, the Gobierno of Rajoy and the Tribunal Constitucional) will clash on the basis of their respective prerogatives: or, respectively, through the adoption of Resolutions parliamentarians or decrees; as well as, on the other hand, through the promotion of appeals and the resolution of the relative sentences of unconstitutionality[398].

With Resolution 1 / XI "*sobre el inicio del proceso político en Cataluña como consecuencia de los resultados electorales del 27 de septiembre de 2015*", the majority parliamentary groups began to gradually develop an action plan aimed at concretizing the project of a Sovereign and independent Catalonia; nevertheless, the Tribunal Constitucional (with the sentence 259/2015) declared the said Resolution timely unconstitutional, motivating it above all on the principles of the primacy of the Constitution and the Spanish constitutional democratic order. The Catalan Parliament, insensitive to the Tribunal's warnings, subsequently adopted Resolution n. 263 / XI "*For the purposes ratified in the Reporting and Conclusions of the Commission of the Proceso Constituente*" and the n. 306 / XI "Sobre la orientación política general del Gobierno de la Generalidad". With these two Resolutions, the Catalan Parliament regulated the constituent process that was to follow before the favorable outcome of a

[396] Please refer to a complete reconstruction of the voting on September 27th G. FERRAIUOLO, 27 settembre 2015: le elezioni "plebiscitarie" di Catalogna, Federalismi.it, n. 18/2015, p. 1-13

[397] On the evocation of such a phase, however fortunately remote, we refer to the journalistic article of L. ANDRAGHETTI, Catalogna, perché la Spagna rischia la Guerra civile, Available: https://www.lettera43.it/it/articoli/mondo/2017/10/23/catalogna-perche-la-spagna-rischia-la-guerra-civile/214900/

[398] For a complete and exhaustive examination of the Catalan institutional conflict in the two-year period 2015-2017, see L. FROSINA, Profili giuridici e aspetti problematici, op. cit, p. 1 - 37

referendum consultation, also subject to a specific discipline. These Resolutions will also be the subject of two rulings by the Tribunal Constitucional (No. 170/2016, as well as No. 24/2017), in which it reiterated its firm orientation regarding the only legitimate route available to Catalan institutions: namely, that relating to a constitutional review process.

After that, the main events of the last eighteen months take over, probably already known to all given the considerable media coverage they received. It all begins with the June 9 announcement of the Catalan President Puidgemont, who, disregarding any authority about the decisions pronounced by the Tribunal Constitucional, made the celebration of a binding referendum on the independence of Catalonia for next October 1st (2017) official. Then, between 6 and 7 September 2017, the Catalan Parliament approved the "Law on the referendum of binding self-determination for the independence of Catalonia" (Law 19/2017) through which the famous "*derecho a decidir*" was recalled, always in the same terms of prerogative of the Catalan people as recognized as a sovereign political subject. Then, again in the aforementioned days, it ratified the "Law on Transience and the Legal Foundation of the Republic" (L. 20/2017), which should have formed the legal basis in the transition process towards the construction of the independent State of Catalonia. Also, these laws (also renamed as Ley de desconexion) had been joined at the same time by two further decrees (No. 139/2017, and No. 140/2017), as they were aimed at regulating the implementation and organization referendum consultation.

However, it is important to point out that this "regulatory package" undoubtedly not only violated the constitutional judicial framework of the Spanish legal system (as punctually confirmed by the constitutional court with judgments No. 114/2017 and 124/2017), but was also approved in violation of the same Catalan Parliamentary Regulation. In fact, specifically the parliamentary groups of the secessionist front had approved such legislative acts in excessively stringent terms on the basis of the

provisions of art. 83.3 of the Regulation[399], thus avoiding some mandatory phases of the ordinary legislative procedure[400].

2.F 1 OCTOBER 2017 TO 27 OCTOBER 2017: TWENTY-SEVEN BURNING DAYS FOR THE INSTITUTIONS AND THE CATALAN PEOPLE

Nevertheless, albeit in a climate of intense tension due to the recent rulings of the constitutional court evocative of the accusation of "grave attack on the democratic and social rule of law", which from the warnings of the central Government of Madrid of application of the art. 155 of the Constitution, on October 1 held the referendum on the independence of Catalonia[401].

A consultation took place in a context dominated by uncertainties, disorders, seizures and searches of electoral seats, often also generated in clashes between the police and the Catalan civil society. The seizure of the ballot boxes operated by the Civil Guard on judicial orders, as well as the decision of the Generalitat a few hours after the consultation to agree on the possibility of voting in any electoral college (the so-called universal electoral census), in addition to the total absence of any control of regularity concerning the correct conduct of the referendum, represented a complex of circumstances symptomatic of a situation that is, to say the least, unreal in a state of law such as the Spanish one. There was no doubt that all these and other anomalies, besides the absence of any respect for the constitutional juridical order, had compromised the real value of the referendum results, which had decreed the victory of the independence front with 90% of the votes (whose participation stood at around 43%[402]). Nevertheless, the Generalitat triumphantly issued the aforementioned data,

[399] Art. 83.3 of the Catalan Parliament's Regulation:
"The agenda of the Plenary may be altered if it agrees, at the proposal of the president or at the request of two parliamentary groups or a fifth of the members of the Parliament, as well as when it is of obligation in compliance with a law. If a matter must be included, it must have complied with the regulatory procedures that allow it, unless explicitly agreed in the opposite direction, adopted by an absolute majority ".

[400] For a complete examination of the procedure followed by the parliamentary groups of the independence front, see L. FROSINA, Profili giuridici e aspetti problematici, op. cit, p. 1 - 37

[401] L. FROSINA, La deriva della Catalogna verso la secessione unilaterale e l'applicazione dell'art. 155 Cost., in Nomos: le attualità nel diritto, n. 3/2017, p. 1 - 20

[402] For an official estimate of the referendum outcomes, see the following link of the Generalitat de Catalunya:
https://web.archive.org/web/20171006212613/http://www.govern.cat/pres_gov/govern/ca/monografics/303541 /govern-trasllada-resultats-definitius-referendum-l1-doctubre-parlament-catalunya.html

and, on October 27, 2017, the Catalan Parliament deliberated the unilateral declaration of independence[403], proclaiming the birth of the Catalan Republic (with the entry into force of Law No. 20/2017)[404].

2.G FROM THE APPLICATION OF THE ART. 155 CONST. TO THE LAST AND CURRENT PHASE OF THE CATALAN QUESTION

With respect to such acts of insubordination and breaking the constitutional order, what was the reaction of the central government led by Rajoy?

First of all, it is necessary to specify from now on that the line of action undertaken by the Madrid executive, which will end with the application of the art. 155 Const.[405], Had been supported with a broad consensus of the Courts Generales, with consequent support and co-responsibility also of the parliamentary opposition forces.

The unprecedented application of art. 155 Const.[406], What and what effects would it have derived from it?[407]

Well, this article would legitimize (provided with the absolute majority approval of the Senate) a direct and forced intervention by the central executive, if and if an autonomous Community should with its own actions damage or prejudice the general

[403] For a reading of the Catalan Declaration of Independence, please refer to the following link: https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=34928&dpath=document&dfile=13102017071536.pdf&content=Dichiiarazione%2Bdi%2Bindipendenza%2Bdella%2BCatalogna%2B% 2D% 2Bstati% 2Beuropei% 2B% 2D% 2Bdocumentazione% 2B% 2D% 2B

[404] T. DE LA QUADRA-SALCEDO Y FERNÁNDEZ DEL CASTILLO, Un nuovo escenario, in El Cronista del Estado Social y Democratico de Derecho, n. 71 – 72, 2018, p. 98 - 101

[405] L. FERRARO, Un nuovo governo autonomico e la fine della coercizione statale in Cataluña: un consuntivo sull'art.155 della Costituzione spagnola, Federalismi.it, n. 17/2018, p. 1-29

[406] Article 155 of the Spanish Constitution

"1. If the Autonomous Community does not comply with the obligations imposed by the Constitution or other laws, or behaves in such a way as to seriously undermine the general interests of Spain, the Government, upon request to the President of the Autonomous Community and, where this is disregarded with the approval by an absolute majority of the Senate, it may take the necessary measures to oblige it to comply with these obligations or to protect those interests.

2. The Government may give instructions to all the Authorities of the Autonomous Communities for the execution of the measures provided for in the preceding paragraph ".

[407] The compatibility of the effects arising from the application of the art. 155 with the democratic principle had previously been the object, albeit transversally, of some rulings of the Tribunal Constitucional with the Sent. n. 215/2014 and the most remote n. 49/1888 and n. 27/1987. With the first of these sentences recalled, the Tribunal Constitucional proceeded to define the article in question as one of the constitutional precepts closely related to the fundamental principle of unity and supremacy of the interests of the Spanish nation; while with the other two sentences he defined it as an extraordinary means of coercion applicable in the context of exceptional situations of considerable gravity.

interest of the State[408]. And in fact, with regard to the Catalan case, the central government, considering the conditions for its application to exist, had on the basis of the provisions of the article adopted a series of decrees: that is, the dismissal of the members of the Catalan Generalitat and their temporary replacement with representatives of the central government; the closure of countless Catalan government offices and offices; the dissolution of the Catalan Parliament, as well as the convening of new elections on December 21, 2017.

Also, alongside these extraordinary political decisions, from the judicial point of view the competent authorities had issued orders for the provision of precautionary detention against Jordi Sánchez and Jordi Cuixart (on charges of sedition and rebellion) respect the two leaders of the most important civilian independence associations). Later, other and further measures restricting personal freedom were also added to other relevant figures of the deported Catalan Generalitat (to whom, in addition to the sedition charge, the crime of rebellion as well as the misappropriation of public funds in relation to the organization of the referendum).

In the elections of 21 December 2017, in addition to the unexpected affirmation of the centrist anti-independence Party Ciudadanos (first political force of the Catalan Parliament with 25.35% of the votes), the independent political bloc (ie, JuntsxCat, Erc and CUP), it retained the absolute majority of parliamentary seats, obtaining 70 seats out of the total 135 (with an overall 47.5% of votes). Also, for the first time the Popular Party, given a paltry 4% of votes, could not achieve a sufficient number of votes for the formation of a parliamentary group. Therefore, the action strategy adopted by the central government of Madrid suffered a clear rejection by the Catalan electorate. In fact, not only the secessionist parliamentary block had maintained an absolute majority, but all those opposed to the demands of self-determination had preferred nevertheless to support the political line of Ciudadanos.

Finally, with regard to the year 2018, some critical issues had raised the question concerning the election of the new President of the Catalan Generalitat, as

[408] With respect to the relationship between the general state interest and the application of the art. 155 Cost. Please refer to D. CAMONI, La coercizione statale nei confronti delle Comunidades autónomas: spunti di riflessione a partire dalla “questione catalana”, in Rivista di Diritto pubblico comparato ed europeo, n. 3, 2018, p. 529-558**;** apoud T. DE LA QUADRA-SALCEDO Y FERNÁNDEZ DEL CASTILLO, Reflexiones sobre el artículo 155 de la constitucion y la proteccion del interés general de españa, in Revista española de derecho administrativo, n. 191, 2018, p. 25 - 76

the secessionist parliamentary groups had continued to insist on the remote designation of the former deposed President Puidgemont (still in exile in Belgium). However, this possibility revealed some complexities and contradictions in terms of constitutional legality[409]. In fact, on the one hand supporters of the secessionist block had hypothesized the legitimacy of the investiture of Puidgemont basing it on the circumstance of a telematic presence or by proxy (as neither the Statute nor the Regulation explicitly require the requirement of "physical presence"); nevertheless, on the other hand, the Madrid executive again threatened a (re)activation of the art. 155 Cost. Also, confirming the impossibility of proceeding through a distance investiture, the Tribunal Constitucional (with order n. 492/2018[410]) had specified that for the purposes of the legitimate designation of the Catalan President the “physical presence” of the candidate is a must. Therefore, subtracting all doubts about the procedural conditions for the presidential nomination, on 10 May 2018 Puidgemont himself, renouncing his own investiture[411], proposed as a new candidate the deputy Quim Torra. And he, in the parliamentary session of May 14, 2018, became the new President of the Catalan Generalitat.

An unexpected event, above all for the resistance to the accusations of corruption that surrounded the Partido Popular for years, was consummated on 1 June 2018. On that date Mariano Rajoy was in fact discouraged by the Spanish Parliament on the basis of a constructive no-confidence motion[412] (first motion constructive mistrust approved by the entry into force of the 1978 Constitution[413]) presented by the secretary of the Socialist Party, Pedro Sánchez, who was appointed as the new prime minister of the Madrid executive[414].

[409] M. CECILI, Spagna: L’investitura impossibile del Presidente della Generalitat catalana. Cronaca di una crisi istituzionale, in Forumcostituzionale.it, 2018, p. 1-8

[410] For a complete reading of the ordinance, please refer to the following link: https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2018_005/2018-492ATC.pdf

[411] For a reading of the letter sent by Puidgemont with which he renounced the new appointment as President of the Generalitat in favor of the designation of Quim Torra, please refer to the following link: https://www.lavanguardia.com/politica/20180510/443477797170/puigdemont- elige-quim-torra-candidate-presidencia-generalitat.html

[412] F. LONGO, La sfiducia costruttiva in Spagna: regole e regolarità nella forma di governo parlamentare, a partire dall’avvicendamento Rajoy-Sánchez, in DPCEonline, n. 4/2018, p. 1267 – 1273; oppure anche C. VIDAL PRADO, Sfiducia costruttiva in Spagna?, in DPCEonline, n. 4/2018, p. 1263 - 1266

[413] R. BLANCO VALDÉS, Spagna: La fine della stabilità? Cambiamenti del sistema partitico e della forma di governo, in Diritto pubblico comparato ed europeo, n. 2, 2018, p. 349-378

[414] L. FROSINA, Da Rajoy a Sánchez. La rivalutazione dell’isituto della sfiducia costruttiva nella forma di governo parlamentare spagnola, in Nomos: le attualità nel diritto, n. 2/2018, p. 1- 21

At first, also based on some openings by the new President Sánchez about the unresolved Catalan issue (among which, the hypothetical possibility of recognizing an independence referendum through a previous constitutional revision[415]), it seemed that a new climate could starting between the Catalan and Madrid institutions. However, also in relation to the setback suffered by the Socialist Party in the recent Andalusian elections (among whose causes of the failure, some had also advanced an attitude deemed too compliant with the demands of the Catalan parties[416]), the tones between the institutions involved had they resumed their ignition. At this point, that on February 13, 2019 the parliamentary members of the Catalan independence front subtracted their external support to the Socialist minority government during the approval procedure of the Budget Law[417], thus determining the resignation of the latter and the convocation of new national elections (the third in less than two years) to 28 April 2019.

3. THE CATALAN SECESSIONIST INSTANCES: IF AND HOW MUCH THEY ARE OBJECTIVELY LEGITIMATE

"A language, a people, a flag and, consequently, a nation"[418]. This motto that the separatists are used to invoke is enough to translate into law what for decades had always been a mere ideal. And indeed the derecho a decidir, so dear to the secessionist Catalan political forces, has represented just this: that is, the juridical claim through which to realize the coveted dream of a free, sovereign and independent Catalonia[419].

The problems related to the validity or otherwise of the recognition of such a right towards the Catalan people, presuppose the resolution of certain questions: 1.

[415] For these and other reflections released by President Sánchez, refer to the following press article "Pedro Sánchez: Solución también holds this pasar por el referéndum de la sociedad Catalana" available at the link: https://www.eleconomista.es/politica/ noticias / 9601036/12/18 / Pedro-Sanchez-La-solucion-tambien-holding-que-pasar-por-el-referendum-de-la-sociedad-catalana.html

[416] The elections in Andalusia commented on by the Spanish press, a news article in Internazionale.it, available at the link: https://www.internazionale.it/bloc-notes/2018/12/03/elezioni-andalusia-stampa-spagnola

[417] The Spanish parliament has rejected the budget law of the Sánchez government, a journalistic article in IlPost.it available at the link: https://www.ilpost.it/2019/02/13/sanchez-legge-bilancio-elzioni-spagna/

[418] Well, for the supporters of the national self-determination theory these elements would be sufficient for the purposes of recognition and exercise of the c.d. "Right of secession". For further information, see C. MARGIOTTA, L'ultimo diritto: Profili storici e teorici della secessione, Il Mulino, 2005, p. 211-213

[419] F. BILANCIA, Il "derecho a decidir" catalano nel quadro della democrazia costituzionale, in Le istituzioni del federalismo, 2014, p. 985-997

What determines the c.d. do I derive from it? On what legal basis did the Catalan institutions consider satisfying the legitimate implementation of this right? And finally, is the Catalan question an exclusively internal prerogative, or has it also justified an international dimension?

In response to the first of the above questions, the notion "*derecho a decidir*" is traditionally associated with the principle of self-determination, since the contents and effects expressed by both rights would appear to be almost the same[420]. Therefore, for that matter the Catalan question, it was preferred to adopt the first of the two terminologies referred[421] to to evoke an apparently new concept, devoid of that authoritative juridical, cultural and symbolic tradition that personifies the right of self-determination. Nevertheless, while it is true that the final results would be the same; on the other hand the derecho to decidir could represent itself as a specification of self-determination[422], since, unlike the latter, it would guarantee a secession process even where there is no people ruled by a colonial force or forced to suffer ethnic discrimination -cultural[423]. Therefore, a hypothetical secession such as the possibly Catalan one would develop into a political and juridical framework, as well as a social one, diversified with respect to what occurred in Kosovo[424], as it would eventually

[420] According to some, indeed, this assonance would not represent a juridically correct qualification, since, while the concept of self-determination is preceded by a collective decision, vice versa, the right to decide would be more related to the notion of sovereignty, and therefore concerning all those issues that fall within the scope of national sovereignty. Therefore, according to the author's judgment the real core of the problem would not be so much tied to the effective recognition of the c.d. "Derecho a decidir", as it is constitutionally recognized that a Comunidad autónoma can express its opinion on questions related to national sovereignty, if anything it is doubtful - indeed unconstitutional according to the opinion expressed several times by the Tribunal Constitucional- whether it can recognize Catalonia as a political subject with decision-making power, with sovereignty. Please refer to A. ABAT I NINET, Il futuro politico della Catalogna, in Federalismi.it., n. 22/2014, p. 35-49

[421] In addition to the first general statements of the derecho a decidir contained in some Resolutions of the Catalan Parliament of 1989, progressively this right has increasingly assumed a greater concreteness up to being invoked, as the main prerequisite with respect to the manifested independence requests, in Resolutions 742 / IX of September 2012 and 5 / X of January 2013.

[422] J. TUDELA ARANDA, El derecho a decidir y el principio democático, in UNED. Teoría y Realidad Constitucional, n. 37, 2016, p. 477-497

[423] The right of secession, as a natural right, would be according to the natural law doctrine characterized by the characters of inalienability and unavailability. However, according to some authors, the reference to this legal aspiration would often be more a means than the ultimate goal actually set, as it is especially aimed, through warnings by a given territorial group to secessionist instances, to demand changes or constitutional revisions of the legal system. juridical in a federalist perspective. Thus they express themselves A. BARBERA e G. MIGLIO, Federalismo e secessione: un dialogo, Ed. Mondadori, 1997, p. 173 e ss.;

[424] International law accepts this interpretation of the concept of "derecho a decidir" understood as the implementation of the principle of self-determination of peoples. That is, it opens up the possibility of legitimizing a secession in situations of injustice, even where there is no colonial force. This is the line

happen “within a democratic context, characterized by the presence of a minority national level, without stressing the liberation from the colonial yoke, typical of self-determination phenomena”[425].

In fact, unlike the right to self-determination (the latter recognized by international law for the first time in the UN resolution No. 1625 / XXV of 1970 entitled "Declaration of principles on friendly relations between States", *derecho a decidir* continues to be a non-existent concept for the international legal order, not contemplated in any legal text or at least in any declaration[426]. Nevertheless, although lacking any legal basis recognized by the international community, this right has been gradually introduced in the Catalan process by assuming similar contents, as anticipated above, to those specific to the self-determination of oppressed peoples. Also, if "*en definitio, pues, el derecho a decidir es el derecho de los ciudadanos to decidir acerca de la secesión*"[427], it would be highlighted that, in adherence to the theory advanced by some scholars, "*el derecho a decidir de los ciudadanos no sería unto the natural consecuencia of the democratic principle*"[428].

Specifically, the derecho a decidir emerged in a solemn way especially with Resolution 5 / X of 23 January 2013, which already from its name ("*Declaración de soberanía y del derecho a decidir del pueblo de Cataluña*") prophesied the centrality of a combination of "derives from decidir - sovereignty" as a fundamental prerequisite in the constituent process of an independent Catalan state. Therefore, the Catalan institutions, with the aim of legitimizing a secessionist process which they qualified as democratic, have tried to recognize, through occasional recourse to referendum consultations, the existence of derecho to decirir the Catalan people, not without first declaring the latter legal entity and sovereign[429]. Nevertheless, given the breach of the constitutional framework that only the mere exercise of voting would have entailed, in

developed in the Declaration of the United Nations Assembly of 9 November 1995, which conditions respect for the territorial integrity of States in the existence of governments that represent the population without discrimination of any kind. So V. FERRERES COMELLA, Cataluña y el derecho a decidir, in UNED. Teoría y Realidad Constitucional, n. 37, 2016, p. 461-675; and F. SERVEGNINI, Spagna: può il caso catalano essere assimilato al caso Kosovo? Suggestioni e difficoltà, in Forum Quaderni Costituzionale, n. 7/2018, p. 1-10

[425] L. CAPPUCCIO, Introduzione. La lunga e accidentata marcia della Catalogna verso una consultazione popolare sull’indipendenza, in Federalismi.it, 2014, p. 3-33

[426] J. TUDELA ARANDA, El derecho a decider, op. cit, p. 477 - 497

[427] V. FERRERES COMELLA, Cataluña y el derecho, op. cit., p. 462

[428] J. TUDELA ARANDA, El derecho a decider, op. cit, p. 479

[429] BILANCIA Francesco, Il derecho a decidir catalano, op. cit., p. 992-993

order to be considered legitimate that binomial should have been justified at least on the basis of the democratic principle, as the latter is anchored on natural law juridical bases. And in fact, "*I derive from the decision of the citizens of the city until the natural consecuencia of the democratic principle [... since the derecho a decidir] is the supreme power of democracy, the path to través de la cual a pueblo puede hacer realidad un destiny. No matter yes no existe marco jurídico legal or político para su ejercicio*"[430]. Therefore, in view of all this, the most significant consequence of the juridical force of the democratic principle derives: that is, that of being able to override the principle of legality[431]. A relationship that exists between the principle of legality and the democratic principle that the current forms of state with pluralist democracy[432] have developed on its balance, since the rule of the majority must always be conformed by norms in their turn guarantors of the rights of minorities. And it is precisely in relation to this last aspect that the recent Catalan strategy of breaking the constitutional legal order has not found any external support from the international community. This is because, in a social and democratic state of law such as the Spanish one, within which the principles of equality and non-discrimination of all its members are cornerstones of the constitutional order[433], the Catalan secession plan would have had to necessarily orient itself towards promotion of a phase of negotiations and negotiations with the central Government of Madrid. Moreover, as previously mentioned, the Tribunal Constitucional itself had already pointed out the constitutional path through which to legitimately introduce a hypothetical secessionist instance, and he necessarily implied the start of a constitutional revisional process. Only that, the political block favorable to independence, convinced of representing the univocal will of the Catalan people[434]

[430] J. TUDELA ARANDA, El derecho a decider, op. cit, p. 479-482

[431] For an exhaustive analysis on the relationship between the democratic principle and the characteristic principles of the rule of law, see a J. JIMÉNEZ SÁNCHEZ, Principio democrático y derecho a decidir, in REAF, n. 19, 2014, p. 211-233

[432] R. BIN – G. PITRUZZELLA, Diritto costituzionale, Ed. Giappichelli, ediz. 19, 2018, p. 53 - 58

[433] X. PONS RAFOLS, Legalidad internacional y derecho, op. cit., p. 86

[434] S. CECCANTI, Catalogna e Spagna al momento senza uscita, in DPCEonline, n. 4/2017, p. 825-827; or we also refer to R. BLANCO VALDES, La rebelión del nacionalismo catalán provoca en España una gravísima crisis política y constitucional, in DPCEonline, n. 3/2017, p. 441-447, which questions whether, "más allá de su rotunda and unquestionable ilegalidad y falta de legitimidad ¿puede adopt a decisión de such envergadura with the vote in favor of 38% of the pueblo Catalán with derecho to vote?"; also, in addition to the requirement of a clear majority with respect to the choice of secession, the scholar J. RUIZ SOROA, Regular la secesión, in Cuadernos de Alzate, n. 46-47, 2013, p. 196-197, which, summarizing the prevailing international doctrine on the subject, had developed five additional conditions for the recognition of the secession act: that is, a. secession as a last resort; b. existence of an unconditional and constant desire for secession over time; c. protection of the positions of those

(when, instead, it is right to remember that in the last elections disputed never the secessionist front has succeeded even to reach the absolute majority of the votes), has opted for an open confrontation with the principle of legality.

And indeed, what was the position of the international community (and especially that of the European Union) with respect to the Catalan question? In this regard, despite the auspices of the entire secessionist bloc about a gradual and shared recognition of the newly formed Catalan Republic (in the aftermath of the Declaration of Indepedence), the European Union in the lead, as well as being followed by the same states that compose it, has maintained a position of absolute non-interference, motivating it on the fact that this question represents a fact exclusively within the Spanish constitutional framework. And in fact, this line of thought finds formal confirmation in the provisions of art. 4.2 TEU which states that "the Union respects the equality of its Member States before the Treaties and their national identity, inherent in their fundamental political and constitutional structure", as it also includes the system of local autonomies and regional[435]. Therefore, appealing also to the legislative scope of the Treaties themselves, the European Union has irrevocably kept its disinterest in the affairs and proclamations of Puidgemont himself, a deposed president still forced into exile in a third State.

However, some scholars[436] have considered that the absence of any provision in the Treaties regarding the derecognition manifested by stateless nations within the EU could on the other hand result in recognition of that right, as the EU as all its Member States, "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men "(Article 2 TEU). Therefore, given the absence of a restrictive provision in this sense, neither Spanish nor European political institutions can invoke any right to limit the right of self-determination of peoples within

within the secessionist community are contrary to it; lack of the right to succeed, existence of a right to dialogue on the same without prejudice to any outcome; and finally, protection of the democratic principle also with regard to affected citizens.

[435] T. CERRUTI, Istanze indipendentiste nell'Unione Europea, in Associazione Italiana dei Costituzionalisti, n. 3, 2015, p. 1-11

[436] N. LEVRAT –S. ANTUNES –G. TOUSSEAU –P. WILLIAMS, The Legitimacy of Catalonia's Exercise of its Right to Decide, 2017, p. 96 disponibile al seguente link: https://ssrn.com/abstract=3078292

the EU. A consideration of strong tones and contents, which however does not recognize any effective counter argument in this regard[437].

What did this bring about?

It is undeniable that the inertia of the international community has officially decreed the failure of every constituent process of the newborn Catalan Republic. And yet, despite the awareness of the Catalan institutions of having acted in violation of both the Spanish constitutional[438] unit and its own Parliamentary Rules, this had not, however, taken away from them the hope of benefiting from some form of international recognition with the branching of the Declaration of indipedenza. And this on the assumption that, as stated by an authoritative doctrine, a secession even if "illegitimately declared and therefore deprived of any effect in the domestic environment (...) [could] however develop its effects, also in legal terms, at the level international when you find the support and therefore the recognition of the community of sovereign states"[439].

In conclusion, in which case hypothetical requests for secession are promoted within a democratic state of law (such as, in this case, Spain), the likelihood that a possible Declaration of independence can enjoy some external support, even if invoked by occasional popular demonstrations[440]. This is because, in such cases, only the principle of integrity of the national territory will prevail with respect to the demands of self-determination of peoples, as in a state with pluralist democracy "the people of such a State through their participation in the government of the State on a basis of equality"[441].

Therefore, also in light of the results subsequent to the Declaration of Independence of October 27, 2017, the Catalan Generalit would therefore have been desirable to follow the path of constitutional revision previously indicated by the Constitucional Court.

[437] G. POGGESCHI, La Catalogna: fra voglia di secessione e sospensione dell'autonomia, in Federalismi.it, n. 7/2018, p. 203 - 221
[438] D. FERNÁNDEZ DE GATTA SÁNCHEZ, La unidad constitucional de España y el problema catalán ante el Tribunal Constitucional, in Revista general de derecho administrativo, n. 48, 2018, p. 1 e ss.
[439] A. MASTROMARINO, La dichiarazione d'indipedenza della Catalogna, in Osservatorio AIC: Quadrimestrale di attualità costituzionale, n. 3, 2017, p. 539
[440] X. PONS RAFOLS, Legalidad internacional y derecho, op. cit., p. 1 - 87
[441] J. CRAWFORD, The Creation of States in International Law, in Oxford, II ed., 2007, p. 119

4. THE ONLY POSSIBLE GUIDING MODEL[442]

If we take the time period between the date of publication of sentence n. 31 of the Tribunal Constitucional, or June 28, 2010, and nowadays, there is no doubt that one element has remained almost constant: that is, the total incapacity of the Spanish political class (in which category also includes the Catalan one) to achieve any form dialogue or constructive compromise. The lack of mutual trust, the unwillingness to give up some claim to resolve the institutional stalemate, as well as the obvious lack of some diplomatic capacity of both parties involved has led to an uncertain and hostile political, legal and social context (sometimes resulted in accusations and civil and jurisdictional clashes[443]) with obvious repercussions on the democratic stability of the Spanish legal system[444]. Likewise, as a demonstration of the tense climate created in recent years in Spain, it is sufficient to recall the insinuations of any doctrine about the role of constitutional guarantor that should always assume the Tribunal Constitucional, accused of arbitrarily favoring the indissolubility of the Spanish territory thus disregarding the demands secessionists evoked by a linguistic minority[445]. Except that, the Tribunal with sentence n. 42/2014[446] had indicated to the Catalan institutions what were the constitutional bases for having the secessionist institution legitimately introduced inside the parliamentary hall.

As already mentioned above, the path indicated by the constitutional court was modeled on the advisory opinion expressed in 1998 by the Canadian Supreme Court (Reference Secession of Québec[447]), as the latter had elaborated a detailed legal

[442] "The decision of the Canadian Supreme Court of 1995, made to decide how to behave in the case of the successful re-election of the referendum in Quebec, could and should have provided guidance ". In these terms, an authoritative scholar has been expressed B. CARAVITA, La Catalogna di fronte all'Europa, Federalismi.it, n. 19/2017, p. 4

[443] A. MASTROMARINO, La dichiarazione d'indipedenza della Catalogna, op. cit. p. 534

[444] L. FROSINA, Referèndum, autodeterminació y transitorietat jurídica. La sfida delle istituzioni catalane all'indissolubile unità della nazione spagnola, in Nomos: le attualità nel diritto, n. 1/2017, p. 1 - 18

[445] "(...) the TC in Spain, despite the legal definition of it as a body of single and special jurisdiction, is clearly a hybrid political-legal organ; when the rulings have a highly political character, the TC plays a decisive role to tip the balance in favor of some specific party interests (...) ". An affirmation with strong contents that clearly shows the thought of some constitutionalists on the position held by the Tribunal Constitucional as, in this case, A. ABAT I NINET, Il futuro politico della Catalogna, op. cit., p. 37

[446] Judgment available at the following link: https://www.boe.es/boe/dias/2014/04/10/pdfs/BOE-A-2014-3885.pdf

[447] Reference available at the following link: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do

analysis about the existence of the c.d. "Right of secession" within the framework of a democratic legal order.

Thus, with respect to the recognition or otherwise of a unilateral right of the Québec people to secession, the Canadian Supreme Court first of all specified that Canadian constitutional law, based on a set of written norms and on principles rooted in tradition and common constitutional law, did not could in no way recognize such a right[448]. Nevertheless, even on the circumstance that these secessionist instances had taken root over time, he had identified some openings, stating that the "Constitution should not be a straitjacket"[449]. And therefore, on the basis of some fundamental principles typical of every federal Constitution of law[450] (among which, the democratic principle, the rule of law, as well as the protection of minorities), he had developed a specific obligation to negotiate that the central Government would have owed with respect to a possible secessionist instance[451]. From all this it would have resulted (as not previously contemplated in the Canadian Constitution), a necessary and necessary process of constitutional revision aimed at legitimizing the secessionist intentions. Finally, with respect to the role of a referendum in the context of a secessionist process, the Supreme Court recognized above all the intrinsic capacity to concretely ensure the democratic principle, as it is representative of the will expressed by the citizens of the community concerned. Furthermore, secondly, it identified in the referendum instrument the undoubted ability to identify itself as the first primary prerequisite to open a possible negotiation with the central government on the issue of secession. In fact, in the event of a favorable outcome to the secessionist instance, an obligation for the federal political authorities to negotiate the process of secession with the Québec institutions would have been achieved[452].

Therefore, the constitutional court, largely adhering to the well-known Reference Secession of Quebec, wanted to point out that the derecho a decidir cannot and must not be equated with an unrecognized right of self-determination, but must be translated

[448] L. FROSINA, Profili giuridici e aspetti problematici, op. cit., p. 1-37
[449] I. RUGGIU, Referendum e secessione. L'appello al popolo per l'indipendenza in Scozia e in Catalogna, in Costituzionalismo.it, n. 2/2016, p. 71-102
[450] E. MOSTACCI, The Canadian constitutional history and its determinants, in DPCEonline, n. 1/2019, p. 625 - 642
[451] X. EZEIZABARRENA, El caso de Québec ante la jurisdicción canadiense, in Quaderno Deusto de Derechos Humanos, n. 90, 2017, p. 35-40
[452] L. FROSINA, Profili giuridici e aspetti problematici, op. cit., p. 1-37

into a mere political aspiration promoted by the Catalan institutions and aimed solely at initiating a possible constitutional review process with the central competent bodies[453].

On the other hand, on the assumption that the Spanish Constitution does not contain any non-modifiability clause, all the proposals could be susceptible of determining a parliamentary[454] debate suitable for determining a constitutional review procedure, in which also include secessionist instances expressed by an historic autonomous Community like the Catalan one. Also, in order to prevent the outcome of the referendum from being the consequence of occasional circumstances, it would be reasonable to associate a further referendum on the same secessionist question at the end of the constitutional review process. In the following way, by associating the time factor with this democratic instrument, it would be ensured that an event as traumatic and destabilizing as secession is guaranteed by a stable and constant majority. Finally, the projection over time of the result would not only offer the advantage of demonstrating the constancy of a pre-eminent will with regard to the secession that a democratic and social state of law could not in the long run ignore, but this time would

[453] S. GAMBINO, Pretese sovranistiche della Catalogna, op. cit., p. 450 - 458

[454] The scholar M. CARRILLO (Il futuro politico della Catalogna, in Federalismi.it, n.22/2014, p. 70-79) identifies four procedural methods through which to constitutionally legitimize a consultation on the independence of Catalonia, Therefore, leaving out two of these four hypotheses, as apparently impossible in the Spanish context, the two most accredited methods are the following: 1. Extensive interpretation of the art. 92 of the Constitution, governing consultative referenda, aimed at all citizens, for particularly important decisions; or, constitutional revision of the art. 150.2 Cost.
Entering into the merits of the first hypothesis, it would be a question of recognizing, on the basis of the art. 92 of the Constitution interpreted extensively, the faculty to convene a secessionist referendum, always on the proposal of the President of the State Government. Also, in order to allow a convocation that can only interest a specific territorial population, the Organic Law 2/1980 of 18 January should be amended, governing the legal regime of referendums. Well, on the basis of the results arising from the proposal of a consultative referendum, therefore non-binding, forms of political dialogue could be realized aimed at a process of constitutional revision, on whose approval the Spanish people should be expressed in its entirety, as unique subject of state sovereignty.
Vice versa, the second of the aforementioned hypotheses is based on the delegation of exclusive competence of the State to convene a secessionist referendum. Therefore, based on the art. 150.2 Cost, which provides that faculties` corresponding to matters of state competence can be transferred or delegated to the Autonomous Communitieś by the State, through organic law, provided that by their nature they are subject to transfer or delegation. However, since the convocation of a secessionist referendum would be susceptible to contrast with the principle of indissoluble unity of the Spanish nation, this faculty could therefore fall a priori among those not likely to be delegated or transferred. Therefore, in consideration of all this, a negotiation between the parties in question would be necessary, from which a constitutional revision project would arise which would harmonize the calling of a referendum on independence with the aforementioned principle.

provide the necessary space to favor a dialogue, or at least a peaceful debate between the parties involved[455].

Thus, the constitutional court, in spite of criticisms and conjectures of which it was often the victim, had opened, so to speak, a door to Catalan aspirations, inviting the Generalitat to start a debate with the Spanish Parliament. However, an invitation that has remained isolated.

5. THE NEED FOR A FEDERAL MODEL

Ultimately, the repeated instances of greater autonomy (resulting then, as in the recent Catalan case, in secessionist intentions) were manifested especially in those historical territorial realities with their own specific cultural and linguistic identity (among all, Catalonia and the Countries Basques)[456]. All this has generated obvious symptoms of dissatisfaction with the autonomous state model[457]. A model that, compared to those typical of a classical federal system, has been characterized by a peculiar and discriminated "asymmetry": since, as anticipated by this phrase, it applied diversified

[455] J. TUDELA ARANDA El derecho a decidir, op. cit., p. 489-490

[456] We recall the unilateral project of self-determination approved by the Parliament of the Basque Country (Law No. 9 of 2008) declared unconstitutional pursuant to art. 2 Const. From the Tribunal Constitucional with sent. 103/2008 ("Plan Ibarretxe")

[457] The will of the constituent power with the adoption of the Constitution of 1978 had been that of achieving an integration of two antithetical principles between them: that is, that of unity and that of autonomy. However, the Constitution did not generate an identification of the territorial autonomies and a consequent recognition of their specific legislative power, preferring to postpone the issue on territorial planning at a later time. This definition, realized through a constitutional synthesis of the device principle and the autonomic one, is based above all on art. 2 of the Constitution, which states that "The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards, and recognizes and guarantees the right to the autonomy of the nationalities and the regions that compose it and the solidarity between all the same ". Therefore, this precept recognizes the Comunidades the right of autonomy, which can be exercised on the basis of the different procedures referred to in Title VIII of the Constitution
Specifically, the principle defines the faculty for territorial autonomies to access the process of recognition of their autonomy and their own self-organization for the purposes of managing the territorial interests of each individual autonomous community; vice versa, the autonomic principle, in addition to defining the organizational structure, specifies the competences of each Community.
Nevertheless, this territorial-normative organization has not satisfied the needs of a greater political and normative autonomy of some territorial autonomies, since the possibilities of which the Title VIII Cost. Have often been reduced through a very restrictive interpretation of regional autonomy, seconded by the laws approved by the Cortes Generales. For this reason, during the years of the democratic system, the level of autonomy achieved in Catalonia was perceived as insufficient and unsatisfactory, such as to cause a crisis of the autonomous Estado.
In these terms they expressed themselves espressi S. GAMBINO (Pretese sovranistiche della Catalogna, op. cit., p. 450 - 458) and M. CARRILLO (Il futuro politico, op. cit., p. 70 - 79).

"weights and measures" in relation to some *Autonomous Communities*. On all the division of competences, which had been regulated differently in relation to the procedure adopted pursuant to art. 143 (c.d. slow street) or 151 Const. (C.d. fast street) On the other hand, only the recourse to the second of the indicated procedures (that is, to the fast way) had allowed a wide and complete attribution of the competences indicated in the art. 148 and 149; vice versa, for the other territorial entities that had mandatory recourse to the slow route (ie all, with the exception of Catalonia, the Basque Country, Galicia and Andalusia) they had to wait until the Ley orgánica de Transferencias (n. 9 of 92) to obtain a full homogenization of the attributions (and therefore also of those initially excluded, or those referred to in Article 149), thus conforming to the other Comunidades. However, if the asymmetry of competences has almost disappeared, other relevant elements of asymmetry have been fixed directly in the Constitution (as, among all, the financial autonomy recognized to the Basque Country and to Navarra), with the obvious consequence of their maintenance and consolidation with respect to the homogenization process that has affected the discipline of competences[458]. Therefore, a constitutional arrangement is the Spanish one which, despite the partial unifying tendency of the 1990s, has remained asymmetric in many other areas[459] (such as the linguistic or scholastic field[460]). However, this paradigm of asymmetric territorial organization, according to some qualifiable also as "disaggregating federalism"[461], has shown all its limitations when

[458] J. CAGIAO Y CONDE, Un sassolino nella scarpa. La Catalogna come chiave della crisi del modello territoriale spagnolo, in Federalismi.it, n. 17/2018, p. 1 – 36

[459] For a list of other asymmetries still existing in the Spanish order, always refer J. CAGIAO Y CONDE, Un sassolino nella scarpa. op. cit., p. 16. "Alongside those already mentioned - and others of minor importance for the purposes of this work: civil law in Galicia, the Basque Country, Navarra, Aragon, Catalonia, Balearic Islands and Valencia; the intermediate institutions of the Canary Islands (Cabildos), Balearic Islands (Consejos) and the Basque Country (Territorios históricos) - the asymmetry existing in the linguistic field was remembered. The EC recognizes (Article 3) the co-official status of languages other than Castilian, where they exist. We speak, in concrete terms, of Galicia, the Basque Country, Navarra, Catalonia, Balearic Islands and Valencia. For the regulation of the co-official, always the art. 3 CE refers to the Statutes and the laws of linguistic normalization, which represent the acts called to define the model of each single CA (Vernet and Punset, 2007). This normative space that the EC leaves to the autonomist legislator therefore introduces further asymmetries in the linguistic field; in fact, not all CCAAs have implemented identical language policies, particularly in the educational field and for access to public administration ".

[460] A. MASTROMARINO, La dichiarazione d'indipedenza della Catalogna, op. cit. p. 9 - 10

[461] "(...) in the disaggregation processes, full equality between the different levels of government is never achieved, since the central one continues to maintain supremacy with respect to the periphery thanks to the persistence, with respect to the past, of rules that express a certain supremacy of the federal order and that introduce, therefore, an atypical vertical asymmetry with respect to the traditional categories of federalism. Furthermore, the federal state that originates in processes of disaggregation

some Comunidades autónomas (above all, as always, Catalonia and the Basque Country in which since time immemorial the nationalist spirit is strong and rooted), they have begun to demand greater political, regulatory, administrative and financial autonomy[462]. In fact, in the face of a rigorous interpretation of the principle of the indissoluble unity of the Spanish nation at the expense of respect for the right to autonomy, the effect that has been determined has been an exacerbation of the nationalist conflict, especially when the territorial structure of the power began a consolidation phase (ie, after Ley n.9 / 92). All this has generated in Catalonia the gradual rise of parties favorable to a secessionist ideal which, also and above all due to the incapacity of the Spanish state (and the ruling political class) to understand the

of power and territory is by its nature a differentiated order, even horizontally, up to the point of being able to foresee even the only partial federation of the territory (...) ".
In these terms A. MASTROMARINO, Il federalismo disaggregativo. Un percorso costituzionale negli Stati multinazionali, Ed. Giuffré, 2010, p. 114 -115
However, as evidenced by E. FOSSAS ESPADALER, (¿Qué federalismo para España ?, op. Cit. P. 30), if there is no doubt that the Spanish autonomous state functions in some respects as a federal state, under many others it finds some deficiencies . Among which:
a) Only the Spanish Nation and its representatives (the General Courts) can decide on the reform of the Constitution. The Autonomous Communities have the power of a constitutional reform initiative, but it does not require their will to approve it since the procedures to modify the Constitution (arts. 167 and 168 CE) are not federal; b) The distribution of competences between the central and the communal areas Autonomous institutions if it is carried out in the Constitution as far as the "constitutional block", which is included in the Statutes of Autonomy of respect for the Communities. If the norms have not been assimilated to the institutions of the countries of a federation that can be approved and reformed as the central institutions of the central, then a procedure drawn up by a negotiation and a pact with the representatives of the Autonomous Community. From these first two aspects it follows that there is no own constitutional ownership of autonomy; c) Not all state power is in double order of government: the Autonomous Communities, for example, do not have their own Judicial Power, although they may assume powers in some aspects of the Administration of Justice; d) The system of distribution of competences if based in a predominance of the company, in a generalized concurrence of powers between the State and the Communities. There is practically no area in which they can unconditionally set their own policies, with which the idea of "political" autonomy is seriously distorted; e) The Autonomous State has incorporated few federal mechanisms for the participation of territorial entities in the general institutions of the State (Senate, Constitutional Court, General Council of Judicial Power), and has not developed intergovernmental relations of a federal nature; f) The greatest singularity of the Autonomous State, inspired by the "integral State" established by the Constitution of the Second Republic (1931), resides without a doubt in the so-called "device principle", which is absolutely original with respect to the Federal State. Based on this principle, the Spanish Constitution does not identify with territorial units that make up the State, nor does it establish the distribution of power between the two instances, two elements present in the majority of federal Constitutions. This principle refers to the territorial entities the capacity of proposing and co-deciding the creation and modification of self-government, with which some aspects of the model are permanently open to its modification. In the end, I think that this is the case with the Autonomous State cannot be fully equated to a federal State despite being based, in some aspects, on the principles and comparing federal political systems.

[462] Indeed, with respect to recriminations in tax matters, it is recalled that the Basque Country (as well as the Comunidad de Navarra, and partly also the Canary Islands) have such financial autonomy as to create a condition of quasi-fiscal sovereignty peculiar to the Spanish territorial context . For further information, see J. CAGIAO Y CONDE, Un sassolino nella scarpa. op. cit., p. 16

underlying reasons behind these requests autonomistic, has progressively translated into a political program. This initiated that season of statutory reforms which subsequently gave rise to the sentence 31/2010, which metaphorically represented "the drop that caused the vase to overflow" with respect to the Catalan question. That is, nine years of institutional conflicts determined by the absence of some minimal form of dialogue about a different configuration of the territorial structure, culminating no less than with the unilateral declaration of Catalan independence. An authentic disfigurement for a Constitution that recently celebrated its forties, and therefore still relatively young[463].

Ultimately, what could be the resolution to this institutional confrontation?

First of all, and this is what has generated most of these levels of conflict, it is necessary that the political class still linked to a centralist nationalism develop a sensitivity aimed at dialogue and confrontation with those that are the needs of peripheral nationalism, and take effect awareness of national, linguistic, cultural and historical complexity rooted in the Spanish context. Because, as wisely observed by the doctrine, it was "the lack of acceptance or encaje, on the part of the dominant nationalism (the Spanish one), of the peripheral nationalisms (dominant in their respective territories) is the cause of the crisis"[464]. And in this regard, perhaps the greatest success of recent Catalan initiatives is precisely that of having started (at least in the academic sphere[465]) debates and questions on the need for a constitutional reform in a federal perspective[466]. So, even if it is only a matter of a simple supposition about the Spanish constitutional future, perhaps history will tell us precisely that the most important legacy originating from the failed Catalan secessionist experience will be to have definitively decreed the overcoming of the autonomic model. On the other hand, this model (especially in the last twenty years) has not only not exploited the

[463] L. FROSINA, La Costituzione spagnola compie quarant'anni. Bilanci e prospettive di riforma, in Nomos: le attualità nel diritto, n. 3/2018, p. 1 - 23

[464] J. CAGIAO Y CONDE, Un sassolino nella scarpa. op. cit., p. 19

[465] Among which, J. CAGIAO Y CONDE –G. FERRAIUOLO –P. RIGOBON (edited by), The Catalan nation. History, language, politics, Constitution in a multinational perspective, Naples, 2018; or ¿Cataluña independiente? in El Cronista del Estado social y democrático de derecho, Sumario n. 71 - 72, 2017, p. 1 - 172; or even the Conference ¿Qué federalismo para España? Bilbao, 25-26 November 2015; or even the XVI annual conference of the Spanish Association of Constitutionalists, at the University of Málaga, entitled 40 anos de Constitución: a mirada al futur, on 26 and 27 April 2018

[466] M. IACOMETTI, La questione catalana, in Diritto Pubblico Comparato Europeo, n. 4, 2018, p. 935-938

elasticity and openness that characterizes the Spanish Constitution to adapt to federal bases, but has progressively reduced the asymmetric potential offered through the "dispositivist principle" , in turn diluting the multi-nationality recognized through the distinction between "nations" and "regions"[467] of art. 2 Cost[468]. And indeed it is the enhancement of this differential aspect that is the key to defining a federalist project in Spain that is shared and also inclusive of peripheral issues. In this regard, the federalist experiences launched in multi-national states similar to the complex Spanish reality, such as Belgium and Canada, which have been able to absorb the existing centrifugal forces, and this through “a policy of the central government (...) [competent] with respect to issues of general scope and state interest, attributing to the sub-state level those differentiating aspects on which autonomy can be built, not necessarily in antagonistic and competitive terms with respect to the sovereignty of the State"[469]. Therefore, even for Spain it would be desirable to adopt such a "federal disaggregating" model, as it includes a process of constitutionalisation of nationalist differences rooted in some autonomous communities[470]. This is because, unlike other classic federal experiences (such as the German one) in which the main question has always been only that concerning the regulation of a plural sovereignty, in Spain there is a further question concerning the management of a plurality of nationalisms, sometimes in conflict and often claiming their own sovereignty as a legal entity. Therefore, the Spanish federalist project (should the future political governance decide to undertake this process) will necessarily have to respond to a double challenge: the (classical) one of the regulation of a plural sovereignty and the one posed by the competition between national projects[471].

Ultimately, Spain should move towards a model of asymmetric multinational federalism based on historical nationalities and differential factors. Therefore, a federal model with variable asymmetry, that is open to all autonomous Communities interested

[467] For a distinction between federalism and regionalism, see A. MORELLI, Le vicende del regionalismo in Europa, in Federalismi.it, n. 16/2018, p. 1 - 10
[468] E. FOSSAS ESPADALER, ¿Qué federalismo para España, op. cit. p. 34
[469] A. MASTROMARINO, La dichiarazione d’indipedenza della Catalogna, op. cit. p. 13
[470] M. CARRILLO, Reconducir el conflicto, constitucionaliza la diferencia, in El Cronista del Estado social y democrático de derecho, Sumario n. 71 – 72, 2017, p. 42 - 47
[471] J. CAGIAO Y CONDE, Un sassolino nella scarpa. op. cit., p. 25

in deepening their own level of self-government[472]. And such a system will only work within a juridical context in which intergovernmental relations are first of all guided by some fundamental values: above all, solidarity and cooperation. From this it follows that, in order to guarantee a complete implementation of the disaggregating federalist paradigm, we must first of all define a cooperative and solidary federalism[473].

6. SHORT CONCLUDING REMARKS

To conclude, in compliance with the theory developed by the constitutional court in the famous ruling 42/2014, the institutional actors concerned should implement a new construction phase based on dialogue and mutual listening. It is necessary that in a social and democratic state of law, such as the Spanish one, the relations between the central and the decentralized power take place within a legal framework dominated by a mutual obligation to negotiate, as evoked by the Tribunal in a famous sentence (n. 42/2014). Therefore, the resolution of the Catalan question will find an outlet only when the collaboration between State and Autonomous Communities

One datum from the recent Spanish constitutional history emerges however on all: Spain and its current model of autonomy, as already mentioned above, has proved unsatisfactory in satisfying the autonomistic needs of its Comunidades, especially those rooted in time and representative of a own national identity. Moreover, it is the same art. 2 of the Constitution, where the principle of respect for the right of the autonomies is established, to confirm the differences existing at the local level, having in fact take care to distinguish between "national" and "regional" autonomies.

[472] A reform in the federal sense that should be based on the following main aspects: the inclusion in the 1978 Constitution of the name of the Autonomous Communities; the conversion of the Senate into a chamber of actual territorial representation; the constitutional recognition of the c. hechos differenciales, such as, for example, language, culture, forality, civil law, insularity and ultra-peripherality; the recognition of the principles of loyalty and collaboration, as well as the intergovernmental cooperation and cooperation mechanisms widely recognized in the new generation statutes; the rationalization and simplification of the system of distribution of competences between the State and Autonomous Communities with a residual clause that can play in favor of the latter; the revision of the financing system of territorial autonomies to guarantee greater solidarity, fairness, as well as an update of the existing forex regime in the Basque Country and in Navarra; a set of rules adequate to ensure greater participation of the sub-state entities in the process of European integration. In these terms L. FROSINA, La persistente crisi catalana e le ipotesi di riforma costituzionale, in Nomos: le attualità nel diritto, n. 1/2018, p. 3

[473] A. ROJO SALGADO, La riforma in senso federalista del modello spagnolo delle autonomie Il miglioramento delle relazioni intergovernative, in Le istituzioni del Federalismo, n. 1, 2006, p. 65 - 36

Therefore, only a modification of the current Title VIII (which governs the territorial organization) can be the key to guaranteeing an estate of the constitutional and democratic Spanish order. Therefore, the hope is that the new political majority, together with the parliamentary opposition groups and the representatives of the *Comunidades autónomas*, will have the will and the strength to start a phase of constitutional reforms directed towards the construction of a federal entity. And indeed, this federal paradigm will have to be necessarily, in addition to being cooperative and in solidarity, also disaggregative: that is, asymmetric and multinational.

Likewise, in order to ensure unanimous participation and acceptance of the constitutional reform project in a federal sense, a specific prerogative should be given to the *Comunidades autónomas* during the reform process. : that of being able to promote a hypothetical secessionist referendum. Not without excluding, also, a second consultation about the same referendum question with the specific intent to verify the popular radicalization with respect to the proposed secessionists.

In conclusion, if Spain does not want to run the risk of shattering into a plurality of micro-states independent of each other, it will necessarily have to open up to constructive dialogue, satisfying the needs of national territorial entities, and this through the recognition of a greater political, regulatory and financial autonomy within a federal system. If he were to accomplish all this, probably even the same constitutional recognition of a secessionist referendum, when naturally anticipated by the previous implementation of a federal organization, should indeed not create any concern about the indissoluble unity of the Spanish nation. In fact, the popular majority of a given Comunidad would hardly express itself in favor of such a "leap into the dark", at a time when its national identity must be safeguarded, protected and above all valued.

To conclude, therefore, the Spanish Constitution (re) requires a reform of its territorial organization that is fully implemented by the principle of "full respect for the autonomy of the Autonomous Communities" pursuant to art. 2 Const., More often than not suffocated for forty years of rigorous application of the principle (certainly antithetical, but not incompatible) of "indissoluble unity of the Spanish nation"[474]

[474] J. CAGIAO Y CONDE, Un sassolino nella scarpa. op. cit., p. 13

[i] As edições utilizadas foram as seguintes: HOBBES, Thomas, *Leviatã ou Matéria, Forma e Poder de um Estado Eclesiástico e Civil*, 2ª ed., trad. João Paulo Monteiro da Silva e Maria Beatriz Nizza da Silva, Lisboa, Casa da Moeda, 1999; ROUSSEAU, Jean-Jacques, *O Contrato Social*, trad. Antonio de Pádua Danesi, São Paulo, Martins Fontes, 1996; e serão referidas simples e respectivamente como "*Leviatã*" e "*O Contrato Social*" ao longo deste relatório.

[ii] WEBER, Max, *Economia y Sociedad*, 2ª ed., v. I, trad. José Medina Echevarría, Juan Roma Parrela, Eduardo García Máynez, Eugenio Ímez e José Ferrater Moura, Bogotá, Fondo de Cultura Econômica, 1964, ps. 170 e ss.

[iii] HABERMAS, Jürgen, *Para a Reconstrução do Materialismo Histórico*, trad. Carlos Nelson Coutinho, São Paulo, Brasiliense, 1983, ps. 219-220.

[iv] BONAVIDES, Paulo, "A Despolitização da Legitimidade" in *Revista Trimestral de Direito Público* nº 3, São Paulo, 1993. Cf., nesse mesmo sentido, HABERMAS, *op. cit.*, ps. 221-222: "Nas articuladas discussões sobre o tipo weberiano de poder legal – a ser "legitimado" somente por meio de procedimentos técnicos –, somente Carl Schmitt e Niklas Luhmann aproximaram-se da tese segundo a qual as decisões produzidas legalmente, no Estado moderno, são aceitas de um modo, por assim dizer, privado de motivos".

[v] Cf. TUCK, Richard, *Hobbes*, trad. Adail Ubirajara Sobral e Maria Stela Gonçalves, São Paulo, Loyola, 2001.

[vi] Essa estrutura retrospectiva contrasta com o impulso prospectivo da narração hobbesiana, que propulsiona os homens a sempre buscarem sua auto-preservação e a sempre acumularem recursos de conservação na pessoa artificial do Leviatã. Com efeito, essa é uma particularidade do argumento de Hobbes: os homens e a criação do Leviatã são apresentados sempre em momentos nitidamente prospectivos, embora as etapas argumentativas somente possam ser compreendidas e concatenadas de forma retrospectiva e, fundamentalmente, em caráter hipotético e analítico.

[vii] SOARES, Luiz Eduardo, *A Invenção do Sujeito Universal: Hobbes e a Política como Experiência Dramática do Sentido*, Campinas, UNICAMP, 1995, p. 212: "Para pensar a problemática envolvida nessas questões, Hobbes, simula um arranjo de laboratório especulativo, uma espécie de experimento mental: propõe ao leitor um cenário hipotético e examina os resultados prováveis que supostamente derivariam da situação original. Conclui que os resultados são indesejáveis em grau extremo e que podem ser evitados".

[viii] SOARES, *op. cit.*, p. 211.

[ix] HOBBES, *op. cit.*, cap. XIV, p. 115.

[x] HOBBES, *op. cit.*, cap. VI, p. 63.

[xi] HOBBES, *op. cit.*, cap. XIII, especialmente p. 111: "Com isto torna-se manifesto que, durante o tempo em que os homens vivem sem um poder comum capaz de os manter a todos em respeito, eles se encontram naquela condição a que se chama guerra; e uma guerra que é de todos os homens contra todos os homens".

[xii] Cf. SOARES, *op. cit.*, p. 215.

[xiii] SOARES, *op. cit.*, p. 228.

[xiv] HOBBES, *op. cit.*, cap. XVII, p. 146.

[xv] Vale reproduzir uma passagem que sintetiza de maneira extraordinariamente clara o sentido do argumento de Hobbes, a saber, SOARES, *op. cit.*, ps. 243-244: "Nesse sentido, o desmembramento analítico-geométrico do todo (a sociedade) em partes (os indivíduos) e destes em subpartes (sensação, representação, imaginação, memória, razão e paixões) seguido dos cálculos relativos aos impasses implicados na associação das unidades (o estado de natureza e a sociedade), correspondem, como adiantáramos, não propriamente a quadros empíricos (reais ou simulados), mas a etapas necessárias de uma investigação rigorosa e introspectiva (...), no limite solipsista, de um indivíduo racional qualquer, instruído pela metodologia analítica adequada. O caráter transcendental do argumento hobbesiano autoriza a passagem imediata da racionalidade do cálculo para a universalidade do seu endosso; da razão individual para a suposição do caráter universal de sua validade".

[xvi] JANINE RIBEIRO, Renato, *Ao Leitor sem Medo: Hobbes Escrevendo contra Seu Tempo*, São Paulo, Brasiliense, 1984, p. 159.

[xvii] HOBBES, *op. cit.*, cap. XXI, p. 177.

[xviii] A peculiaridade da inovação implementada por Rousseau pode ser imediatamente atestada a partir de uma leitura prevenida do subtítulo de *O Contrato Social*, qual seja, "*Princípios do Direito Político*" – nota-se, desde já, que Rousseau pretende oferecer, em seu contrato social, um princípio de direito político, vale dizer, algo como uma fórmula jurídico-legal capaz de circunscrever a política em determinados parâmetros formais; o contrato social perde o caráter essencialmente analítico e dedutivo apresentado em Hobbes para projetar-se quase que concreta e empiricamente em um estatuto jurídico-legal.

[xix] ROUSSEAU, *op. cit.*, cap. I, p. 9.

[xx] ROUSSEAU, *Discurso sobre a Origem e os Fundamentos da Desigualdade entre os Homens*, trad. Maria Ermantina Galvão, São Paulo, Martins Fontes, 1999.

[xxi] ROUSSEAU, *op. cit.*, liv. I, cap. VI, ps. 20-21.

[xxii] ROUSSEAU, *op. cit.*, *idem*, *ibidem*.

[xxiii] ROUSSEAU, *op. cit.*, liv. I, cap. VIII.

[xxiv] ROUSSEAU, *op. cit.*, liv. II, cap. VI, ps. 45-47. Cf., a esse respeito, SALINAS FORTES, Luiz Roberto, *Rousseau: da Teoria à Prática*, São Paulo, Ática, 1976, p. 93: "Se o problema da conservação do corpo político se coloca a partir deste momento é porque existe um hiato entre a promessa inicial e seu efetivo cumprimento por parte dos membros da comunidade: enquanto as obrigações não forem cumpridas, o todo permanece na sua dispersão natural. Sua conservação consiste em uma promoção de uma existência virtual para uma existência de fato".

[xxv] ROUSSEAU, *op. cit.*, liv. II, cap. VI, p. 49.

[xxvi] MEIRA DO NASCIMENTO, Milton, "Reivindicar Direitos segundo Rousseau" in WEFFORT, Francisco C., *Os Clássicos da Política*, v. 1, 13ª ed., São Paulo, Ática, 2002.

[xxvii] BOBBIO, Norberto, *Direito e Estado no Pensamento de Emanuel Kant*, 2ª ed., trad. Alfredo Fait, Brasília, UNB, 1997, p. 46.

[xxviii] HABERMAS, *op. cit.*, p. 220.

[xxix] HABERMAS, *op. cit.*, p. 226.

[xxx] HABERMAS, *op. cit.*, ps. 225-226.

[xxxi] ROUSSEAU, *O Contrato Social*, *op. cit.*, liv. I, cap. VIII, p. 26.

[xxxii] CASSIRER, Ernst, *A Filosofia do Iluminismo*, trad. Álvaro Cabral, Campinas, UNICAMP, 1992, p. 362: "Por todo o trabalho de seu pensamento, ele [Rousseau] preparou melhor do que nenhum outro pensador do seu século, o caminho de Kant. Este pôde apoiar-se em Rousseau, estribar-se nele para a construção sistemática do seu próprio mundo intelectual: esse mundo intelectual que venceu a filosofia do iluminismo e que, no entanto, é a sua derradeira transfiguração e a sua mais profunda justificação". Ainda, e de modo mais peremptório, CASSIRER, *A Questão Jean-Jacques Rousseau*, trad. Erlon José Paschoal, São Paulo, UNESP, 1999, p. 58: "Neste caso, apenas um viu clara e corretamente a conexão interna de suas idéias, apenas Kant tornou-se exatamente neste ponto um discípulo e admirador de Rousseau".

[xxxiii] KANT, Immanuel, *Fundamentação da Metafísica dos Costumes*, trad. Paulo Quintela, Lisboa, Edições 70, 1986, ps. 21: "Neste mundo, e até também fora dele, nada é possível pensar que não possa ser considerado como bom sem limitação a não ser uma só coisa: uma boa vontade"; e p. 85: "Autonomia da vontade é aquela sua propriedade graças à qual ela é para si mesma sua lei (...). O princípio da autonomia é portanto: não escolher senão de modo a que as máximas da escolha estejam incluídas simultaneamente, no querer mesmo, como lei universal."

[xxxiv] O melhor exemplo da doutrina do positivismo jurídico pode ser encontrado em KELSEN, Hans, *Teoria Pura do Direito*, 6ª ed., trad. João Baptista Machado, Coimbra, Armenio Amado Editora, 1984, tanto pelo seus propósitos de "purificar" a teoria jurídica de qualquer

"contaminação" política ou metafísica, quanto por suas contradições ao fundamentar a validade/legalidade da ordem jurídica em uma "norma fundamental" (*Grundnorm*) capaz de validar todo o sistema, mas que é na verdade, um pressuposto metodológico – uma metáfora jurídica do imperativo categórico kantiano.

[xxxv] SCHMITT, Carl, *Legalidad y Legitimidad*, trad. Jose Diaz Garcia, Madrid, Aguillar, 1971.

[xxxvi] LUHMANN, Niklas, *Legitimação pelo Procedimento*, trad. Maria da Conceição Côrte-Real, Brasília, UNB, 1980.

[xxxvii] LUHMANN, *op. cit.*, p. 32. E, ainda, p. 29: "(...) o conceito de legitimidade perde o seu fundamento moral com a positivação do direito, que se impôs completamente no século XIX".

[xxxviii] RAWLS, John, *Uma Teoria da Justiça*, trad. Almiro Pisetta, Lenita M. R. Esteves, São Paulo, Martins Fontes, 1997, ps. 90-91.