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Breaking a "Taboo": the Case for a Dynamic Approach to Secessionist Claims *

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1. *Secession in a static, legalistic perspective*

From a legal point of view, the issue of secession presents a number of framing difficulties, common to both the national dimension (constitutional law) and the global dimension (international law). A joint consideration of the two levels is therefore considered appropriate, with a view to identifying analytical schemes that enable these difficulties to be overcome (or at least mitigated).

a) As many authors have pointed out, secession represents for constitutional law scholars a veritable "taboo";[1] it would even impose

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diplomatic caution on those wishing to study this subject by looking at legal systems other than his/her own. [2]

This point is clearly reflected in the writings of a number of authoritative Italian constitutional lawyers. Augusto Barbera, for instance, affirms that secession must be treated "as a question of fact, and not of law", to be ascribed not to the world of law but to that of "the infinite possibilities of men".[3] Pushing such an approach to its extreme consequences, Alessandro Pace argues that "even if Article 5 [of the Italian Constitution][4] did not exist, the consent to the dismemberment of the State (or even to the secession of a part of it) would still be a revolutionary fact; and such would remain whatever the path (even a peaceful one) envisaged for its realization"; accordingly, "all legal acts carried out to this purpose (e.g., a consultative referendum) should be considered radically null and void, susceptible to trigger civil, criminal and administrative responsibility and unenforceable by anyone".[5]

These views have to be framed against the backdrop of a legal system featured by the existence of an intangible normative core, unamenable to constitutional revision. However, it should be emphasized that the intangibility of the "unitary principle" does not derive from an explicit constitutional prescription, but is rather a sort of logical (or ontological) limit: "unity" shapes the identity of the national legal order, by defining it in its constitutive elements (people,

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[1] S. Mancini, *Ai confini del diritto: una teoria democratica della secessione*, in *Percorsi costituzionali*, n. 3, 2014, 624; A. López Basaguren, *La secesión de territorios en la Constitución española*, in *Revista de Derecho de la Unión Europea*, n. 25, 2013, 88; L. Paladin, *Valori nazionali e principio di unità della Repubblica nella Costituzione italiana*, in *Studi in onore di Manlio Mazziotti di Celso*, vol. II, Padova, 1995, now in Id., *Saggi di Storia costituzionale*, Bologna, 2008, 115-116, explicitly referring to an intellectual and political taboo («*tabù intellettuale e politico*»).

[2] Cfr. F. Bilancia, *Il "derecho a decidir" catalano nel quadro della democrazia costituzionale*, in *Le Istituzioni del Federalismo*, n. 4, 2014, 986.

[3] Cfr. A. Barbera – G. Miglio, *Federalismo e secessione. Un dialogo*, Milano, 1997 (edizione citata 2008), 153 e 155.

[4] As it is well known to Italian readers, Article 5 enshrines the principle whereby the Italian "Republic is one and indivisible".

[5] A. Pace, *Processi costituenti italiani 1996-1997*, in *Studi in onore di Leopoldo Elia*, tomo II, Milano, 1999, 1139.

territory, government); by altering the latter, therefore, the rupture of unity results in the elimination of the original legal order and not in its mere transformation. For this reason, the "indissoluble unity" model is potentially transposable in every national legal system; this is why it would be valid in the Italian constitutional system – in the words of Pace – "even if Article 5 did not exist".

In a similar vein, one may consider a recent ruling by the German Constitutional Court (2 BvR 349/16: secession is in itself contrary to the constitutional order; "the Länder are not the masters of the Constitution"),[6] as well as the position taken by the Venice Commission, whereby "le principe de l'intégrité territoriale est très généralement reconnu, implicitement ou explicitement, en droit constitutionnel. A l'inverse, la sécession ou la modification des frontières est tout aussi généralement exclue par le droit constitutionnel, ce qui ne saurait surprendre, puisque celui-ci est le fondement de l'État qui pourrait par hypothèse être amputé".[7]

The situation may be different in systems that do not envisage limits to constitutional revision: a "secession clause" could in such cases be found in the provisions regulating the procedures for amending the Constitution.

The Spanish legal system is a relevant case in point. The *Tribunal constitucional* (TC) has, on several occasions, affirmed the lack of a "*núcleo normativo inaccesible a los procedimientos de reforma constitucional*".[8] A secessionist claim can therefore be legitimately pursued, provided that the revision procedures set out in the Constitution are respected. As acknowledged in Judgment No. 42 of 2014, "*si la Asamblea Legislativa de una Comunidad Autónoma, que tiene reconocida por la Constitución iniciativa de reforma constitucional* […], *formulase una propuesta en tal sentido, el*

[6] On this decision, see G. Delledonne, *I* Länder *non sono i padroni della Costituzione: il* Bundesverfassungsgericht *di fronte a un tentativo secessionista bavarese*, in *Quaderni costituzionali*, n. 1, 2017, 145 ss.

[7] See the Report «Un cadre juridique général de référence pour faciliter la solution des conflits ethno-politiques en Europe», CDL-Inf (2000) 16, 2-3. The quoted text is reproduced in the Opinion No. 762/2014 of 21 March 2014 (CDL-AD [2014] 002), § 17 on Crimea.

[8] See, among many others, the decisions Nos. 48/2003, 103/2008, 31/2009, 42/2014.

Parlamento español deberá entrar a considerarla"; the so-called "right to decide" (*derecho a decidir*) – i.e. the formula that embodies the Catalan claim for a referendum on independence – is deemed as an "*aspiración política susceptible de ser defendida en el marco de la Constitución*".

Some authors compared the position of the Spanish TC to that of the Canadian Supreme Court:[9] the latter, in the well-known Reference on the Québec secession, affirms the unconstitutionality of a unilateral secession of the Province and identifies, at the same time, the constitutional revision as a possible way to reach that outcome.[10] And indeed, the Judgment No. 42/2014 by the Spanish TC contains an explicit – although, as it will be said, misleading – reference to the opinion of the Canadian Court.

Even in these cases, however, such openness towards a "right to secede" is in fact very limited, if not illusory. Secession by legal means risks facing a *de facto* impracticability: this is due, as a matter of course, to the fact that (majorities of) systemic minorities are structurally excluded from the possibility of becoming (qualified) majorities in the State institutions where constitutional revision is ultimately decided. It is not by chance that some of the most relevant studies on the issue of secession are confined to the so-called secession of the minority, to be kept distinct from the secession of the majority (which would end up in a sort of expulsion).[11]

b) At a first glance, international law (or, rather, mainstream international law scholarship) seems to have a different take on secessionist phenomena. Although the very word "secession" seldom pops up in international legal texts,[12] this topic cannot be said to have

[9] In this sense, see e.g. G. Delledonne, *op. ult. cit.*, 145.
[10] Cfr. *Reference re Secession of Quebec*, [1998], 2 SCR 217.
[11] Cfr. A. Buchanan, *Secession. The Morality of Political Divorce from Sumter to Lithuania and Quebec*, Boulder, 1991, Spanish translation *Secesión. Causas y consecuencias del divorcio político*, Barcelona, 2013, 58; P. Bossacoma i Busquets, *Justícia i legalitat de la secessió. Una teoria de l'autodeterminació nacional des de Catalunya*, Barcelona, 2015, 33 ss.
[12] E. Duga Titanji, *The right of indigenous peoples to self-determination versus secession: One coin, two faces?*, in *African Human Rights Law Journal*, 2009, p. 52 ff., p. 71.

been treated as a "taboo". According to a generally accepted view, which has been upheld by the International Court of Justice,[13] international law neither prohibits nor authorizes, as such, unilateral declarations of independence. This is because secession is not conceived of as a break in the established order, but merely as a "fact" yielding international legal consequences: ultimately, the emergence of a new state entity, with all that ensues.[14]

On closer inspection, such approach conceals – under the guise of apparent "neutrality" – a clear disfavor towards secessionist outcomes, insofar as it makes international recognition of the seceding entity conditional upon passing the "ordeal" of a violent (and, in the worst cases, armed) conflict with the parent State.

Yet, starting from the end of the Second World War, a body of international norms questioning (at least in part) this paradigm has gradually emerged: the law of self-determination. As it is well-known, from the 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples* to the 2007 *Declaration on the Rights of Indigenous Peoples*, passing through Common Article 1 to the International Covenants on Human Rights, the principle of self-determination is commonly defined as endowing "all peoples" with the right to "freely determine their political status".[15] It is also known that the international community agrees on considering this right as envisaging the legal entitlement for peoples subject to colonial or

[13] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 ff., para. 79.

[14] This view on secession is generally labelled as the "realist" one. For a thoughtful account of this approach, including a balanced discussion of the criticism levelled against it, see E. Milano, *Formazione dello Stato e processi di State-building nel diritto internazionale. Kosovo 1999-2013*, Napoli, 2013, pp. 14-33.

[15] In additional to political self-determination, the principle at hand also entails the peoples' right to "freely pursue their economic, social and cultural development". In this regard, Common Article 1(1) to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights provides, at para. 2, that: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence".

foreign domination to pursue independence[16] as a mode of self-determination.

At the same time, one may observe how, with the end of the decolonization era, the principle of self-determination went through a veritable identity crisis. Indeed, any attempt to update it and expand its scope of application to non-colonial situations is regularly frustrated by the lack of coherence in international practice, especially as far as secessionist movements are concerned. The point is that the stabilization of a customary rule through a "general practice accepted as law" by the various members of the international community – an outcome which in itself is quite hard to achieve – is nearly impossible in the area of self-determination, where the most fundamental, and most jealously protected attributes of state sovereignty (national boundaries, form of state, form of government) are potentially at stake.[17] Indeed, the crystallization of the aforementioned norms on colonial and foreign domination was made possible by the unique political conditions which led to the demise of colonial empires – a situation which is unlikely to recur in comparable terms in the foreseeable future.

In this regard, it has been influentially argued that, although post-colonial international law has little to say in relation to the *substantive* aspects of secession, a number of *procedural* rules to be applied to secessionist processes could indeed be distilled from State practice.[18] However, it is important to underscore that, according to

[16] It should be noted, in this respect, that many authors regard decolonization as a phenomenon not classifiable as "secession", since colonies and occupied territories have been traditionally viewed as having a legal status different from that of the State administering it. See, also for further references, A. Tancredi, *Secessione e diritto internazionale: un'analisi del dibattito*, in *Diritto pubblico comparato ed europeo*, 2015, p. 449 ff., pp. 465-466.

[17] S. Mancini, *Minoranze autoctone e Stato. Tra composizione dei conflitti e secessione*, Milano, 1996, p. 255.

[18] This view has been in particular put forth by Antonello Tancredi. See, among others, A. Tancredi, *A normative 'due process' in the creation of States through secession*, in M.G. Koehn (ed.), *Secession. International Law Perspectives*, Cambridge, 2006, p. 171 ff. (identifying the following requirements should be complied with: 1) no foreign military support, 2) consent of the majority of the local

this view, compliance with such "normative due process" do not bestow on the seceding entity a legal entitlement to have its claim supported by the international community. Contrariwise, failure to respect these rules entail that the seceding entity must not be recognized even if it displays in fact effective, exclusive and stable control over its territory.

In the light of the above, the contribution of both legal disciplines to the study of this topic would appear quite limited. Any meaningful role for constitutional law would in fact be ruled out at the outset: secession is not an issue to be examined – in theory or in practice – in legal terms. The establishment a new sovereign political entity as a consequence of the separation of a portion of the territory of an existing State is an *extra ordinem* fact, which can be legitimized only by virtue of its own political force and not by orderly (or orderable) legal paths. At most, the acts directed towards that objective will be considered as wrongs, to be sanctioned according to the provisions laid down by domestic legislation. On the other hand, while not (necessarily) qualifying secession as unlawful, international lawyers basically look at it as a fact that is relevant in the dynamics of State formation, but not – with the notable exception of peoples subject to colonial and alien domination – as a legal entitlement. This remains true even if one adopts the "normative due process" approach: compliance with "procedural" rules on secession comes into play only if the seceding entity satisfied *as a matter of fact* the other requirements for statehood, i.e. if it managed to emancipate itself from the control of the parent State authorities.

Against this background, the present paper aims to make the case for complementing such traditional and legalistic approach with a dynamic one. By a "dynamic approach" we mean one that does not content itself with addressing secessionist claims in binary terms ("is secession allowed by the Constitution?" "is there a right to secede under international law?"), but strives to orientate the underlying political processes by providing them with an appropriate legal-institutional framework. The proposed approach, in other terms,

population expressed through referendum and 3) respect of the *uti possidetis* principle).

acknowledges the existence of a tension between the "moral authority" to make a secessionist claim (which may derive from wide and peaceful popular support) and the "legal authority" to implement that, which is generally lacking;[19] and tries to defuse this tension by channeling secessionist claims through public deliberative processes governed by constitutional and, to some extent, international law. To this end, we will first offer an overview of the factors and recent trends pushing towards the adoption of a different theoretical framework with regard to secessionist phenomena (Section 2). Then, the cases of Scotland, Quebec and Kosovo will be discussed as precedents that may be relied on to build alternative legal approaches to secession (Section 3). We will try to show, finally, that approach proposed in this paper already has some (authoritative) matches in existing literature (Section 4). Section 5 concludes.

2. *The need for a different approach*

A Analyses based on a static, legalistic approach have recently been confronted with secessionist claims, often emerging in the context of advanced democracies. In this respect, one may detect signs of inadequacy – if not outright failure – of the traditional way of dealing with these issues, which justifies a revamped interest in certain, somehow heterodox doctrinal views.

In fact, there are elements encouraging the adoption of a different theoretical framework, which may (non-exhaustively) sketched as follows.

a) To begin with, the very establishment and consolidation of pluralist democracies makes it questionable to reduce secessionist

[19] This language is borrowed from the one employed in relation to the Scottish referendum on independence. See below Section 3.1.
view has been in particular put forth by Antonello Tancredi. See, among others, A. Tancredi, *A normative 'due process' in the creation of States through secession*, in M.G. Koehn (ed.), *Secession. International Law Perspectives*, Cambridge, 2006, p. 171 ff. (identifying the following requirements should be complied with: 1) no foreign military support, 2) consent of the majority of the local population expressed through referendum and 3) respect of the *uti possidetis* principle).

claims – *sic et simpliciter* – to a matter of mere public order: as it has been noted, "in democracy, even the secessionist threat must be considered a political question. It is in other contexts [...] that it is viewed solely as a military problem to be solved with coercion or with the victory of secessionist forces". In this perspective, the responses provided by a legal order to such claims can be themselves understood as indicators of democratic quality.[20]

b) Independentist movements – as some recent cases show – may employ peaceful strategies, supported by massive social mobilizations and acts of (mere) civil and political disobedience.[21] In the face of these strategies, a repressive reaction centred on the criminalization of secessionist movements could result, for a democratic State, greatly problematic. This is also in the light of the fact that the charges that are likely to be filed – and have in fact been filed – to initiate criminal proceedings against secessionist groups do often entail an element of violence. In this respect, the Catalan case is emblematic: independentist politicians and activists have been indicted before the *Tribunal Supremo* for the very serious crimes of rebellion (Art. 472 et seq. of the Criminal Code) and sedition (Art. 544 et seq. of the Criminal Code); both offences envisage the use of violence; if we consider that the presence of such an element is highly dubious in the acts which the defendants are accused of, it will appear all the more clear how we are witnessing distortive interpretations that undermine basic democratic safeguards, having particular regard to the principle of legality in criminal law.[22] This carries the risk that the

[20] A. Cantaro, *Introduzione*, in C. De Fiores – D. Petrosino, *Secessione*, Roma, 1996, 22.

[21] See *Social Movements and Referendums from Below. Direct Democracy in the Neoliberal Crisis*, Bristol University Press, 2017. This boosted a renewed interest in scholarship on secessionist phenomena. See, most recently, G. Martinico. *Il diritto costituzionale come speranza. Secessione, democrazia e populismo alla luce della* Reference Re Secession of Quebec, Torino, 2019; P. Bossacoma i Busquets, *Morality and Legality of Secession. A Theory of National Self-Determination*, Cham, 2019: as well as the excellent contributions collected in C. Closa, C. Margiotta, G. Martinico (eds.), *Between Democracy and Law: The Amorality of Secession*, Abingdon/New York, 2019.

[22] See, for instance, the *auto* of the criminal *sala* of the *Tribunal supremo* of 5 January 2018 (n. *recurso* 20907/2017), denying the release of Oriol Junqueras. The element of

principle of unity turns into a "tyrannical" principle, leading to the breach of other principles that characterize – in the same way as (if not more than) that of "unity" – the Spanish legal system as "democratic".

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violence was recognized as present because the defendant could have *foreseen* that the initiatives carried out, which were supported by an intense popular mobilization, *could have generated violence* («la aceptación del plan incluía la aceptación de previsibles y altamente probables episodios de violencia», p. 10). If we consider what actually happened, this violence would be concretely found only in relation to sporadic and marginal episodes, which would be in themselves wholly insufficient to support the very serious charges against the defendant. And indeed, the *Tribunal* included among the consequences that the accused would have foreseen, the reaction – in fact, brutal – of the Spanish State aimed at preventing the referendum: «es cierto que no consta que el recurrente haya participado ejecutando personalmente actos violentos concretos. Tampoco consta que diera órdenes directas en tal sentido. […] Es llano que tanto el recurrente como los demás sabían que el Estado no podía ni puede consentir esa clase de actos, que desconocen e impiden la aplicación de las leyes que rigen el Estado democrático de Derecho, y que actuaría a través de los medios a su disposición, entre ellos el uso legítimo, y como tal, proporcionado y justificado, de la fuerza. Era previsible, en esa situación, que, con una alta probabilidad, se produjeran enfrentamientos en los que apareciera la violencia» (p. 13). The violence which the defendant was accused of was therefore, primarily, that of Spanish police repressing of the referendum of the 1st of October. See *Legalidad penal y proceso independentista* (*eldiario.es*, 9 November 2017) e *La banalización de los delitos de rebelión y sedición* (*eldiario.es*, 21 November 2017), which were endorsed by several Spanish scholars of Criminal Law. The recent decisión by the *Tribunal supremo* (Judgment No. 459 of 14 October 2019), which put an end to the criminal proceedings against Catalan independentist leaders, in fact acquitted the defendants from the charge of rebellion. But this did not prevent it from issuing very harsh sentences (up to 13 years in prison) for the crime of sedition. For a critical comment on this judgment, having particular regard to its impact on the protection of certain fundamental democratic rights, see J.L. Martí, *An Exotic Right: Protest and sedition in the Spanish Supreme Court's ruling on Catalan secessionism*, in *VerfBlog*, 18 October 2019; A Gamberini, *La condanna degli esponenti indipendentisti catalani: un* crimen lesae maiestatis *nel cuore dell'Europa?*, in *Forum di Quaderni costituzionali*, 23 October 2019; M. Frigo, *Spain: Does the Supreme Court judgment against Catalan leaders comply with human rights law?*, in *Strasbourg Observers*, 16 December 2019; as well as Amnesty International, *España: Análisis de la sentencia del Tribunal Supremo en la causa contra líderes catalanes*, 19 November 2019.

c) Supranational integration processes can represent an important factor in playing down – and therefore reassessing – secessionist conflicts. In fact, state sovereignty has already been experiencing a gradual dismantling and re-articulation, which has been lessening its characteristics of absoluteness.[23] With specific reference to the European Union, one could even reframe a demand for secession from "external" (to the Member State) to "internal" (to the EU), so defusing its disruptive potential.[24] A similar approach would be even more fruitful when the dislocation of power caused by supranational integration generates pressures on the spaces of autonomy that are difficult to tolerate by territorial communities featured by a marked inclination towards self-government. The failure to initiate a political debate in the European institutional bodies on such questions – an attitude which has so far prevailed – results in the reaffirmation of the full sovereignty of the nation-State, of a State-centric vision of the EU, which is far from the prospect of a deeper political integration.

d) Despite calls for its demise in the post-colonial era, the principle of self-determination still plays a role in international legal life. In the last few years, indeed, self-determination of peoples and its jargon have popped up in different domains of international practice. Just consider, in this respect, extensive references to the principle contained in the 2007 *Declaration on the Rights of Indigenous Peoples*,[25] its recurring presence in the text of agreements aimed at settling secessionist conflicts,[26] the acknowledgment by the International Court of Justice that the principle "has a broad scope of

[23] For a similar perspective, see D. Innerarity and A. Errasti, *Deciding on what? Addressing secessionist claims in an interdependent Europe*, in Closa, Margiotta, Martinico, *cit. supra*, p. 62 ff.

[24] N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, Oxford, 1999, Italian translation, *La sovranità in discussione. Diritto, stato e nazione nel «commonwealth» europeo*, Bologna, 2003, spec. 325 ss.; see also N. Krisch, *Catalonia's Independence: A Reply to Joseph Weiler*, in *www.ejiltalk.org*, 18 January 2013.

[25] See Articles 3 and 4, as well as 16th and 17th preambular paragraphs.

[26] See the practice referred to in M. Weller, *Settling Self-determination Conflicts: Recent Developments*, in *European Journal of International Law*, 2009, p. 111 ff.

application" which goes beyond decolonization issues,[27] or the widespread recognition of Libyan and Syrian rebels as "the only legitimate representative of their people".[28]

How to reconcile this practice with the lack of clearly defined rules on self-determination outside the decolonization context? In this regard, one should take care not to confuse the general "principle" with the individual "rules" originating therefrom – a distinction masterfully drawn by Antonio Cassese in his celebrated monograph on self-determination.[29] In his view, the existence of general principles, such as that of self-determination, is "a typical expression of the present world community", which is often too divided to agree upon specific rules but nonetheless needs "some sort of basic guidelines for [its] conduct", a lowest common denominator of "the conflicting views of States on matters of crucial importance".[30]

In relation to self-determination, Cassese identified this lowest common denominator in the "quintessence of self-determination", namely the "need to pay regard to the freely expressed will of the peoples"[31] whenever foundational political decisions are at stake. Its open-textured character notwithstanding, this principle remains "one of the essential principles of contemporary international law"[32] in that

[27] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, para. 144.

[28] Regardless of whether it was appropriate in the circumstances of the case, in fact, the use of this defining formula signals the intention by the recognizing State (or international organization) to qualify an (armed) opposition group as a national liberation movement for the purposes of the application of the self-determination regime. See, also for further references, D. Amoroso, *Il ruolo del riconoscimento degli insorti nella promozione del principio di autodeterminazione interna: considerazioni alla luce della "Primavera Araba"*, in *Federalismi.it*, 2013, p. 1 ff., pp. 22-35.

[29] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge, 1995, pp. 126-133.

[30] *Id.,* 128.

[31] This formula was borrowed by the ICJ's Advisory Opinion in *Western Sahara*, I.C.J. Reports 1975, p. 12 ff., para. 59. See also J. Klabbers, *The Right to Be Taken Seriously: Self-Determination in International Law*, in *Human Rights Quarterly*, 2006, p. 186 ff.

[32] *East Timor (Portugal v Australia)*, I.C.J. Reports 1995, p. 90 ff., para. 29.

it indicates "the course of action to be taken when one is confronted with problems concerning the destiny of a people".[33]

On these premises, one may legitimately doubt what would remain of such a basic principle, if States and international organizations were allowed – when not obliged – to turn a deaf ear on secessionist claims that are a genuine and peaceful expression of the will of the people, or, even worse, on its violent quelling by the parent State, as the traditional understanding of self-determination would seem to require.[34] Nor, in the same perspective, it seems acceptable to wait for a bloody escalation of violence before intervening.

3. *Embracing a different perspective on secessionist phenomena: from a static approach to a dynamic one*

Symptoms A number of important precedents are already available for defining legal approaches to secession that are best suited to the scenarios mentioned above. However, it should be pointed out from the outset that scholars are frequently inclined to marginalize them or to reduce their relevance.

3.1. *Legal authority and moral authority in the Scottish case*

The first case under consideration is the Scottish referendum in 2014. Here we are witnessing a consensual political process, leading to a vote that will have the unionist option prevail. In the stages of such a

[33] Cassese, *cit. supra*, p. 128. In a similar vein, see G. Palmisano, *Autodeterminazione dei popoli*, in *Annali dell'Enciclopedia del diritto*, 2012, p. 82 ff. See also the statement issued on 25 October 2017 by the UN Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, in relation to the Catalan case, where several references are made to the obligation of the Spanish government to comply with the principle of self-determination (*UN independent expert urges Spanish Government to reverse decision on Catalan autonomy*, 25 October 2017, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22295).

[34] Weller, cit., pp. 112-114.

process, there may be elements of particular interest for the purposes of our investigation.

When the 2011 Scottish elections gave an absolute majority to the Scottish National Party (SNP), which presented a programme that included a commitment to hold a referendum on independence,[35] Alex Salmond stated that the independentist claim had acquired a "moral authority".[36] To this assertion London did not retort, on the basis of a static/rule-based argument, that the Parliament of Holyrood lacked the power to activate a referendum procedure.[37] The British Government was perfectly aware of the fact that "the Scottish Parliament does not have the *legal authority* to hold an independence referendum".[38] In the face of a tension between the legal and moral authority, however, the former was the one to give in, placing itself at the service of the latter. The title of the report commissioned by the House of Commons to find the most appropriate path to allow the celebration of the referendum is particularly telling in this sense: "The Referendum on Separation for Scotland: *making the process legal*".[39]

The opposing sides thus shared the idea of a close interplay between morality, politics and law. The dominant nation – structurally a majority – decides on the basis of the will expressed by a minoritarian national group: the (one-off) transfer by the Westminster Parliament to the Scottish Parliament of the competence to regulate and call the referendum on independence represents a legal device

[35] *Re-elect. A Scottish Government Working for Scotland (2011). Scottish National Party Manifesto 2011*, 28 [http://votesnp.com/campaigns/SNP_Manifesto_2011_lowRes.pdf].

[36] *Stunning SNP election victory throws spotlight on Scottish independence*, *theguardian.com*, 6 May 2011.

[37] See the introduction, by Prime Minister David Cameron and Deputy Prime Minister Nick Clegg, of the document *Scotland's constitutional future. A consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom*, January 2012, 5, [www.official-documents.gov.uk].

[38] "*Scotland's constitutional future*, cit., 6 (emphasis added). In the same vein, see the Report by the House of Lords' Select Committee on the Constitution, *Referendum on Scottish Independence*, 2012, 12-13 [http://www.publications.parliament.uk].

[39] *The Referendum on Separation for Scotland: making the process legal*, House of Commons Scottish Affairs Committee, 2012 [http://www.publications.parliament.uk] (Emphasis added).

which was not already present in the system, but that was established – by way of political processes – in its interstices, in order to support a claim regarded as morally justified.[40]

The attempts to reduce this trend to the British exceptionality, notably by claiming that it cannot be replicated in systems with a rigid constitution, are far from infrequent.[41] Yet, this overshadows an essential fact: the responses to the Scottish claim were still the result of decisions formally and ultimately attributable to central institutions: the paths taken were not legally available in the short term to the peripheral national group. The situation that arises in the British context are, in this perspective, only *quantitatively* – not *qualitatively* – different from those found in the experiences of continental constitutionalism.[42] The procedures to be set in motion in view of certain results will be, in the latter case, more complex and articulated, but still accessible whenever dominant political forces at the state level become aware of the need to resolve the political conflict through solutions that are acceptable from the perspective of democratic pluralism.

3.2 *Adherence to the law and legitimacy in the Québec case*

The conceptual framework provided in 1998 by the Canadian Supreme Court was rightly considered to be "un referente mundial por contener seguramente la más avanzada doctrina constitucional sobre el derecho de secession".[43] However, even in relation to this

[40] See *Scotland Act 1998 (Modification of Schedule 5), No. 242 Order* del 2013, approved by the Westminster Parliament to implement the *Edinburgh Agreement* of October 2012.

[41] See J.A. Montilla Martos, *El referéndum de secesión en Europa*, in *Revista de Derecho Constitucional Europeo*, n. 26, 2016, § 2 [http://www.ugr.es/~redce/REDCE26/articulos/11_MONTILLA.htm].

[42] See, in broad terms, O. Chessa, *Sovranità: temi e problemi di un dibattito giuspubblicistico ancor attuale*, in *Rivista AIC*, n. 3, 2017, 21-22.

[43] E. Fossas Espadaler, *Interpretar la política. Comentario a la STC 42/2014, de 25 de marzo, sobre la Declaración de soberanía y el derecho a decidir del pueblo de Cataluña*, in *Revista Española de Derecho constitucional*, n. 101, 2014, 287. On this issue, see extensively G. Delledonne and G. Martinico (eds.), *The Canadian*

case there is a tendency not to take the Reference in its overall (and innovative) meaning, but instead to cut out individual segments thereof and use them to justify conclusions that are misaligned with its normative gist.

A significant example of such an attitude is the use of the Reference made by the TC in the aforementioned Judgment No. 42/2014: the foreign precedent is relied upon to affirm the impracticability of a consultative referendum on independence,[44] whereas the 1998 Reference was in fact triggered by a prior manifestation of popular will, through a referendum, coming from a territorial minority.[45] This brings to the limelight the speciousness of the TC's argumentation and its distance from the Canadian paradigm: admitting secession by legal means, but ruling out the possibility of celebrating a referendum on the question, leads to the paradoxical (and surreal) situation where it would be required "to start the process of constitutional amendment to allow Catalan independence, before there is any reason to believe that Catalans really want to quit Spain".[46]

In other cases, the contribution to the debate of the 1998 Reference is somehow overlapped with its legislative follow-up,[47] even though the full adherence of the latter to the former appears, in several respects, questionable (it is not by chance that the Canadian

Contribution to a Comparative Law of Secession. Legacies of the Quebec Secession Reference, Cham, 2019.

[44] Subsequent TC's case law, following a view already expressed in Judgment No. 103/2008, will be even clearer on this point: «el respeto a la Constitución impone que los proyectos de revisión […] se sustancien abierta y directamente por la vía que la Constitución ha previsto para esos fines […]. no caben actuaciones por otros cauces ni de las Comunidades Autónomas ni de cualquier órgano del Estado» (STC 31/2015).

[45] E. Fossas Espadaler, *Interpretar*, *cit. supra*, 288 ff.

[46] V. Ferreres Comella, *The Secessionist Challenge in Spain: An Independent Catalonia?*, in *I-Connect. Blog of International Journal of Constitutional Law*, 22 November 2012.

[47] *Clarity Act*, SC 2000.

Clarity Act was followed by a "mirror law" of the province of Quebec).[48]

Taking into account here the scheme proposed by the Canadian Supreme Court, this conceptual framework may be summarized as follows:

a) it is acknowledged that "'a people' may include only a portion of the population of an existing state. The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a state's population" (§ 124). As a consequence, "the social and demographic reality of Quebec" is deemed as a "political unit" (§ 59), so accepting the conflict between two legitimate majorities ("the clear majority of the population of Quebec, and the clear majority of Canada as a whole"), by excluding that one "'trumps' the other" (§ 93), or that one is regarded as "more or less 'legitimate' than the others" (§ 66).

b) such a majority (a "clear majority on a clear question") may be detected, at the provincial level, also on the basis of a referendum ("a democratic method of ascertaining the views of the electorate on important political questions"), even though this democratic tool is not expressly envisaged in the Constitution and therefore is bereft of immediately binding legal effects (§ 87).

c) should that be the case, "the federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire" (§ 88).

d) The general obligation to negotiate in good faith operates within two extremes that are incompatible with constitutional principles: on the one hand, the actions of the territorial minority intended to carry out secession by unilateral means; on the other hand, the "unreasonable intransigence" in negotiations by the

[48] F. Requejo – M. Sanjaume, *La fosca claredat canadenca*, in *Ara.cat.*, 6 August 2019. For a more general account of the issue, see S. Beaulac, *Sovereignty referendums: A question of majority?*, in Closa, Margiotta, Martinico, *cit. supra*, p. 105 ff.

Federation or the other Provinces. In this latter case, "violations of those principles by the federal or other provincial governments responding to the request for secession […] would be evaluated in an indirect manner on the international plane"; "a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process" (§ 103).

This approach is also based on the framing of political processes in a twofold dimension: if in the Scottish case there is tension between *legal* and *moral authority*, the Canadian Supreme Court relies on the dialectic between *adherence to the law* and *legitimacy*: "a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy. […]. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values" (§ 67).[49]

In a democracy, law is not only an external constraint on political decision-making, but must also provide the means to ensure that the latter is in line with the will of the people ("the system must be capable of reflecting the aspirations of the people", § 67), even in the fragmented manifestations of it that emerge in pluri-national systems. There is therefore an inescapable "interaction between the rule of law and the democratic principle" (§ 67): the latter is not only included in the former, but also shapes its content. Here lies the thrust of the Court's assertion whereby "the Constitution is not a straitjacket" (§ 150).

[49] It has been underscored how «the rejection of an approach solely based on a legalistic and formalistic conception of constitutional normativity» is one of the backbones of the legal reasoning of the Canadian Supreme Court (J.F. Gaudreault-Desbiens, *Secession Blues: Some Legal and Political Challenges Facing the Independence Movement in Quebec*, in *Percorsi costituzionali*, n. 3, 2014, 768-769).

3.3 *Obligation to negotiate in good faith and international recognition of the seceding entity: the Kosovo case*

The identification of the interplay between negotiation in good faith and international recognition of secessionist claims is perhaps the most ground-breaking contribution of the 1998 Reference *Re Secession of Quebec*, at least from the perspective of international law. Although its actual implications remained in fact untested as regards the Canadian legal system (since Canada and Quebec have not yet entered into such negotiations), this insight provides us with a valuable analytical tool to understand another, admittedly very different, post-colonial secessionist conflict, which started to take on international prominence around the very same years the Reference was handed down: the case of Kosovo.[50]

Indeed, the issue of the status of Kosovo was the object of prolonged diplomatic talks, prompted by the UN and the Contact Group on Kosovo[51] and intermittently carried out by concerned parties from the (failed) Rambouillet Conference of March 1999[52] to the Kosovo's Unilateral Declaration of 17 February 2008 (and beyond)[53]. In dealing with the Kosovo case, thus, the international community had to concretely address some of the questions left unanswered by the 1998 Reference, having specific regard to the actual meaning of the obligation to negotiate in good faith. In particular:

a) During the 2006-2007 round of negotiations, led by the UN Special Envoy on Kosovo Martti Ahtisaari, the Contact Group, which

[50] On which see extensively Milano, *cit. supra.*

[51] The Contact Group was composed by France, Germany, Italy, Russia, United Kingdom and United States.

[52] It is important to note that the outcome document of that Conference, the "Interim Agreement for Peace and Self-Government in Kosovo", was endorsed by Contact Group and signed by Albanian-Kosovars representatives, but in the end was not adopted because of the opposition of the Serbian delegation.

[53] Reference is made to the EU-facilitated dialogues between Belgrade and Pristina aimed at the normalization of the relations between the two countries, which led in 2013 to the conclusion of a *First Agreement* to that effect (info available at: https://eeas.europa.eu/diplomatic-network/eu-facilitated-dialogue-belgrade-pristina-relations_en).

took part to the meetings, made public its assessments as to Belgrade's and Pristina's attitudes during talks, e.g. by inviting the Serbian government "to demonstrate much greater flexibility in the talks than it has done so far"[54] and calling on it "to cease obstruction of Kosovo-Serb participation in Kosovo's institutions"[55] or by praising the Albanian-Kosovar representatives for the constructive approach shown "in the decentralisation talks".

b) The unilateral adoption by Serbia, in the middle of negotiations, of a new Constitution which reaffirmed that Kosovo should always be an integral part of its territory, so directly impinging on the very object of the talks, was perceived as problematic (and possibly an act of bad faith) by some members of the Contact Group[56] as well as by the Venice Commission.[57]

c) The reaching of a deadlock was officially ascertained by the UN Special Envoy on 26 March 2007, when he declared that the "potential to produce any mutually agreeable outcome on Kosovo's status is exhausted".[58] On that occasion, he also set forth his Comprehensive Proposal for the Kosovo Status Settlement (a.k.a. Ahtisaari Plan), where Kosovo's independence, "to be supervised for an initial period by the international community", was characterized as "the only viable option".[59]

d) It is only after this acknowledgment that Kosovo resorted to unilateral action, by adopting the 2008 Declaration of Independence,

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[54] Contact Group Statement, 24 July 2006, available at: https://2001-2009.state.gov/p/eur/rls/or/69376.htm.

[55] *Ibid.* See also Contact Group Ministerial Statement, 20 September 2006, available at: https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/declarations/91037.pdf.

[56] See, for references, B. Stankovski, *Is There an Obligation to Negotiate Secession in International Law? From* Reference re Secession of Quebec *to* Kosovo Advisory Opinion *and Beyond*, ESIL Conference Paper No. 13/2015, p. 15.

[57] Opinion No. 405/2006 19 March 2007 (CDL-AD(2007)004), paras. 7-8.

[58] Report of the Special Envoy of the Secretary-General on Kosovo's future status, 26 March 2007, UN Doc. S/2007/168, para. 3.

[59] *Ibid.*, para. 5. This conclusion was fully endorsed by the Secretary General (see Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, to which the Report is attached).

whose Preamble explicitly regrets "that no mutually-acceptable status outcome was possible, in spite of the good-faith engagement of our leaders".[60] Moreover, the Declaration contained an emphatic commitment to route the secessionist process along the tracks laid out by the UN in the Ahtisaari Plan.[61]

Following the 2008 Declaration, a substantial portion of the international community officially recognized Kosovo's statehood (98 UN Member States out of 193). Moreover, Kosovo has been accepted as member of a number of international organizations, including the International Monetary Fund and the World Bank. While recognition is far from universal, it is broad enough to put Kosovo in a condition of international sociability,[62] which – as suggested by the Canadian Supreme Court – may in the end prove crucial in securing the success of a secessionist attempt.

Of course, several factors may have contributed to this outcome. And there is certainly much truth in Ahtisaari's contention that "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts."[63] But this does not diminish its importance for our purposes. After all, outside the (somewhat uniform) colonial context, every self-determination claim is in a sense unique, and deserves an *ad hoc* solution. There is, however, at least one factor that lends itself to generalization: as foretold in the 1998 Reference, the good faith shown by seceding entity throughout the process, coupled with the "unreasonable intransigence" by the counterpart, are likely to have played a non-negligible role in accelerating the recognition process.[64] Despite the inapplicability of traditional rules on external self-determination, in other words, during negotiations Kosovo's claim for independence gained "moral authority" and "legitimacy" also in the eye of States not particularly keen on its cause, thus obtaining their recognition.

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[60] See 11th preambular paragraph. The Declaration is available at: http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf.

[61] See paragraphs 1, 3-5, 8, 12 of the Declaration, as well as its 12th preambular paragraph.

[62] This expression is borrowed from Tancredi, *Secessione*, *cit. supra*, p. 477.

[63] Report of the Special Envoy, *cit. supra*, para. 15.

[64] Stankovski, *cit. supra*, p. 17.

At the same time, and looking at the Kosovo affair in its entirety, one is again led to question the acceptability of a legal regime where a claim for self-determination was taken into account by the international community only after the perpetration of gross human rights violations (experienced, mostly but not exclusively, by Albanian-Kosovars) and a potentially destabilizing external military intervention.

4. *Alternative approaches to secessionist phenomena in the academic debate*

While a) We can find studies that suggest dynamic approaches to the issue of secession also in literature. Particularly striking, as regards constitutional law, are those advanced in contexts which, as we have seen, are characterized by an almost radical closure as to the framing of secession in legal terms.

Franco Modugno, for example, in relation to a legal system where the concept of indissoluble unity prevails, has relativized the scope of unity and indivisibility proclaimed in Art. 5 of the Constitution, thus serving a double need. In the first place, it is avoided the latent anti-democratic tendency connected to the "ideal and supreme aspiration to which the idea of constitutional rigidity tends [...]. The assumption, on which, in periods of crisis, the essence of the enduring vitality of a Constitution is based, is that the fear for the arbitrary or 'unjust' outcomes of democracy never becomes an authoritarian, external or abstract limit – set from above – against democracy".[65] Secondly, by placing remedial theories in the background of the analysis, the author affirms that the verification of the conditions justifying secession must be "ultimately entrusted to the judgement of the minorities [...], if one does not want to incur an authoritarian setback, even if it were of the authority and dictatorship

[65] F. Modugno, *Unità-indivisibilità della Repubblica e principio di autodeterminazione dei popoli (riflessioni sull'ammissibilità-ricevibilità di un disegno di legge costituzionale comportante revisione degli artt. 5 e 132 Cost.)*, in *Studi in onore di Leopoldo Elia*, cit., 1041.

of the majority".[66] On both levels, the influence of the Canadian scheme is evident: the interaction between the democratic principle and rigidity is made dynamic (and biunivocal); the territorial minorities are guaranteed a decisive role in the context of the processes considered, so as to rebalance their relationship with central powers.

The influence of the Canadian model is even more apparent in the position expressed in 2012 by Francisco Rubio Llorente, from the pages of a well-known newspaper: "si una minoría territorializada, […] concentrada en una parte definida, delimitada administrativamente y con las dimensiones y recursos necesarios para constituirse en Estado, desea la independencia, el principio democrático impide oponer a esta voluntad obstáculos formales que pueden ser eliminados. Si la Constitución lo impide habrá que reformarla, pero antes de llegar a ese extremo, hay que averiguar la existencia, y solidez de esa supuesta voluntad".[67]

All these positions point in the direction of the "proceduralisation" of secession. In this perspective, secession becomes a complex procedural process, whose various stages involve constant political negotiation between the parties: in setting time frames, methods and rules for the holding of the referendum,[68] in the electoral campaign preceding the vote[69] and in the phase that will unfold – possibly – after the referendum result. Even at this last stage, political negotiation retains wide margins of decision, which do not take for granted the secessionist outcome:[70] the Canadian Supreme

[66] Ivi, 1029.
[67] F. Rubio Llorente, *Un referéndum para Cataluña*, *El País*, 8 ottobre 2012.

[68] See – for instance – the negotiations leading to the *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, 15 October 2012.
[69] Consider how the offer of the so-called "Devolution Max" made by Prime Minister Cameron was decisive for the outcome of the Scottish referendum. The referendum campaign's debate went beyond the dilemmatic value of the institution: the final outcome was the concretization of a method for resolving the territorial conflict, in a unitary (or "otherwise unitary") perspective of fuller recognition of pluri-nationality.
[70] The Brexit affair – although it cannot be fully equated to secession – shows that fairly long after the vote of 23 June 2016 and the subsequent activation of Article 50

Court, from this point of view, stressed that "no negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow" (§ 91). This makes secession, in the final analysis, an *extreme ratio*: before that outcome, less radical solutions, inspired by the federal logic of the accommodation of national diversity,[71] remain available to the parties.

This has led some authors to identify a new argument of a remedial nature for a morally justified secession, which translates in legal terms into a hypothesis of unreasonable intransigence during negotiations: the refusal of the central powers to proceed to a redefinition of the autonomous-federal structures in function of a more adequate and full recognition of certain territorial claims.[72]

b) As far as international law is concerned, some attempts have been made in scholarship to conceive of the international regime of self-determination in its dynamic aspect, viz. as a policy-oriented process through which the international community upholds, reshapes or rejects the peoples' demands to change the status quo by freely determining their political status. [73]

TEU (29 March 2017), there are numerous questions about the final outcome of the process triggered by the referendum. In this context of uncertainty, there is even the possibility of preventing the United Kingdom from leaving, perhaps through a new consultation or an electoral changeover. On this point, see B. Caravita, *Brexit: ad un anno dal referendum, a che punto è la notte?*, in *Federalismi.it*, n. 16, 2017, 4; F. Savastano, *Tra accordi e nuove difficoltà. Osservatorio Brexit 5 ottobre 2017 – 10 gennaio 2018*, in *Federalismi.it*, n. 23, 2018, 4; Id., *EU Withdrawal Act e terremoto nel governo May. Osservatorio Brexit 9 marzo - 11 luglio 2018*, in *Federalismi.it*, n. 14, 2018, 4.

[71] See A.-G. Gagnon, *L'Âge des incertitudes: essais sur le fédéralisme et la diversité nationale*, Université Laval, 2011.

[72] M. Seymour, *Els pobles i el dret a l'autodeterminació*, in A.-G. Gagnon – F. Requejo (eds.), *Nacions a la recerca de reconeixement: Catalunya i el Quebec davant el seu futur*, Barcelona, 2010, 62 ss.; A. Buchanan, *Secesión*, cit., 19-21.

[73] See, also for references, D. Amoroso, *Whither the Principle of Self-Determination in the Post-Colonial Era? The Case for a Policy-Oriented Approach*, ESIL Conference Paper No. 9/2015.

Dissatisfaction with the static, ruled-based approach originates from its failure to consider that the content of the principle of self-determination is – especially in the post-colonial era – in a state of flux, as its application in concrete cases is ultimately determined by the convergence of the prevailing political forces within the international community. As Antonio Cassese put it, because of its "general, loose and multifaceted" character, the principle of self-determination lends itself to "various and even contradictory applications", in that is prone to be "manipulated and used for conflicting purposes".[74] This has perhaps been the case because the contribution of international courts – and specifically of the International Court of Justice[75] – in the field of self-determination has been less significant than in other areas of international law, partly because States have shown a reluctance to refer self-determination matters to third-party adjudicators and partly because the very same adjudicators have preferred to carve out for themselves a secondary role to that of political, state-driven organs.[76]

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[74] Cassese, *cit. supra*, 128-129. See also M. Pertile, *Il parere sul Kosovo e l'autodeterminazione assente: quando la parsimonia non è una virtù*, in L. Gradoni and E. Milano (eds), *Il parere della Corte internazionale di giustizia sulla dichiarazione di indipendenza del Kosovo: un'analisi critica*, Padova, 2011, p. 89 ff., pp. 120-121.

[75] It has been noted, in this regard, that ICJ's pronouncements on the issue – although not "merely adjectival" – are basically aimed at supporting the activities of UN political organ (J. Crawford, *The General Assembly, the International Court and Self-determination*, in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge, 1996, p. 585 ff., pp. 592-594. It is worthy of note that, when the ICJ has been called upon to settle a self-determination controversy in the absence of a previous determination by the General Assembly or the Security Council, it has shown an overly cautious attitude (see *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, cit.; on the inherent limits of the role of international adjudication in this case, see L. Gradoni, *Conclusioni: Questa non è una dichiarazione di indipendenza*, in Gradoni and Milano (eds), *cit. supra*, p. 227 ff., pp. 254-255).

[76] Of course, there are some notable exceptions, such as the African Commission on Human and Peoples' Rights, which has found itself competent to adjudicate individual and collective complaints concerning the violation of the right to self-determination; see *Katangese Peoples' Congress v. Zaire*, Communication No. 75/92 (1995); *Jawara v. Gambia*, Communications Nos. 147/95, 149/96 (2000), paras. 72-73;

These considerations led some authors to frame the law of self-determination as a "process" rather than as a "rule", by building upon the teachings of the authors belonging to the so-called New Haven School (NHS) of international law.

The New Haven School, pioneered by Professors McDougal and Lasswell, describes international law as a global process of authoritative and controlling decisions.[77] International law would therefore be a dynamic process, rather than a formal set of static rules. In a nutshell, the main tenets of this approach may be summarized as follows. To begin with, the interpretative moment is accorded paramount importance, being the medium through which law becomes part of political reality.[78] Moreover, the policy factors lying behind legal decisions are "systematically and openly dealt with" so as to allow "public scrutiny and discussion".[79] Finally, formal theories on international legal personality are discarded in favour of a more comprehensive, pragmatic approach aimed at valuing the role of all the participants in global decision-making processes.[80]

Kevin Mgwanga Gunme et al v. Cameroon, Communication No. 266/03 (2009), paras. 163-203.

[77] M.S. McDougal, H.D. Lasswell and M.W. Reisman, *The World Constitutive Process of Authoritative Decision*, in *Journal of Legal Education*, 1967, p. 253 ff. Under this model, therefore, law is made of decisions possessing two elements: "authority" and "control". While the latter basically refers to coercion and is common to all power processes, "authority" is typical of the law-making process and indicates the conformity of a given decision to the world community's expectations "about who is competent to make what decisions, in what structures, by what procedures, and in accordance with what goals and criteria." (L.-C. Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective*, 3rd ed., Oxford, 2015, p. 17. The notion of "authority", therefore, is crucial in discerning law from decision-making processes resulting in the exercise of "naked power" (Lasswell, MacDougal and Reisman, *cit. supra*, p. 257).

[78] M.S. McDougal, *The Interpretations of Agreements and World Public Order*, New Haven, 1967.

[79] R. Higgins, *Problems and Process. International Law and How We Use It*, Oxford, 1995, p. 5; I. Scobbie, *A View of Delft: some Thoughts about Thinking about International Law*, in M. Evans (ed.), *International Law*, 4th ed., Oxford, 2014, p. 53 ff., p. 76.

[80] M. Noortmann, *Understanding Non-state Actors in the Contemporary World Society: Transcending the International, Mainstreaming the Transnational, or*

This theoretical model well fits with the analysis of self-determination processes for several reasons. Firstly, given the open-textured character of the principle of self-determination, its interpretation resembles more a policy-directed choice than a purely legal exercise. Being committed to normative values (which may be roughly summed up with the binomial "peace and human dignity")[81], however, NHS jurisprudence does not equate international law with naked power or self-serving political interests, but provides a critical theoretical framework through which to discuss and scrutinize the international behavior of all participants in the decision-making process.

Secondly, the dynamic approach advocated by the New Haven School rightly emphasizes the role played by non-state entities which, while not enjoying the formal status of international subjects, have some say in self-determination processes. To be at stake, in particular, are political parties, insurrectional groups, and local government bodies whose perspectives and patterns of self-identification represent an inescapable point of reference in examining self-determination claims. Relatedly, this approach gives due weight to the fact self-determination has historically been implemented through a community-driven process within which a critical issue concerned the allocation of competences among various state and non-state actors.

Thirdly and finally, by questioning the "sanctity" of past trends, the NHS approach frees the principle of self-determination from the "chains" of its glorious (but largely outdated) anti-colonialist past and paves the way for an overall rethinking of what constitutes, at present, a legitimate self-determination claim.

Bringing the Participants back in?, in M. Noortmann, A. Reinisch and C. Ryngaert (eds.), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers*, Abingdon-on-Thames, 2010, p. 153 ff..

[81] Chen, cit., pp. 101-103.

5. Concluding remarks

Two different approaches to the issue of secession have been here outlined: a static approach and a dynamic one. If the former is largely predominant – in domestic and international practice as well as in literature (especially the continental one) – the latter may prove, in certain circumstances, to be more fruitful in terms of a satisfactory resolution of political-territorial conflicts.

In this connection, it has been argued that the Canadian affair, despite the real risks of dismemberment that have arisen in some phases, must not be considered as "a bad precedent nor as a failure from a moral point of view: it will have allowed for decades to accommodate different nations in a single State, it will have allowed the French-speaking minority nation to express, on many occasions, its own secessionist will and it could lead to the construction of a new Quebec state in terms consistent with liberal and democratic contractualism".[82] In the same way, the Scottish process (starting from devolution) has been interpreted not as a systemic crisis but rather as a democratic demonstration of "flexibility to adjust to such a challenge and the capacity also to recognise the multinational character of the State which underpins the political aspirations of its different peoples";[83] "a sign of strength, the latest example of the state's pragmatic reconsolidation in response to internal stresses".[84]

All of this comes with a significant consequence, which may seem paradoxical: in both hypotheses, secession did not occur, and the dialectic between nationalisms – which was not denied – was pushed on new bases of mutual recognition. On the contrary, in a context such as the Spanish one, where State institutions – confronted with the strength and persistence of the secessionist claim –opposed a rigid rule-based approach, territorial tensions can be considered anything but overcome: the nationalistic fracture remains – and is

[82] P. Bossacoma i Busquets, *Justícia*, cit., 30-31.
[83] S. Tierney, *"The Three Hundred and Seven Year Itch": Scotland and the 2014 Independence Referendum*, in M. Qvortrup (a cura di), *The British Constitution: Continuity and Change. A Festschrift for Vernon Bogdanor*, Oxford, 2013, 141-142.
[84] W. Walker, *International reactions to the Scottish referendum*, in *International Affairs*, vol. 90, n. 4, 2014, 745.

radicalized; repressive responses by the Spanish State risk marking a retreat of the system's democratic credentials.[85] The very functionality of the form of State government is seriously compromised: the Catalanist parties, which in many past occasions were the keystone of governability, are placed outside the negotiations for the formation of the Executive, making them particularly complex; from 2015 to the present, the Spanish people have been called to vote three times, and the current prospects of appointment of the President of the Government, after the round of elections of 28 April 2019, appear somewhat uncertain.[86]

However, neither of the two approaches is to be affirmed in absolute terms. The challenge will be to figure out when the transition from one to the other is necessary. In general terms, the two perspectives can be linked to the domains of constitutional "normality" and "exceptionality", the latter coming into play only when the constitutional authority itself is facing a veritable legitimacy crisis.[87] It has been recalled that "the very idea of replacing constitutional legitimacy with decisions in the name of constitutional legality can be, in times of crisis, a dangerous and counterproductive illusion".[88] Such an approach is, however, too general, and must be declined on the typology of conflicts which are of interest here. There

[85] See Economist Intelligence Unit, *Democracy Index 2017. Free speech under attack*, London, 2018, 10; Amnesty International, *Amnesty International Report 2017/18. The State of the World's Human Rights*, London, 2018, 339-341; Amnistía Internacional España, *1-O en Cataluña: obstáculos para la investigación del uso excesivo de la fuerza*, Madrid, 2018; Human Rights Watch, *World Report 2019. Events of 2018*, USA, 2019, 237; United Nations Human Rights Office of the High Commissioner - Working Group on Arbitrary Detention, Opinions No. 6 of 13 June 2019 and No. 12 of 10 July 2019.

[86] For a general account of the conflicting irruption of the peripheral dynamics in the central one, see M.A. Jovanović, *Can Constitutions Be of Use in the Resolution of Secessionist Conflicts?*, in *Journal of International Law and International Relations*, vol. 5, n. 2, 2009, 77; G. Nevola, *Capire la secessione*, in *Il Mulino*, n. 5, 1997, 824-825.

[87] X. Bastida Freixedo, *El derecho de autodeterminación como derecho moral: una apología de la libertad y del deber político*, in J. Cagiao y Conde – G. Ferraiuolo (eds.), *El encaje constitucional del derecho a decidir. Un enfoque polémico*, Madrid, 2016, 221-222.

[88] G. Zagrebelsky – V. Marcenò, *Giustizia costituzionale*, Bologna, 2012, 126.

are many indicators which, on the whole, may help to frame – also from a legal point of view – secessionist claims, in order to mark the passage from "normality" to "constitutional exceptionality" and to understand when the relinquishment of the static approach in favour of the dynamic one can become expedient: the historical depth, the social, political, cultural and value background of those claims; the adequacy of the existing autonomous-federal structures in relation to the nationalistic-territorial complexity found in a given legal order; the willingness of the central powers to review these structures when they show a deficit of functionality, in particular in the perspective of the recognition of that complexity; the political and social support that the instances in question enjoy.

Bearing this last profile in mind, can Catalan and Bavarian independence, for example, in the current historical phase, be regarded as deserving of the same type of legal classification and the same institutional responses? The former, in the last three electoral rounds (2012, 2015, 2017), expresses in the regional Parliament (in terms of seats and votes) a broad support to the referendum (and in the last two, a majority, in terms of seats only, in favour of independence) and breaks through, as we have recalled, in the state dimension, obstructing the governance mechanisms; the latter, in relation to the event which leads to the cited decision 2 BvR 349/16, has as its only claimant a party that, at the level of the Lander, does not exceed, since 1970, 2.1% of votes.[89]

At times, these evaluations are not simple, which can make a synergy between different scientific domains profitable and necessary; and which requires an endeavour to escape theoretical approaches that are "uncritically" grounded on the rule of majority and that contribute, in this way, to "dig unbridgeable furrows of incommunicability between the different constituent factors (ethno-national and territorial) of composed State entities";[90] and to overcome the biases generated by the "language of fragmentation"

[89] This electoral result, which is still below the 5% threshold for access to the allotment of seats, was reached by the *Bayernpartei* in the Bavarian elections of 2013; the second best result since 1970 is 1.7% in 2018.

[90] Cfr. F. Palermo, *Prefazione*, in A.-G. Gagnon, *L'età delle incertezze*, cit., XVII-XVIII.

beyond which Benedict Anderson glimpsed "a Panglossian conservatism that likes to imagine that every status quo is nicely normal" and that feeds the ideology of the great countries whereby they always "stand for progress and peace, while their adversaries stand for 'narrow' nationalism".[91] This is, in a nutshell, the "confession" wished for by Michael Billig, when he urged social scientists to become aware of the pervasive schemes through which the *banal nationalism* of well-established States operates.[92] These, too, can be considered methodological indications worthy of consideration.

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Abstract: The essay deals with secession, that from a legal point of view presents a number of difficulties common to both the national dimension and the global one. Moving from a recognition of the evidences coming from a static and legalistic approach, relevant cases are analyzed in order to demonstrate the necessity in adopting alternative, dynamic approaches to secessionist phenomena in the academic debate.

Keywords: secession, static or dynamic approach, legal and moral authority, law and legitimacy, good faith and international recognition.

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[91] B. Anderson, *Imagined Communities. Reflection on the Origin and Spread of Nationalism*, London-New York, 1983. For a critical appraisal of "economicist" bias towards identitarian peripheral claims see also A. Cantaro, *Introduzione*, cit., 16-17.
[92] See M. Billig, *Banal Nationalism*, London, 1995, especially p. 125 ff.