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# GUARANTEES OF RIGHTS AND PROTECTION OF DIVERSITY: TOWARDS A CONSTITUTIONAL INTERPRETATION OF THE SECESSIONIST REQUESTS

*Posted on 31 Maggio 2018 by Alessio Martino*

Studies on dissolution and secession have acquired ever greater centrality because of the growing crisis of the state sovereignty's supremacy (J. Butler e G. Chakravorty Spivak, "Che fine ha fatto lo stato-nazione?", Meltemi Editore, Rome 2009; M. Luciani, "L'antisovrano e la crisi delle costituzioni", Rivista di diritto costituzionale, 1996, p. 178 ss.; N. MacCormick, "La sovranità in discussione. Diritto, stato e nazione nel «commonwealth» europeo", Il Mulino Editore, Bologna 1999) which has undermined the idea of nation (P. Ridola, "Diritto comparato e diritto costituzionale europeo", Giappicchelli Editore, Turin 2010; S. Benhabib, "Cittadini globali. Cosmopolitismo e democrazia", Il Mulino Editore, Bologna 2008; C. Galli, "Spazi politici. L'età moderna e l'età globale", Il Mulino Editore, Bologna 2001). This condition of crisis has generated a fracture of national identities through the re-emergence of local and regional identities.
The interpretation of these phenomena (and especially of the recent secessionist and dissolutive requests that brought to bthe crisis of the political unity's concept) must be developed through a dynamic vision of

comparison between the state and sub-state communities. This approach can dissolve the disruptive character of secession instance (S. Mancini, "Ai confini del diritto. Una teoria democratica della secessione", Osservatorio Costituzionale, January 2015) notwithstanding the classic and well-known theory of secession as a form of revolution (H. Kelsen, "Teoria generale del diritto e dello stato", Etas editore, Milan 1994).

Certainly, secession represents a problematic concept with a contradictory nature (S. Mancini, "Ai confini del diritto. Una teoria democratica della secessione", cit.). Nevertheless, it cannot be roughly forced into the enclosure of the *unlawful*. A constitutional idea of secession is possible, and the attempt to develop a constitutional theory of secession as a form of political action is ancient (J. Althuius, "La politica. Elaborata organicamente con metodo, e illustrata con esempi sacri e profani", eds. C. Malandrino, Claudiana Editore, Turin 2009). However, opposite readings of this phenomenon have been, so far, more successful and one of the main troublesome issues of secession results from the affirmation of state sovereignty's absolute supremacy (such US Supreme Court expressed, for instance, in the judgment *Texas vs White*: *"When Texas became one of the United States, she entered into an indissoluble relation. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States"*). Such an interpretation of the local realities' instances did not leave space for the constitutional theories of division (whatever the intensity of this division) that originated in the US southern states during the nineteenth century. In this manner, during the following century, the theories hostile to secession ended up influencing the very behaviour of international law towards the requests for recognition of the local identities.

Even so, the local identity's instances represented a core element in the development of the idea of state. Such instances are not necessarily characterized by the disruptive end, as they can represent, instead, the dynamic element at the base of an evolution of the concept of sovereignty that survives the crisis of nation. In this way, the secessionist issues (which

does not necessarily have a breaking ending, potentially finding its true realization in the protection of unity) can act as an emergency valve, getting to represent a tool for the protection of cultural and historical minorities.

According to this interpretation, the Quebec's secessionist conflict is one of the most significant for a constitutional reading of the concept of secession. Moreover, the successful way in which it was managed can be identified as a paradigm. The Canadian Supreme Court, in fact, had an unexpected success in tempering the secessionist issue by a decisive but conciliatory intervention. The court's approach opened to those theories that – giving relevance to local identities – admit a disruptive conclusion of the secessionist instance (M. Lind, "In defense of liberal nationalism", Foreign Affairs, 73, No. 3, 1994; D. Miller, "On Nationality", Oxford University Press, Oxford 1997, p. 92). Balancing that, the court has drawn up a series of rigid procedural forms on which building the request for greater autonomy or even independence. The target of the court, in essence, was to resolve the conflict without opening a clash.

The interpretive work of the Canadian court has rejected the vision of secession as a remedy for injustice (A. Buchanan, "Secessione: quando e perché un paese ha il diritto di dividersi", Mondadori Editore, Milan 1994) by sharing the theories of national identity (A. Margalit, "La società decente", Guerini e Associati, Milan 1998; J. Raz, "The Authority of Law: Essays on Law and Morality", Oxford University Press, Oxford 2009) and combining them with those based on the democratic process (H. Beran, "The consent theory of political obligation", Routledge Kegan & Paul, London 1987). The court emphasized the theory according to which the guarantees of rights and the protection of diversity (J.S. Mill, "Considerazioni sul governo rappresentativo", Editori Riuniti, Rome 1997) are best expressed in the democratic and multinational state. At the same time, the court gave centrality to the concept of freedom (in particular freedom of association) recognizing the importance of admitting the dissociation from the state.

Following this interpretation, minorities certainly have a right to demand the opening of a change process, but that demand can be transformed in

a secessionist request only according with the constitutional forms. The possibility of opening a path that could potentially lead to the creation of a new state must be allowed, but only through the negotiated way.
In fact, for the Canadian court "*to negotiate*" means recognizing that in a democratic and plural society the elevation of one's position to absolute is not admissible. Therefore, "*to negotiate*" means opening up to the other; finding a common solution to the opposing instances; recognizing differences; looking for a way based on mutual respect.
The considerations of the Canadian Court on the management of the conflict have been disregarded by the Spanish constitutional court in the Catalan case. In fact, the Spanish court seems to have sharpened the conflict between the central government and the Catalan community. Nevertheless, no one has ever intended "*to define the details of a consensual secession*" in order to "*negotiate*" but rather "*to discuss in good faith a political solution to the conflict*" (V.F. Comella, "La Catalogna e il diritto di decidere", Lo Stato. Rivista Semestrale di Scienza Costituzionale e Teoria del Diritto, No. 6, year 2016, p. 236).
The tension between Madrid and Barcelona stems from the Constitutional Tribunal's ruling on the 2010 Catalan statute (judgement No. 31 of 2010). The new statute, founded on constitutional uniqueness of Catalonia, tried to acknowledge all aspects of Catalan identity (people, nation, language, historical differences), using constitutional-consistent tools (at the least in purpose) and following paths that aimed to keep Catalonia within constitutional borders. However, the decision issued in 2010 – in contrast with the autonomous demands and without any balance – has questioned the "*autonomic peace*" strenuously achieved at the end of Franco's totalitarianism. The court, as expressed by Judge Martin de Hijas in his dissenting opinion, incoherently used its interpretative power, turning into a "*positive legislator*" (R. Ibrido, "Il 'derecho a decidir' e il tabù della sovranità catalana. A proposito di una recente sentenza del Tribunale costituzionale spagnolo", Federalismi.it, No. 14, year 2014).
The Constitutional Tribunal has essentially transformed "*a debate on the recognition*" (J. M. Castellà Andreu, "La sentencia del Tribunal Constitucional 31/2010 sobre el Estatuto de Autonomía de Cataluña y su

significado para el futuro del Estado autonómico", Federalismi.it, No. 18, year 2010) – based on a "*right to decide*" that the Court had accepted as a political aspiration but not as a true right – in a showdown. Consequently, frustration of Catalan people turned into an unconditional political support to the independentist parties, which gradually gained more centrality in the government of the Catalan Generalitat reaching parliamentary majority.

In this context, the Catalan Parliament approved in 2013 the resolution no. 5/X: a deliberately subversive measure based on the assumption that the Catalan people in its history had already democratically manifested the desire of government autonomy: that transformed the Catalan issue into a constitutional conflict which brought to the complete rejection of any negotiation about peaceful coexistence.

The reaction of the Constitutional Tribunal was very harsh. In the decision no. 42 of 2014, it reacted to the Catalan resolution by elevating to "dogma" the concept of sovereignty and closing off any possibility of mediation with the instances of autonomy. In this way, any residual space for the recognition of local instances has been severely circumscribed.

Between 2015 and 2016 it was already uncertain whether there was still the possibility of a negotiated solution between the Spanish and Catalan governments able to avoid a breakpoint. Subsequently, the progressive enlargement of the electoral base of the Catalan "*antisystem*" parties led to the definitive explosion of the clash in 2017, when the government of the Generalitat approved laws No. 19 and No. 20 of 2017 concerning "*the establishment of a self-determination referendum*" and "*the legal transition to the Catalan Republic*".

The Spanish constitutional court did not set itself as an element of cohesion, but as an active part of the conflict. With a series of judgments (No. 114 and No. 124, but also with No. 121 on "*rules for the celebration of the referendum*" and No. 122 on "*convening of the referendum*"), the court passed on all the legislative measures of the Catalan institutions, fighting not only "on one side" but, even more, exclusively "for a side".

In this vein, the different epilogue of the various identity instances appears to be closely linked whit the role displayed by Constitutional

courts as dealing with conflicts arising from secessionist requests. In fact, when the courts have placed themselves in a conflictual way against the identity instances of minorities (Catalan case), those instances have become real attempts at secession. Otherwise, when the same courts have developed a dialogue (*rectius*, a negotiation) aimed at recognizing local issues (Quebec's case; Basque case), unity has always been protected.

Therefore, the *discrimen* between the crisis and the maintenance of the legal system lays in the different reaction to the emergent instances of recognition rather than in the concrete strength of these requests. Indeed, that's one of the reasons why even international law has given to the conflicts aimed at the formation of new states a procedural reading with the aim of reducing the conflict (A. Tancredi, "La secessione nel diritto internazionale", CEDAM, Padua 2001).

Furthermore, secession processes – regarded through the prism of the decisions issued by Constitutional courts – appear to be deeply intertwined with constitutional dynamics. Courts' decisions open up the possibility for a dynamic understanding of secession, whose outcome can go beyond the rupture of the unity, leading instead to a more articulated recognition of differences.

At the outset, a constitutional approach to secession – notwithstanding how counterintuitive it may seem – can soothe the traditional conundrum between right to self-determination and rupture of national unity. The role of Courts, in this light, eases a wider and context-sensitive comprehension of secession, which engages with the function of the Constitution as a tool for integration and for the inclusion of differences.

**This paper is a reworked version of a speech held by the author at the King's College of London for the 2018 International Graduate Legal Research Conference*