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Constitutional Judges and Secession. Lessons from Canada … twenty years later

by

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Abstract

In constitutional theory, the *referendum* is an instrument that allows for the expression of the popular will in government decisions and through which people are asked to vote directly on an issue or policy. Over the last decades, the referendum has been the instrument used by minority groups to claim their independence supported by popular will. This paper examines trends in constitutional jurisprudence on the issue of independence referendums. The birth of this constitutional trend can be found in the 1998 decision by the Supreme Court of Canada in the *Reference Re Secession of Quebec*. The principles developed therein have been further explored in two recent cases, issued by the Italian Constitutional), and by the Spanish Constitutional Tribunal in the latest decision of the *Catalonia saga* (Judgment no. 114/2017).

Keywords

referendum, secession, constitution, constitutional judges, Canada

1. Introduction

In constitutional theory, the *referendum* (from the Latin expression *ad referendum*, meaning "convocation to referee") is an instrument of direct democracy that allows the expression of the popular will in government decisions and through which people are asked to vote directly on an issue or policy (Morel 2012: 502). Thanks to the influence exercised by Rousseau's ideas, and mainly the idea that the only valid form of legislation was popular legislation, it is possible to find the first constitutional traces of the *referendum* in the 1793 French Constitution (which remained inactive) and in the Swiss constitutional order (federal and cantonal) in which, since 1848, the referendum found extensive and well-structured prediction (Salerno 1988: 202). While no explicit reference to referendums or popular consultation was provided in the 1787 US Constitution, referendums started to be used by American states from the end of XVIII century, thanks to the influence exercised by the *Progressive Movement* and by the idea of the need to extend the use of the popular will (Salerno 1988: 203).

Although the referendum has been a subject of interest in legal science since its first conceptualisation, this interest has increased in the XX century, following the greater use of referendum, both internationally[I] and constitutionally (as evidenced in the composition of many European Constitutions, such as the 1919 Weimer Constitution; Salerno 1988: 204).

Referendums can take an extensive variety of forms: we can distinguish between *mandatory* or *compulsory* referendums and *optional* or *facultative*, depending if the request of the referendum is a compulsory part, or not, of a regulated process as, for example, a legislative process; we can distinguish by the actors who propose it, between referendums initiated by institutional actors such as the executive, the legislative branch, or a parliamentary minority, and popular initiatives. With regard to the formal objective, it is possible to differentiate between *abrogative*, *suspensive* or *deliberative* referendums when the vote is on existing legislation, and *prepositive* referendums if it refers to new legislation. We can classify referendums by the reference to the legal consequences of the vote, distinguishing between *consultative* or *advisory* referendums or *binding* ones. The referendum can deal with a wide category of legislative acts (ordinary legislation, constitutional reforms or international treaties), and it can concern a

range of subjects: institutional, international, territorial, moral, economic etc. (Morel 2012: 508).

The recent comparative experience, of the last 30 years, shows us an increasing trend in using the referendum as a tool to support minority groups' demands for independence. Apart from those cases in which the independence request came from oppressed people as the expression of their right to self-determination, there has been an increasing use of the referendum by minority groups living in consolidated democratic states. Usually they are groups with a specific historical and cultural heritage, distinct from the majority, which already enjoy regional and/or federal political autonomy status: their demand is directed to obtaining the sovereignty that they consider belongs to them, through secession from the State they are part of.

For Qvortrup (2014: 1-4), since the Second World War there have been slightly more than fifty referendums on independence. The conditions under which these took place were very different: for example, the referendum in French Guinea that was held in 1958 was part of the decolonisation process that took place in the second half of the XX century. It was held as part of a wider referendum across the French Union to adopt the new French Constitution. As the consequence of rejecting the adoption of the French Constitution, Guinea gained independence. Referendums held in 1991 in Latvia, Estonia and Lithuania to gain independence were part of the restructuring of Europe after the dissolution of the Soviet Union. The constitutional referendum held in Iceland in 1944 asked voters whether the Union with Denmark should be abolished and a new constitution approved. But the list is longer.

Very few referendums had been held in each decade before 1990, while in the last 30 years there has been an explosion of plebiscites (Qvortrup 2014: 1-4). Referendums held before 1990 are strongly linked to an international consolidation of the right to self-determination of peoples, and the decolonisation process, while referendums held since the end of the Eighties finds their explication, from a geo-political point of view, in the fall of the Berlin Wall and the dissolution of the Soviet Union that redesigned the features of Europe.

However, referendums held since the middle of the Nineties have had different characteristics: they have been held in democratic countries, and they have all resulted in the rejection of the proposed change, as shown by referendums in Quebec in 1980 and 1995, in

St. Kitts and Nevis in 1998[II] and in Scotland in 2014. The only case in which a referendum on independence in a democratic country was successful is Montenegro in 2006.

From a political point of view, the outcome of a referendum on independence is related to multiple elements. However, to be constitutionally legitimate, secession requires that certain essential elements be respected. Since most contemporary constitutions are silent on this point, with very few exceptions,[III] constitutional judges have been responsible for determining which elements should be respected to allow a *constitutional secession*. More specifically, this article will deal with two main aspects: the constitutional nature of a referendum on independence or secession, and its possible legal effects.

In this regard, in the following pages we will first see the theoretical configuration of secession, and the transition from a *de facto* institution to a subjective legal situation which, in some cases, clearly provides for its qualification as a right (paragraph II). The analysis of the reference of the Supreme Court of Canada on the intent of the secession of Quebec will follow (III): even if the decision issued by the Supreme Court of Canada dates back to 1998, the constitutional argumentation developed therein still represents an important and topical lesson for more recent cases of independence intent, as in the cases of the Veneto Region in Italy and Catalonia in Spain. Thus, the Italian Constitutional Court Judgment no. 118/2015, and the latest decision of the Spanish Constitutional Tribunal in the Catalonia saga (Decision no. 114/2017), will be analysed (respectively in paragraphs IV and V). This choice is mainly due because both constitutional judges have faced the same problems in dealing with an internal entity with intents on secession, and have both chosen analogous solutions, inspired by similar constitutional principles to those developed by the Supreme Court of Canada's 1998 decision.

Last, some final considerations on the emergence of a constitutional tendency among constitutional judges, on the use of referendums for independence, will be developed in paragraph V.

2. Secession, Constitution and Referendum

Secession, as the "formal withdrawal from a central authority by a member unity" (Wood 1981: 110) is an event through which new states are created. Part of constitutional theory considers secession as an *extra ordinem* fact, generally ignored by traditional international

doctrine and international law[IV] and *demonized* by constitutional law. Constitutional legal scholarship has underlined how the idea of secession clashes with State and sovereignty conceptions elaborated in the XIX and XX centuries, in that supposed constitutional rights to secession are "manifestly absurd for the nature of the Constitution itself".[V] In 1869 the US Supreme Court, in the case *Texas vs. White,*[VI] stated that "When […] Texas became one of the United States, she entered into *an indissoluble relation*. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. 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."[VII] Secession has become considered as a taboo, and has almost become forbidden by constitutional law that has given prevalence and priority to the principle of unity of the State.

According to the *compact theory*, however, secession is an inherent right related to the belief that – with specific reference to Southern States of the US – the union between states is made on a volunteer basis. Moreover, secession has been justified by the *inherent-power argument*, according to which States have the power to reassert their previous status of sovereignty and- as Calhoun argued (1992)– due to the absence of federal power (Neff 2015: 407-401).

The principle of unity started to lose part of its power when, in 1921, the Aland Islands asked for independence from Finland: in that case, the League of Nations stated that secession can never be unilateral;[VIII] the only case in which secession can be unilateral is when it represents a remedy to an injustice. From that moment onwards, secession started to be considered as a *remedial right.*[IX] The right of self-determination has been recognised since the Second World War, and it has provided the conditions under which secession can be legitimate under international law. According to art. 1 of the 1966 International Covenant on Civil and Political Rights "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Due to its wide formulation, this disposition also seemed to include the right to secede, but only for oppressed peoples (Ruggiu 2016: 75). As a matter of fact, contemporary international doctrine considers secession as an extreme remedy to

situations in which a State has committed a gross violation on the right to free self-determination of a people, or other fundamental human rights of minorities, or other groups which are under its sovereignty. Secession as a remedial right is constituted when a State exercises a form of abusive sovereignty that, from an international point of view, would justify the "rebellion against tyranny and oppression" indicated in the Preamble of the 1948 Universal Declaration of Human Rights as a legitimate reaction. Here, secession is strongly related to the right of free self-determination of peoples in its *external* perspective: in this case, the right to self-determination is denied by the State, whose claim rests on the principle of State integrity and unity. However, rather than authorising the right to secession, the trend is to ask the State to stop committing the violation and to reestablish the *status quo ante*. Even if the trend is toward the prevalence of the principle of state integrity over secession,[X] as established in paragraph 7 of the United Nation General Assembly Resolution n. 2625 (XXV), the State's right to have its integrity respected is strictly conditional on the respect the State gives to *internal* self-determination, giving representation to the whole people, including minority groups (Murswiek 1993: 38).

These had been the guiding principles during the decolonisation process; however, since the end of this process in the 1990s, secession claims have started to gain a new profile. First of all, they come from minority groups with historical, cultural and linguistic specificities. Secondly, these groups are part of consolidated democratic States within which they already have specific political autonomy: the aim of their independence claims is to regain lost sovereignty. Thirdly, they do not seek to use the referendum as an instrument to participate in government or policy making decision, but rather they use the popular consultation instrument to give space to a minority will.

At the moment, very few Constitutions explicitly recognize a right to secession (the Constitutions of Ethiopia,[XI] Liechtenstein[XII] and Saint Kitts and Nevis[XIII] do so), while the Constitutions of Chad,[XIV] Djibouti,[XV] Mauritania,[XVI] Senegal[XVII] and Ukraine[XVIII] all make specific reference to the need to proceed to a referendum in a secession process. This data reflects the predominant trend according to which Constitutions generally reject the possibility of local entities seceding and gaining independence, preferring the protection of the principle of State unity, as analysed in the following pages.

3. The Quebec intent of secession: the decision of the Supreme Court of Canada in the *Reference Re Secession of Quebec* [1998][XIX]

Tensions between Quebec and Canada's central government have far-reaching origins, dating back to the foundation of the Federation. As a majority French-speaking province, Quebec has consistently pushed for the recognition of its 'distinct society', separate from that of the other Anglo-Saxon provinces, periodically threatening unilateral secession from the rest of the Canadian territory.

The position of the Canadian government has been to leverage mono-national sentiments, which was considered the foundation of the 1867 British North America Act (BNAA) (Groppi 2006: 29-31), resulting from the compromise between the colonies, including those that were not part of the Federation at an early stage. This compromise was considered as the *pactum societatis*, whose rationale is to be found not in territorial collectivities, but rather in the consensus given by individual citizens to the Federation.

The aim of the BNAA was ambiguous: on one side, the English-speaking founding fathers intended to create a great British North American nation; while, on the other side, French-speaking delegates wanted to protect their cultural diversity. Finally, the BNAA represented the birth of a political nationality based on the coexistence of different *families* (Russell 2004: 32 ff.). From that moment, Quebec was characterized by a strong social and political conservatism and a defensive nationalism.

Change began with the *Quiet Revolution,* that characterised Quebec from the early 1960s.The province went through a period of economic, political and cultural development, with the government of Jean Lesage, leader of the Liberal Party, and the support of the small bourgeoisie which cleaved to ideas of a social state and thus sanctioned the end of a traditional pattern of clerical immobilism (Clift 2014: 18 ff.).

This was followed by a growing involvement of the province in the fields of labour, economics and education, with the consequent expansion of the bureaucratic provincial apparatus. This was also the time when a nationalist sentiment was revitalised, which changed the attitude of the French-speaking community that then began to defend their own interests. The Quebec government called for more powers, but at that time the federal union was never questioned.

Quebec refused to sign the 1971 Victoria Charter as it conceived of the idea of the Constitution as a *pactum societatis,* and not as a confederal pact (Behiels 2005: 23 ff.); moreover, it provided for the principle of regional equality of Canadian provinces, which implied a failure to recognise Quebec's primacy with reference to social policy (Tosi 2006: 127). From the second half of the 1970s the first independent movements began to form. In 1976, the *Parti Québécois* – founded in 1968 and whose main purpose was to obtain sovereignty for the province – gained a majority in Quebec's parliament (Pinard-Hamilton 1978) and launched a referendum to gain a mandate to negotiate with the rest of the country a new agreement recognising political sovereignty in Quebec, while maintaining an economic association and a monetary union between the two new sovereign entities. The referendum took place on May 20, 1980: almost 86% of the population voted but the referendum question was rejected by nearly 60% of voters, receiving little more than 40% of the consensus. The negative outcome of the referendum was in part determined by the *No campaign* carried out by the Federal Government, based on the promise that in the event of a negative outcome of the referendum, a process of renewal of the constitution would have begun.

In spite of the negative outcome of the referendum, the *Parti Québécois* won the next year's provincial assembly elections and re-established itself in government as an interpreter of the interests and will of the Quebec people, and hence the only official interlocutor with the central government.

In 1982, the Constitution Act was approved and the Canadian Constitution was repatriated: for Quebec, the repatriation of the Constitution was an unlawful act, due to its unwillingness to adhere to the new constitutional pact. As a consequence, the province has utilised the guarantee instruments introduced with the reform much more frequently than the other provinces (including the notwithstanding clause provided in Section 33 of the Canadian Charter of Rights and Freedoms). Given the dissent, in 1986 the new Liberal Quebec government of Robert Bourassa laid down five essential conditions for consenting to the Canada Act of 1982 (Groppi 2006: 36 ff.).

In 1987, a political agreement was signed at Meech Lake, which included the extension of all requests made by Quebec's government to all provinces, apart from the recognition of the distinct nature of the Quebec community. The reform project was adopted by Quebec and gained the consent of six other provinces, but some political facts created a stalemate. The change of government in New Brunswick, Terra Nova and Manitoba called for few

points to be modified, but collided with Quebec's refusal to make changes thus leading the Meech Lake agreement to fail (Breton 1992).

In 1990, the Quebec Government established a parliamentary Commission (Commission Bélanger Campeau) in order to examine possible solutions for the constitutional political future of Quebec (Nemni 1993). The final report of the committee became the starting point for new negotiations between Quebec and the Federal Government: a series of intergovernmental conferences were convened and at the end of the meeting held in Charlottetown at the end of August 1992, the parties found a compromise on a new constitutional review text. The main idea of the text elaborated in Charlottetown was to reprise the Meech Lake solutions, to include the recognition of a veto power for Quebec, and of a special distinction in terms of French language and culture.

When the *Parti Québécois* returned to power, the new Prime Minister, Jacques Parizeau, fulfilling the promises of the electoral campaign, launched a new popular consultation on the sovereignty of the Province. The government submitted to the Provincial National Assembly a draft law on the Quebec's future (the Act Respecting the Future of Quebec**)**. After just over a month, the people were called to the polls to express their vote on Quebec's accession to the condition of sovereignty. While in 1980 the people were to decide on whether to give a mandate for negotiating an agreement with the Federal Government recognizing the sovereignty of Quebec, the 1995 referendum on sovereignty was no longer about delegation to intergovernmental negotiations; rather it was directed to know the Quebec people's will on accession to sovereignty. Negotiations after the popular consultation were to be limited to a proposal for a new form of political-economic association between the two sovereignty entities (Canada and Quebec). Despite increasing popular support for the independence solution, the result of the referendum was once again negative. The referendum, in which almost 94% of citizens participated, was rejected with 50.6% of negative votes. After the negative result of the referendum, the central government sought to reduce preferences for independence, and the Federal Parliament approved a resolution recognizing the distinct nature of Quebec society.

In 1996, the Federal Government, using the reference instrument, asked the Supreme Court to issue a reference on the legitimacy, in domestic as well as international law, of a possible unilateral secession of Quebec from the rest of Canada. In particular, the reference was based on three questions: the first requested the Court to determine whether the

National Assembly or the Government of Quebec could, in accordance with the Constitution of Canada, unilaterally proceed to the secession of the Province from the rest of the country. The second question questioned the judges on the provision in international law of such a right, and whether there is a right of self-determination that would give the Province the right to unilateral secession. In the third question the Federal Government asked the Court to determine which of the two regimes, the national or international, would have precedence in Canada in the event of a conflict between the two in relation to the right to unilateral secession of the province.

The decision issued by the Supreme Court is relevant, not only for the arguments developed with specific reference to the questions referred by the Government, that have been deeply analysed by several authors (*ex plurimis* Gaudreault-DesBiens 1999) and because it "combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity" [*Reference re Manitoba Language Rights,* (1985) 1 S.C.R. 721 (Manitoba Language Rights Reference), at p. 728], but also with specific reference to the topic this article is dealing with: the legal nature of a referendum on independence or secession and its possible legal effects.

The analysis is conducted on the Court's taking as reference the fundamental principles of the Canadian Constitution: federalism, democracy, constitutionalism and the principle of legality and respect for minorities, an understanding of which is necessary for both the interpretation of the written constitution, but also an understanding of the historical context and previous jurisprudential interpretations made in constitutional matters. In the light of some fundamental historical stages in Canadian history – such as the conferences of Charlottetown and Quebec in 1864, the 1867 BNAA, the attempt of secession of Nova Scotia amongst others (see further *Reference Re Secession of Quebec*, cit., para. 33-48), the Supreme Court underlined how the federal principle is the key to all the needs expressed by the various political and cultural realities that have characterised and continue to characterise the whole Canadian legal system. The 1867 BNAA had given birth to a nation: federalism was the mechanism by which diversity could be linked to unity. Canadian constitutional history has demonstrated the ability of institutions to change and adapt to changing political and social needs of the country, always ensuring full compliance with the principle of legality and respect for democratic institutions and minority requests. Thus, the basis of Canadian federalism is the recognition of the diversity of the constituent units of the Confederation,

and the right of provincial governments to foster the development of their communities within their spheres of jurisdiction. This is a context in which, notwithstanding the possibility of cultural and linguistic minorities in Quebec pursuing their collective interests, the Court emphasizes the will, present throughout the whole history of the country, of all Provinces to protect not only their autonomy of government on local subjects, but also their respective cultural traditions (*Reference Re Secession of Quebec*, cit., para. 55-60).

Against this backdrop, the Court stated that the referendum, even though it has no direct legal effect and is therefore legally unfit for a unilateral secession, is in any case the expression of a democratic will, and in the case of the referendum in Quebec the will of a part of the Quebec people. Consequently, a referendum that brings a clear expression to the Quebec people should be given a considerable weight: it is the application of the principle of the *clarity of the majority*, meaning that the results of the referendum must not be ambiguous both in relation to the question submitted to the vote, and as to the level of support achieved (*Reference Re Secession of Quebec*, cit., para. 86).

Consequently, if there is a clear indication by a province of the will to pursue secession, the principle of federalism, coupled with the democratic one, binds each and every one of the parties of the Confederation to negotiate constitutional changes that are functional to the implementation of this will. The Constitution of Canada is the product of the sovereignty of the Canadian people, and that power makes it possible to make any constitutional change deemed appropriate within the Canadian territory (*Reference Re Secession of Quebec*, cit., para. 87), thus rejecting the extreme hypothesis that the other Provinces and the Federal Government would have to passively accept the unilateral will of Quebec. A unilateral declaration of independence carried out at the margins of law and constitutionality, and possibly accompanied by a declaration of unconstitutionality of the Court, might well only be successful in the case of an entity which had effective control over the territory, and from the subsequent recognition of the international community.

Consequently, the judges of the Supreme Court excluded that *external* and/or *internal* self-determination might be established in the case of the intent of secession of Quebec: the only constitutional right granted to Quebec to satisfy their will to independence would have been to initiate the legal proceedings provided for in the Constitution for its revision. After the Supreme Court decision, the Clarity Act was approved, which set out the rules to be observed in negotiations between the federal government and a province that wants to secede.[xx]

Even if some scholars have been critical towards the Supreme Court decision for the poverty of theory in it (Choudry and Howse 2000), it represents an important step in the construction of a judicial constitutional tendency of progressive constitutional openness to secession with respect to the 186 US Supreme Court case in *Texas vs. White*. The principles elaborated therein have been adopted and further elaborated by other constitutional judges as shown in the following sections.

4. The *Canadian lesson* on the Italian Constitutional Court: Judgment no. 118/2015

In Italy it is also the case that there are territorial entities that aspire to greater political autonomy and, in some cases, to independence. According to Art. 116, para. 1 of the 1948 Italian Constitution "Friuli-Venezia Giulia, Sardinia, Sicily, Trentino-Alto Adige/Südtirol and Valle d'Aosta/Vallée d'Aoste have special forms and conditions of autonomy pursuant to the special statutes adopted by constitutional law." The special status accorded to these five Regions by the Constituent Assembly is related to the historical and cultural legacy that characterises them, as well as their geographical position. Indeed, Friuli-Venezia Giulia, Trentino-Alto Adige/Südtirol and Valle d'Aosta/Vallée d'Aoste are Regions located on the Italian borders with Austria and Slovenia, Austria and Switzerland and Switzerland and France respectively; as for Sardinia and Sicily, both are islands.

However, at the beginning of the 1990s, new regional movements for autonomy began to appear, progressively acquiring an important position in the political arena: the cases of the Lombardia and Veneto Regions. In particular, in 1991-1992 the Veneto Region, whose regional council was formed by a majority comprising left-wing parties [*Democrazia Cristiana* (Christian Democracy), *Partito Socialista* (Socialist Party), *Partito Socialdemocratico* (Social Democratic Party), and *Partito Repubblicano* (Republican Party)] approved the proposal presented by the *Gruppo Socialista del Veneto* (Socialist Group of Veneto) to launch a popular consultation asking whether the people of the region would have wanted to include Veneto among regions with special statutes.[XXI] The *Partito Democratico della Sinistra (*Left-wing Democratic Party), the *Federazione dei Verdi* (Federation of the Greens), two Venetian autonomous movements *Liga Veneta* (Venetian League) and the *Union del popolo veneto* (Venetian People Union), as well as the national hierarchy of the *Partito socialista italiano*

(Italian socialist Party-PSI), opposed this proposal. The President of the Council (at that time, Giulio Andreotti), challenged the regional law, which was annulled by the Constitutional Court with Judgments no. 470/1992. The Constitutional judge stated that 'as long as [the regional consultative referendum] has no binding effect it cannot exercise its influence, direction and orientation, not only on the power of initiative of the Regional Council, but also in relation to the subsequent stages of the state legislative process, up to affect discretionary choices entrusted to the exclusive competence of central state organs: with the consequent violation of that limit already indicated by this Court for regional consultative referendum that refers to the need to avoid "the risk of adversely affecting the constitutional and political order of the state"' (Judgment no. 470/1992, *Considerato in diritto* no. 4).

A referendum on autonomy was again proposed in 1998, but once again the central Government (presided over by Romano Prodi) challenged the Regional Law on an "Advisory referendum on the submission of a constitutional law proposal for granting the Veneto Region special forms and conditions of autonomy" and the Constitutional Court annulled it with Judgment no. 496/2000 with similar reasons to those laid down in the 1992 ruling.

A third attempt was made by the Veneto Regional Council in 2001-2002, with the approval of a regional law on "Advisory Referendum on the submission of a constitutional law proposal for the transfer to the Veneto Region of functions state government in the field of health, professional training and education, local police."[XXII] Once again, the central Government (under Giuliano Amato), challenged the law at the Constitutional Court, but this was subsequently withdrawn by the new Silvio Berlusconi government.

A fourth attempt was made in 2014, with the approval of Regional Laws no. 15 on the "Advisory Referendum on the Autonomy of the Veneto" and no. 16 on the "Consultative Referendum on the Independence of Veneto": the first launched a consultative referendum on the autonomy of the Region, while the second launched a referendum on independence for the Region.

In particular, Law no. 15 envisaged a *negotiation* between the President of the Regional Council and the Central Government for 'defining the contents of an advisory referendum aimed at knowing the will of the voters of Veneto to obtain further forms of autonomy in the Veneto Region' (Art. 1). If negotiations had not reached an outcome within one hundred

and twenty days from the approval of the law, the President of the Regional Government would have been authorized to launch an advisory referendum to know the will of the voters of Veneto (Art. 2, para. 1), on five questions:

1) Do you want that further forms and condition of autonomy will be attributed to the Veneto Region?

2) Do you want a percentage of not less than 80 per cent of the taxes paid annually by Venetian citizens to the Central Administration to be used in the regional territory in terms of goods and services?

3) Do you want the Region to keep at least 80 percent of the taxes levied on regional territory?

4) Do you want the revenue from the funding sources of the Region not to be subject to destination constraints?

5) Do you want the Veneto Region to become a special status Region?

In the case that the referendum would have reached the *quorum* for its validity and that the majority of the votes would have been validly expressed, the President of the Regional Council would have proposed to the Regional Council itself a negotiating program to be conducted with the State and submitted a state bill containing paths and contents for the recognition of further and specific forms of autonomy for the Veneto Region (Art. 2, para. 2).

Law no.16 gave powers to the President of the Regional Council to launch an advisory referendum to know the will of the Veneto voters on the following question: do you want Veneto to become an independent and sovereign Republic? (Art. 1, para. 1). The President of the Regional Government and the Regional Council were entrusted with safeguarding the right of the Veneto people to self-determination (Art. 3) in every competent national and international arena.

Both laws have been challenged by the Central Government before the Constitutional Court: Law no. 15 for violating Arts. 3, 5, 116, 117, 119 and 138 of the Constitution as well as Arts. 26 and 27 of the Statute of the Veneto[XXIII] and Law no. 16 for the violation of Arts. 5, 81, 114, 138 and 139 of the Constitution.

With Judgment no. 118/2015, the Court declared the unconstitutionality of the questions indicated in numbers 2, 3, 4 and 5 of Art. 2 of Law no. 15,[XXIV] while Law no. 16 was declared unconstitutional *in toto*.

According to the Court, the referendum is a link between the people and government institutions: it is not a form of spontaneous exercise of collective freedom of expression. Rather, it fulfills a function: to initiate, influence or counter public decision-making processes, mostly regulatory, even in cases where there is no immediate legal effect on the sources of law. These characteristics mean that a referendum can be launched by a Region on issues of interest of the regional community. But it also means that regional referendums can cover areas beyond the boundaries of regional subjects and territory, up to the point of interlinking with the national dimension.[XXV] At the same time, this does not mean that Regions can take initiatives - even of popular consultation - free in form, or beyond the limits set by constitutional provisions. The Constitution and Regional Statutes (as indicated in Art. 123 of the Constitution) establish the regional referendum discipline framework within which each Region can move and define its own political autonomy:[XXVI] autonomy that must be carried out in harmony with constitutional principles and dispositions.[XXVII]

Respect for constitutional principles and dispositions implies that even though each Region has the freedom and autonomy to establish the forms, ways and criteria of popular participation in the democratic control processes of its acts,[XXVIII] once these choices have been taken and consecrated in the Regional Statute, they apply to the subsequent regional activity, even legislative, given the fundamental character of the Regional Statute and its relationship with the regional laws drawn up by the Constitution in terms of both hierarchy and competence.[XXIX]

In Veneto, regional referendums are regulated in Arts. 26 (abrogative referendum) and 27 (consultative referendum) of the Statute:[XXX] the normative framework sets out that regional referendums on tax and budget laws, and implementing measures, are excluded as well as referendums on laws and regional acts whose contents constitute fulfillment of constitutional, international and European obligations. This limit has been part of the constant Constitutional Court case law, according to which regional referendums, including those of a consultative nature, cannot involve constitutional-level choices.[XXXI] According to the Italian constitutional judge, the referendum set out in Law no. 16 deals with fundamental constitutional choices that are obviously precluded to regional referendums according to the constitutional and statutory framework, and its jurisprudential interpretation. Moreover, the proposed referendum would have led to institutional overtures radically incompatible with fundamental principles of unity and indivisibility of the Republic. Indeed, according to Art.

5 of the Italian Constitution 'The Republic, one and indivisible, recognizes and promotes local autonomies; implements in those services that depend on the State the fullest measure of administrative decentralization; and accords the principles and methods of its legislation to the requirements of autonomy and decentralization".

The unity of the Republic is one of those essential elements of the constitutional order that cannot be put under constitutional revision.[XXXII] Even if the republican order is also based on principles that include social and institutional pluralism and territorial autonomy, as well as an openness to supranational integration and international order, these principles must be developed within the framework of the unity of the State. According to the consolidated constitutional jurisprudence, pluralism and autonomy do not allow Regions to qualify themselves in terms of sovereignty or allow their governing institutions to be assimilated into those with national representation.[XXXIII] More importantly, the same principles cannot be exploited towards a fragmentation of the system, and cannot be invoked to justify initiatives aimed at asking voters, even for consultative purposes, on prospects for secession in view of the establishment of a new sovereign subject. A referendum initiative that, like the one in question, contradicts the unity of the Republic could never be translated into a legitimate exercise of power by regional institutions and thereby should be considered as an *extra ordinem* fact.[XXXIV]

Following the Constitutional Court Judgment no. 118/2015, the President of Veneto issued a decree launching the referendum for October 22, 2017. The date is no mere coincidence: it is the 151th anniversary of the plebiscite of Veneto – held on 21 and 22 October 1866 – which sanctioned the unification of the Venetian and Mantua provinces with the Kingdom of Italy. The referendum received a popular participation of 57.20% and received 98.10% of positive votes. Negotiations with the central Government will follow.

5. The *Canadian lesson* on the Spanish Constitutional Tribunal: Judgment no. 114/2017

An organised Catalan nationalist political movement has existed since the end of the XIX century, initially claiming simple autonomy for the region, later adopting a more radical independent position (Claret and Santirso 2014). However, its juridical and political structures find its origin in the Carolingian Empire (Gonzalez 2016: 119).

A first attempt to proclaim the Independent Catalan Republic took place in the 1920s but it was repressed by the Primo de Rivera right-wing regime (Scotoni 2001-2002: 400). When the monarchy fell in 1931, even though there was a significant weakening of central power, manifestations of autonomist expression were almost silent and a convergence with the central power was observed (Oleart 2014: 8). During the Civil War, the Catalans supported the republican forces, fearing another totalitarian regime; their defeat was heavy with severe economic and social harm. The *Catalan question* was considered as the major catalyst of the war (Gonzalez 2016: 121). After Franco's dictatorship, Catalonia implemented a strong policy of cooperation with the government. The Spanish Parliament approved a Statute of Autonomy for Catalonia in 1979, re-established the *Generalitat* as the government of Catalonia, Catalan as the official language of the region, and reinstated the Catalan flag (Gonzalez 2006: 122). Thus, for more than thirty years, Catalan independence has not been a problematic issue. In the early 2000s, some independent parties began to rise, growing more and more, to the point of reaching a majority in the regional parliament in 2015.

In March 2006, the Spanish Parliament adopted a new version of the Catalan Statute, which strengthened the autonomy of the Autonomous Community, and which in its Preamble defined Catalonia as a nation within the State. The new statute also established the right and duty of Catalan citizens to understand and speak the two official languages, Catalan and Castilian. In July of that same year, the Popular Party of Mariano Rajoy (at that time in the opposition) filed one of seven challenges against the new Catalan Statute in the Constitutional Tribunal, defining the text – in particular the definition of Catalonia as a Nation - as a threat to the unity of Spain.

The Constitutional Tribunal decision arrived four years later, in 2010 (Judgment no. 31/2010, of June 28), annulling part of the Catalan Statute, stating that reference to Catalonia as a nation has no legal value and that the Constitution recognizes nothing but the Spanish nation. It also denied the use of the Catalan language as the first language in Catalan administrations and the media.[XXXV] The decision of the Court triggered the reaction of the Catalans and a month later the first popular demonstrations began.

On November 9, 2014, Catalonia organized a symbolic consultation, which was not recognized by the government of Madrid, and was found unconstitutional the Constitutional Court.[XXXVI] At the referendum, the favorable vote for independence reached over 80%, but participation was modest; turnout was only 36% of the voting population. On September

27, 2015, regional elections took place. These had been perceived of as a plebiscite for or against independence. Separatist parties (from both the right and left wing) obtained 47.8% of the popular vote, and for the first time formed a majority in the Catalan parliament. The new *separatist* Parliament approved a series of normative acts, whose aim was to build the road to independence: Resolution 1/XI on "The beginning of the political process in Catalonia as a result of the election results of September 27, 2015" and its Annex, approved on November 9, 2015; Resolution 263/XI, by which the report and the conclusions of the Study Commission of the Constituent Process was ratified (declared unconstitutional and void by the Constitutional Tribunal with Judgment no. 259/2015, of December 2 and Decision no. 24/2017, of February 14).

However, all the decisions issued by the Constitutional Tribunal in this respect were ineffective.

On September 6 and 8, 2017 the Catalan Parliament approved two Laws proposed on August 31, 2017 by *Junts pel Sí* and the *Candidatura d'Unitat Popular* (CUP). Law no. 19/2017, on the "Self-Determination Referendum", launched a new referendum on self-determination, and Law no. 20/2017, on "Law of legal and foundational transience of the Republic", provided for the founding of the [Catalan] Republic, conditional on the results of the referendum to be held on October 1, 2017. The Laws were approved, in wide violation of the Catalan Parliamentary Regulation; the order of the day was altered to urgently include the proposals; and all the guarantees of the opposition to present amendments were eliminated. The proposed laws were prevented from being submitted to the Council of Statutory Guarantees, and they were approved in a day, without the chance of a proper parliamentary debate.

Both Laws have been challenged to the Constitutional Tribunal for the serious problems they pose from a constitutional and legal point of view, as well as for the respect of the democratic rule of law.[XXXVII] Both Laws have been suspended by the Constitutional Tribunal, which has declared Law no. 19/2017 unconstitutional with Judgment no. 114/2017, issued on October 17, 2017. First of all, Law no. 19 has been promulgated with an atypical formula that has no precedents: the reference of the promulgation by the President of the *Generalitat* on behalf of the King (as provided for by Article 65 of the Catalan Statute) as the Ordinary State Representative in Catalonia (Article 67.6a), is omitted and the only reference is that it is known to all citizens that the Law has been approved by the Catalan Parliament. Similar

objections can be made regarding the Preamble of the Law: it refers to some of the Catalan Parliament's resolutions adopted in application to the right of self-determination. These Resolutions had already been declared unconstitutional by the Constitutional Tribunal: for example, Resolution 5/X, which adopted the "Declaration of sovereignty and the right to decide of the people of Catalonia" (declared unconstitutional and null by the Constitutional Tribunal Judgment no. 42/2014, of March 25); Resolution 306/XI, on the "General Political Orientation of the Government" (declared null, also in what now matters, by the Constitutional Tribunal Decision no. 24/2017, of February 14). Linking in this way with previous actions of the institutions of the *Generalitat*, the regional legislature sought to finalise its secession process from the Spanish State, which had given rise, in successive phases, to many decisions of unconstitutionality by the Constitutional Tribunal in respect of the so-called "constituent process" in Catalonia.[XXXVIII]

In the first instance, the contents of the challenged law are *abnormal* as a sovereignty of the Catalan people was proclaimed (Art. 2), differentiated from Spanish sovereignty; for according to Art. 1, para. 2 of the Spanish Constitution, sovereignty belongs to Spanish people. Moreover, the Catalan Parliament was identified as the *representative* of that sovereignty (Art. 3, para. 1), and Law no. 19/2017 is provided with legal supremacy on any other rule that could contradict it (as provided in Art. 3, para. 2, in the second additional provision and in the first final provision). This supremacy is configured as *unconditioned* and it that would affect the Spanish Constitution and the same Catalan Statute of Autonomy. The foundational basis of Law no. 19/2017 does not reside in the Constitution and in the Statute of Autonomy either: rather, they reside in the right to self-determination of people (Art. 3, para. 3), considered as "fundamental and inalienable for the people of Catalonia" (Art. 3, para. 2); the right to self-determination of people is claimed to be part of the current legal system (Art. 3, para. 3), being recognized as "the first human right" (Preamble of Law no. 19/2017) based on international treaties and Arts. 96 and 10, para. 2 of the Spanish Constitution.

Similarly to the Italian Constitutional Court's Judgment no. 118/1995, the Spanish Constitutional Tribunal has also dealt with the topic of which matters can be submitted to a regional referendum - even if only consultative - and the legal consequences of that.

In the Spanish constitutional order, the State has exclusive competence on referendums. This competence extends, in accordance with the constant jurisprudence of the

Constitutional Tribunal, not only to the authorization for such consultations (as provided by Art. 149, para. 1, no.32 of the Spanish Constitution), but also to their establishment and regulation. In the Spanish legal system, the referendum is considered to be the channel for the direct participation of citizens in public affairs. It is a participation with a political nature that is the subject of a fundamental right (Art. 23, para. 1 of the Spanish Constitution) whose development and regulation corresponds only to an Organic Law (Art. 81, para. 1 of the Spanish Constitution) and, more specifically, to that provided for in Art. 92, para. 3 of the Constitution for the regulation of the "conditions and procedure of the different modalities of referendum provided for in the Constitution". In accordance with constitutional norms, only the State is competent to regulate the launch of a referendum, "whatever the modality or territorial scope on which it is projected" [Constitutional Tribunal Judgment no. 31/2015, of February 25 (*Fundamento Jurídico* 6.A)]. Autonomous Communities are conferred only with a competence of additional intervention [Constitutional Tribunal Judgment no. 51/2017, of May 10 (*Fundamento Jurídico* 6.a)].

However, there are some material limits to regional referendums. Among others, fundamental issues that were resolved in the constituent process, such as the definition of identity and the unity of title of sovereignty, are removed from the decisional capacity of constituted powers [Constitutional Tribunal Judgment no. 51/2017, of May 10 (*Fundamento Jurídico* 5 c) and d)] and should be submitted to the constitutional review process [Constitutional Tribunal Judgment no. 90/2017, of July 5 (*Fundamento Jurídico* 6, also citing previous decisions of the Court)]. Thus, an Autonomous Community cannot launch a referendum that goes beyond the framework of its own competences, or which affects fundamental issues resolved by the constituent process, and that are removed from the decision-making capacity of the constituted powers [Constitutional Tribunal Judgment no. 103/2008, of September 11 (*Fundamento Jurídico* 4) and Constitutional Tribunal Judgment no. 138/2015, of June 11 (*Fundamento Jurídico* 3)].

In the specific case of Law no. 19/2017, Catatonia's government had called for a referendum without prior State authorization, and launched a referendum neither provided for in the Constitution nor in Organic Law no. 2/1980. Moreover, its explicit aim was to violate the essential principles of the Spanish constitutional order: national sovereignty, that resides with the Spanish people; the very unit of the Nation, constituted in a social and democratic State of law; and the supremacy of the Constitution itself, to which all public

powers are subject and also, therefore, the Parliament of Catalonia (Arts 1, para. 2, 2, 1, para. 1 and 9, para. 1 of the Spanish Constitution).

In addition, the Court emphasised, similarly to the affirmation of the Supreme Court of Canada, that "the Constitution is not the result of a pact between historical territorial instances that preserve rights prior to the Constitution and superior to it, but a norm of the constituent power that is imposed with binding force in its scope"[XXXIX]. The premise of the sovereignty of the people of Catalonia marked the referendum of binding self-determination, that Law no. 19/2017 regulated and convoked, as unconstitutional for being irreconcilable with the unit of the Spanish Nation on which the Constitution is based (Art. 2 of the Spanish Constitution). According to the Tribunal, if such a consultation were to have been held in the conditions intended, that unit would have been legally aggrieved; for even if the vote had not implied the independence of Catalonia, that unit of the Nation, and that of the State in which it is constituted would have been canceled irremissibly. The principle of unity means that all Spaniards, as free citizens and equal in rights, are the only ones that, hypothetically, could be called upon to decide on the permanence and destiny of the State (Art. 168 of the Spanish Constitution);[XL] they are the only holders of the constituent power, and a decision that could affect the whole nation, such as the secession of an Autonomous Community, cannot be granted to only a fraction of the Spanish people, as Law 19/2017 purported. The whole Constitution (also, therefore, its Art. 2) is not a *perpetua lex*:[XLI] it is, without exception, susceptible of reconsideration and revision in law.[XLII]

Finally, in much the same way that the Supreme Court of Canada had, in 1998, excluded the existence of a right to *external* and/or *internal* self-determination of the Quebec people, the Spanish constitutional judge stated that none of the "peoples of Spain" (as indicated in the Preamble of the Spanish Constitution), had the "right to self-determination", considered by Law no. 19/2017, as the right to promote and consummate its unilateral secession from the State in which Spain is constituted. All the evidence shows that such a right is not recognized in the Constitution.[XLIII] The inclusion of the right of self-determination, as interpreted by Catalonia with Law no. 19/2017, would mean that the act of sovereignty of the State in contracting international treaties, obliging Spain to recognize such rights under such conditions, would have entailed the paradoxical renunciation of that same sovereignty. These hypothetical commitments would have declared unconstitutional under the unconditional supremacy of the Constitution.[XLIV]

6. Final Considerations

Part of Constitutional law considers secession as an *extra ordinem* fact. For a long time, it has considered it as an unconstitutional fact, even though some secession and independence was gained through the use of force. Over time there has been a progressive development of Constitutional approaches, where those aiming for secession have started to use a constitutional instrument: the referendum. This evolution has been possible thanks to the development in international law of the idea of secession as remedial right, part of the right to free self-determination of oppressed peoples. Thanks to the right of self-determination, the decolonization process found its justification and international legitimation and many oppressed peoples were allowed to gain independence.

The closed nature of constitutional law to the question of self-determination finds its justification in the protection of the principle of constitutional unity. In the XIX century, the unity of the State was considered as an almost absolute value; Constitutional law has progressively started to admit the possibility of secession; but only under certain conditions. The Canadian Supreme Court in the decision *Reference Re Secession of Quebec* has indicated which these conditions are, establishing a solid constitutional framework that has generated a constitutional tendency, progressively confirmed by other judges (in the cases of the Italian Constitutional Court and the Spanish Constitutional Tribunal). This tendency is characterized for three main elements. First of all, there is a constitutional tendency in considering the Constitution as a *pactum societatis* between all the individuals. In consequence any change to the constitution considered as a *pactum societatis* must be agreed between all citizens, including the possible secession of part of the territory that is inadmissible, such as a unilateral secession or a secession based only on the will of people territorially involved in the secession.

Secondly, there is a common constitutional trend toward the idea that the referendum is an instrument to allow people to take part in government or public policy decisions. It can also be an instrument capable of expressing a minority will, but this will cannot produce binding legal effects on the majority. If the minority will is *clear* – where *clear* means, as stated by the Supreme Court of Canada, that the results of the referendum must not be ambiguous in relation to the question submitted to the vote, as well as to the level of support achieved

- it can be considered as a starting point of a constitutional process to renew the *pactum societatis*.

Lastly, there is a constitutional consensus toward the configuration of the right to self-determination of people as a non-absolute right. Rather, it is conceived of as a fundamental right for people in a state of oppression but outside of these circumstances, the principle of State unity prevails over it[XLV].

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* Inter-American Academy of Human Rights.

I The reference is to popular consultations made under the vigilance of the League of Nations in contended territories: see Butler-Ranney (1978).

II An independence referendum was held in Nevis on 10 August 1998 in order to secede from the Federation of Saint Kitts and Nevis. Although it was approved by almost 62% of voters, it was not valid because it needed a two-thirds majority to succeed.

III See *infra*, paragraph II.

IV According to a neutralistic approach, mainly sustained by traditional international doctrine, secession is considered as a *de facto* phenomenon, generally not explicitly authorized or prohibited by law (Quadri 1968: 423 ff.; Arangio-Ruiz 1971: 132 ff.).

V According to Barbera "[…] a constitutional right to secede is manifestly absurd for the very nature of the Constitution [...]. The Constitution, any Constitution, being a pact to guarantee the political unity of a state, excludes secession by its very nature. The political pact underlying the Constitution applies to that particular people, to that specific territory. You can change everything you want, always remaining in the constitutional legality [...] but you cannot create two political communities, mutilate the territory without violating the Constitution" (Miglio and Barbera 1997: 177 f.). See also Bluntschli, who considers secession as a hypothesis of State extinction (1881: 253 ff.) and Jellinek, who underlines the ontological incompatibility of the hypothesis of a variation of the political organization with the very idea of the state assumed as a sovereign entity representative of a virtually perpetual socio-political reality (1949: 296 ss.).

VI *Texas vs. White,* 74 U.S. 700 (1869)

VII *Texas vs. White*, cit., 726. Emphasis added.

VIII See Report of the Commission of Rapporteurs, League of Nations Council, Doc. B7 21/68/106, 1921.

IX The basis of secession as a remedial right can be traced back to jusnaturalism and late middle age contractualism (Althusius 1614) as a legitimate instrument against the tyrannical government (Margiotta 2005: 31 ss.; Tosi 2006: 12-22). But it has been with Locke theorization that this idea has had a further and more complete development (Locke 1982: 227 ff.). See also Mancini 2012.

X As demonstrated by the praxis developed in the Nineties in different States as Bosnia-Herzegovina, Georgia, Moldova, Azerbaijan, Kosovo, Chechenia and outside Europe in Tibet, Sudan, Comoro Island and Sri Lanka.

XI Art. 39, para. 1 of the 1994 Constitution of Ethiopia: "Every nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession".

XII Art. 4, para. 2 of the 1921 Constitution of Liechtenstein (modified in 2003): "Individual communes have the right to secede from the State. A decision to initiate the secession procedure shall be taken by a majority of the citizens residing there who are entitled to vote. Secession shall be regulated by a law or, as the case may be, a treaty. In the latter event, a second ballot shall be held in the commune after the negotiations have been completed".

XIII Art. 113, para. 1 of the 1983 Constitution of Saint Kitts and Nevis, according to which "1. The Nevis Island Legislature may provide that the island of Nevis shall cease to be federated with the island of Saint Christopher and accordingly that this Constitution shall no longer have effect in the island of Nevis".

XIV Art. 219 of the 1996 Constitution of Chad (modified in 2005): "No cession, no exchange, no addition of territory, is valid without the consent of the People expressed by way of referendum".

XV Art. 62 of the 1992 Constitution of Djibouti (modified in 2010): "No cession, no acquisition of territory is valid without the consent of the people who decide by means of referendum".

XVI Art. 78 of the 1991 Constitution of Mauritania (modified in 2012): "[…] No cession, no exchange, no addition of territory is valid without the consent of the people who pronounce themselves by way of referendum. […]".

[xvii] Art. 96 of the 2001 Constitution of Senegal: "[…] No cession, [or] no addition of territory is valid without the consent of the population interested. […]".
[xviii] Art. 73 of the 1996 Constitution of Ukraine (modified in 2014): "Issues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum".
[xix] *Reference re Secession of Quebec*, [1998] 25 S.C.R. 217.
[xx] See Romero Caro 2017 (in this Special Issue).
[xxi] Legislative resolution adopted by the Veneto Regional Council on March 5, 1992, on "Advisory Referendum on the Submission of a State Bill for Amending Provisions on the Regime of the Regions".
[xxii] Regional Law no. 12/2002, on "Consultative referendum on the implementation of a Constitutional Law proposal for the transfer to the Veneto Region of State functions on health, professional training and education, local police".
[xxiii] Statute of Autonomy of the Veneto Region approved with Regional Law no. 1/2012.
[xxiv] The Constitutional Court declared the unconstitutionality of the questions provided in Art. 2, no. 2, 3, 4 and 5 for violating Arts. 26 and 27 of the Statute of the Veneto Region and of Art. 123 of the Italian Constitution, because they were related to tax matters. The Court underlined that these provisions violated the constitutional principles in the field of coordination of public finances since they affect the bonds of solidarity between the regional population and the rest of the Republic. In addition, the possibility that the Veneto Region was included among the regions with special statute affects fundamental constitutional choices that cannot be subject to regional referendums.
[xxv] Constitutional Court Judgments no. 496/2000; no. 470/1992; and no. 256/1989.
[xxvi] See also Judgment no. 80/2012.
[xxvii] *Ex plurimis* see Judgments no. 81 and 64/2015.
[xxviii] It implies the possibility of introducing new types of referendums also in line with those laid down in the Constitution (Judgment no. 372/2004).
[xxix] Constitutional Court Judgment no. 188/ 2011.
[xxx] See *supra* nota n. XXII.
[xxxi] Constitutional Court Judgments no. 365/2007; no. 496/2000; no. 470/1992.
[xxxii] In this sense see Italian Constitutional Court Judgment no. 1146/1988.
[xxxiii] Italian Constitutional Court Judgments no. 365/2007; no. 306 and no. 106/2002.
[xxxiv] On the Italian Constitutional Court Judgment no. 118/2015 see Conte 2015 and Tega 2015.
[xxxv] On the Spanish Constitutional Tribunal Judgment on the Catalan Statute see Ibrido 2011.
[xxxvi] See Spanish Constitutional Tribunal Judgments no. 31/2015 and 32/2015, both of February 25.
[xxxvii] Both laws and Decrees no. 139/2017, of September 6, of the Generalitat of Catalonia, convening the Self-Determination Referendum of Catalonia and no. 140/2017, of September 7, on complementary rules for holding the referendum on self-determination, have been suspended by the Constitutional Tribunal, after being challenged by the Government under the provisions of Art. 161, para. 2 of the Spanish Constitution.
[xxxviii] Among the most recent see Spanish Constitutional Tribunal Judgment no. 90/2017, of July 5 (*Fundamento Jurídico* 3.d).
[xxxix] Constitutional Tribunal Judgment no. 76/1988, of April 26 (*Fundamento Jurídico* 3), and in the same terms Constitutional Tribunal Judgments no. 42/2014, of March 25 (*Fundamento Jurídico* 3), in which the Spanish Constitutional Tribunal makes an explicit reference to the Canadian Supreme Court Reference on the Quebec intent of secession; 259/2015, of December 2, *Fundamento Jurídico* 4.b); and 90/2017, of July 5 (*Fundamento Jurídico* 6).
[xl] Spanish Constitutional Tribunal Judgment no. 103/2008, of September 11 (*Fundamento Jurídico* 2), according to which only citizens, acting necessarily at the end of the reform process, can have the supreme power, that is, the power to modify without limits the Constitution itself.
[xli] Every one of the constitutional provisions are susceptible of modification, but for this it is necessary the respect of the framework of the procedures of reform of the Constitution, since the respect to these procedures is, always and in any case, inexcusable [Spanish Constitutional Tribunal Judgment no. 138/2015, of June 11 (*Fundamento Jurídico* 4), and jurisprudence there cited].
[xlii] The Spanish Constitution admits and regulates its total revision [Art. 168 of the Spanish Constitution and Spanish Constitutional Tribunal Judgment no. 48/2003, of March 12 (*Fundamento Jurídico* 7)].
[xliii] Spanish Constitutional Tribunal Judgment 42/2014, of March 25 (*Fundamento Jurídico* 3.b) and Spanish Constitutional Tribunal Decision no. 122/2015, of July 7 (*Fundamento Jurídico* 5).
[xliv] See Art. 95 of the Spanish Constitution and Art. 27, para. 2, let. c) of the Organic Law of the Constitutional Tribunal; Spanish Constitutional Tribunal Judgments no. 100/2012, of May 8 (*Fundamento Jurídico* 7); no. 26/2014, of February 13 (*Fundamento Jurídico* 3); and no. 215/2014, of December 18 (*Fundamento Jurídico* 3.a).

[XLIV] See also Fasone 2017.

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