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Challenging the constitutional dimension of territorial integrity: comparing Brexit with other instances of secession.

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Introduction.

This master's degree thesis aims to analyse the phenomenon of Brexit as an instance of secession. The dissertation wants to draw attention to this important moment of European history, widely recognized as one of the most unexpected and pioneering challenges to be faced in European Union and highlight the elements that make this event a legitimate model of secession, although peculiar. Indeed, it is necessary to talk about a peculiar instance of secession, as the Brexit case evidently does not show the typical characteristics of a secessionist event. Such characteristics will be later better explained, but generally speaking, it is possible to anticipate a definition of the phenomenon: secession can be defined as 'a method of creation of States, the most conspicuous and probably the most common until 1914'[1], and it consists in 'the creation of a State by the use or threat of force without the consent of the former sovereign'[2]. Indeed, secession usually entails the presence of a State and a territory part of it that attempts to obtain independence and create a new state entity without the former sovereign's consent. It is also important to highlight that, since the first modern Constitution was adopted[3], secession has always been a critical issue for constitutional design[4] and, in the juridical tradition and in liberal constitutionalism[5], secession has been transformed in a sort of constitutional taboo[6]. While European Union is surely not a State and the United Kingdom is not a territory wanting to become a new state entity, it is also possible to affirm that treating Brexit as a 'simple' case of treaty withdrawal would mean ignoring the peculiar nature of European Union. For this reason, secession may be studied as a wide phenomenon that comprises numerous occurrences with various characteristics, like British withdrawal from the EU. To study Brexit as an instance of secession, a comparative work will be done in the dissertation. In fact, three 'typical' secessionist events will be analysed and compared with Brexit: the case of Quebec in Canada, that of Catalonia in Spain and the secession of Kosovo from Serbia.

The first chapter provides a first analysis of secession. It begins with an investigation of secession and state integrity. Indeed, when addressing the subject of secession, it seems convenient to first start by defining State integrity, as secession is an act that is opposite to the

[1] James Crawford, *The creation of States in International Law* (2nd edn, Oxford University Press 2007), 183.
[2] Krystyna Marek, *Identity and Continuity of States in Public International Law* (2nd edn, Librairie Droz 1968), 207.
[3] The first modern Constitution was adopted in 1789 in the United States. See Dieter Grimm, *Constitutionalism: past, present, and future* (1st edn, Oxford University Press 2016).
[4] Tom Ginsburg, 'Secession' (2018), August Issue, Constitution Brief https://www.idea.int/sites/default/files/publications/constitution-brief-secession.pdf accessed 21 September 2023.
[5] For further details on the subject see: Costanza Margiotta, *L'ultimo diritto: profili storici e teorici della secessione* (1st edn, Il Mulino 2005).
[6] Susanna Mancini, 'Costituzionalismo, federalismo e secessione' (2014) 4 Istituzioni del federalismo 779, 784.

idea of State integrity and it is the State integrity itself, together with other challenging notions, that makes secession a problematic subject. In this first paragraph, there will be an investigation of the approach to State integrity both in domestic and international law. Indeed, it will be shown how the territory is coessential to the State[7] and this partially explains the significance given to State integrity in the public law doctrine. On the other hand, with reference to international law, the idea of territorial integrity became a universal tenet of international law over the course of the 19th century[8], with the protection of it being nowadays specifically mentioned in the United Nations Charter as a component of the prohibition of the use of force[9]. Also, the principle is the subject of several UN resolutions[10] and of treaties, both at the multi- and at the bi-lateral level[11]. Later, the approach of public law to State integrity will be analysed with particular reference to the three States chosen, after that the methodology and the choice of the cases have been explained. The second paragraph of this first chapter will be focused on secession in contemporary democracies, by giving a proper definition of the phenomenon, studying secession as an infringement of the rule of law and as a right in international law and showing the limits of this international approach. This paragraph will be helpful for better understanding secession in general and will be the basis for studying each case study in the dissertation. Indeed, this paragraph can be considered, together with the previous one, the basis for understating the rest of the work. The last element to which this first chapter is dedicated is the approach to integrity of European Union. Indeed, after briefly describing the most important milestones of European integration, there will be a focus on the illustration of the peculiar nature of European Union and the dispositions regulating the withdrawal from European Union. Hence, article 50 TUE, that enables any Member State to withdraw from EU on the basis of its own constitutional requirements[12], will be investigated.

Chapter 2 is dedicated to the narrative of the three secessionist instances chosen to help analyse Brexit as a case of secession. Indeed, the chapter will first be focused on secession in federal Sates, explaining the main characteristics proper of this system of government and showing how federalism in the West is regarded as a successful experiment in which secessionist movements coexist with a liberal and democratic form of government[13]. Later, the

[7] Roberto Bin and Giovanni Pitruzzella, *Diritto Pubblico* (16th edn, G. Giappichelli Editore 2018), 13.
[8] Christian Marxsen, 'The Concept of territorial integrity in international law- What are the implications for Crimea?' (2014) 75 Heidelberg Journal of International Law 32, 34.
[9] United Nations General Assembly, 'Charter of the United Nations' 1945.
[10] See UNGA, Res. 3314 (XXIX) (14 December 1974); UNGA, Res. 2625 (XXV) (24 October 1970).
[11] See, for example, United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994).
[12] Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
[13] Will Kymlicka, 'Federalism and Secession: at Home and Abroad' (2000) 12 Can J L and Jurisprudence 207, 217.

attention will be put on Quebec's secessionist history. Particularly, Quebec is one of Canada's provinces and is characterized by having a majority of French-speaking population, unlike the rest of Canada. This linguistic difference, together with other elements, caused conflicts between Quebec and the Canadian central government and Quebec experienced two attempts to secede from Canada through a referendum. Both referendums did not obtain a result in favour of secession, but, as a result of the last attempt, the Supreme Court of Canada was sued by the federal cabinet to express on whether Quebec can secede from Canada unilaterally, whether international law permits the unilateral secession of Quebec and if there is, under international law, a right to self-determination that would give Quebec the right to secede unilaterally[14]. The answers to such questions gave rise to a decision[15] in which the Court affirmed that secession should not be regarded as illegal *a priori* and endorsed the possibility to allow a right to secede. This pronouncement had a pivotal role in the reading given to secession after 1998, not only in Canada but also in the rest of the world. After this analysis, the second paragraph of the chapter is dedicated to the Catalonian case. Once giving an overlook of secession in regional States, the peculiarities of the case are narrated. Regional States are States which might be affirmed as an 'intermediate solution' between unitary and federal States or, according to some scholars, as a 'smoother' version of federal States[16]. Particularly, Spain is sometimes recognized as having a 'quasi-federal' State structure[17]. Being a regional State, it is characterized by territorial divisions and Catalonia is one of its Autonomous Communities experiencing secessionist movements. Catalonia's desire to secede is rooted in historical, cultural, economic, and political factors. However, this wish did not strongly develop until 2012, the year that signed the beginning of the Catalan crisis[18]. After this year, there were several events that caused tensions, culminating in the 2017 referendum, with mobilizations happening. In this referendum, even if with dubious results, the wish to secede was expressed by the popular wish and on 10 October the independence of Catalonia was affirmed with reserve[19]. However, later, the Constitutional Tribunal declared the transition from autonomous community to State of Catalunya

[14] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[15] *Ibidem.*
[16] See, among others, Erin Ryan, 'Secession and Federalism in The United States: Tools for Managing Regional Conflict in a Pluralist Society' (2016) 96 Oregon Law Review 123, 172 and Sergio Bartole, 'Internal Ordering in the Unitary State' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 611.
[17] Sergio Bartole, 'Internal Ordering in the Unitary State' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 611.
[18] Josep Maria Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec' in Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019), 73.
[19] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 233.

unconstitutional[20] and no major changes were applied to the asymmetries of Spain. In the meanwhile, two particularly important decisions were expressed by the Spanish *Tribunal Constitucional*, and these will be analysed in the chapter, together with the consequences produced by the 2017 referendum. Lastly, the secession of Kosovo will be studied. This is an extremely peculiar instance of secession, being also the only one among the three cases picked that succeeded into the creation of a new State. Kosovo is an example of a secession that happened in an unlawful manner if looked from the perspective of its original State's (Serbia) public law, but that was legitimized by the international community and by international law, something without precedents. Also, this is the only case here of a secession happening without an expression of the people's will through a referendum, as the secession of Kosovo happened after the Kosovar Assembly passed a unilateral declaration of independence from the Republic of Serbia on 17 February 2008[21]. Moreover, the Kosovar secession will be studied from the perspective of the right to self-determination.

Later, the third and last chapter of this work will be focused on the analysis of Brexit as an case of secession. First, the chapter contains a recap of the history of the European Union, focused on the highlights of the British entrance in the Community and of its relationship with the *sui generis* entity[22]. Later, the reasons why the withdrawal from the EU in the Brexit case may be considered as an example of secession will be enumerated and a comparison between Brexit and each of the cases of study will be made. The chapter will be then closed with a consideration about the distinctiveness of Brexit as a case of secession. Lastly, conclusions will be made.

In order to draft this work, it was necessary to consult various sources: from monographs on secession, state integrity and related subjects to academic articles dealing with the cases under analysis and sources like decisions of Supreme Courts, constitutions and resolutions of the UN Security Council, among others.

[20] *Ibidem*, 234.
[21] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 926.
[22] Olivier Costa and Nathalie Brack, *How the EU really works* (2nd edn, Routledge 2019).

Chapter 1.

Secession and State Integrity.

1.1 State integrity in national and international law.

When addressing the subject of secession, it seems convenient to start by defining State integrity, as secession is an act that is opposite to the idea of State integrity and it is the State integrity itself, together with other challenging notions, that makes secession a problematic subject, both in domestic and international law. Indeed, this first paragraph will focus on State integrity.

1.1.1 State integrity according to constitutional law.

The term 'State' refers to a particular historical manifestation of political power organization, characterized by a monopoly of legitimate force within a defined territory, and the utilization of an administrative structure[23]. The emergence and consolidation of the modern State in Europe during the period spanning the fifteenth to seventeenth centuries marked a departure from earlier models of political power organization[24]. This transformation was characterized by two key features: the centralization of legitimate governing authority within a defined territory under the control of a singular governing body, and the existence of a pre-established administrative structure that facilitated the functioning of a professional bureaucracy[25]. Notably, the concentration of the political power in the state came as a reaction to the dispersion of power typical of the feudal system which was consolidated between the late twelfth and thirteenth centuries[26]. Indeed, the creation of the modern State entails a significant process of consolidating political authority, replacing the previous decentralized power structure characteristic of feudalism[27]. The modern State is a stable centralized apparatus that has, in a certain territory, the monopoly of legitimate force and the legal concept that served to frame this characteristic of the State is that of 'sovereignty'[28]. Sovereignty has two aspects: internal and external, where the first consists in the supreme power of command in a given territory, which is so strong that it does not recognize any other power above itself, while the second aspect consists in the independence of the State from any other one[29]. The creation of

[23] Roberto Bin and Giovanni Pitruzzella, *Diritto Pubblico* (16th edn, G. Giappichelli Editore 2018), 6.
[24] René Daval and Hortense Geninet, 'Henry Sidgwick on Sovereignty and National Union of the Modern Nation' (2013) 266 (4) Revue internationale de philosophie 439, 440.
[25] *Ibidem.*
[26] *Ibidem,* 441.
[27] Roberto Bin and Giovanni Pitruzzella, *Diritto Pubblico* (16th edn, G. Giappichelli Editore 2018), 8.
[28] *Ibidem.*
[29] *Ibidem.*

the modern State has caused the arising of questions asking 'who' actually exercises the sovereign power[30]. Here, Italian and German jurists answered the question with the theory of the legal personality, where the State is seen as a legal person, that is sovereign[31]. On the other side, post-1789 French constitutionalism developed the idea of the sovereignty being proper of the nation[32]. Both theories went in contrast with the ideology that attributed the sovereignty to the people. This idea was proper of the philosopher J.J. Rousseau[33]. During the 20th century constitutionalism tended to embrace the popular sovereignty idea[34]. However, nowadays the sovereignty is believed to be proper of a State within a certain territory[35]. Here, it is necessary to stress the essentiality of the territorial character in order to possess sovereignty[36]. Indeed, nowadays the entire mainland is subject to the sovereignty of States, except Antarctica[37]. This because the territory is coessential to the State[38].

In the context of this section of the work, where State, territory and their integrity are the main concepts, the notion of integrity might be better investigated. One of the most influential authors who addressed integrity is Dworkin. He asserted that integrity is a political ideal separate from justice, fairness, equality, and other concepts, but only within the context of a non-ideal theory[39]. Indeed, integrity is a political virtue proper of reality, where adherence to the law is far from perfect and partially due to actual disagreements over what really constitutes a just behaviour[40]. Thus, integrity becomes crucial when pluralism and political fragmentation are in play. In Dworkin's opinion, integrity cannot take the place of justice and fairness[41]. Instead, integrity is an additional, though different, value in the non-ideal world, and as such, it could compete with other moral needs such as justice[42]. Dworkin acknowledges that integrity may be outweighed by competing values in some situations, but he insists that integrity is a crucial political virtue in and of itself[43]. In his perspective, the concept of integrity is far more fundamental and strongly related to political legitimacy; accordingly, he believes that

[30] *Ibidem.*
[31] *Ibidem, 9.*
[32] *Ibidem.*
[33] *Ibidem.*
[34] *Ibidem,* 10.
[35] René Daval and Hortense Geninet, 'Henry Sidgwick on Sovereignty and National Union of the Modern Nation' (2013) 266 (4) Revue internationale de philosophie 439, 439.
[36] *Ibidem.*
[37] Roberto Bin and Giovanni Pitruzzella, *Diritto Pubblico* (16th edn, G. Giappichelli Editore 2018), 13.
[38] *Ibidem.*
[39] Andrei Marmor, 'Integrity in Law's Empire' (NYU Conference on 'Dworkin's Later Work', New York, September 2019), 2.
[40] *Ibidem.*
[41] *Ibidem.*
[42] *Ibidem,* 4.
[43] *Ibidem.*

integrity plays a role in politics[44]. He supposes that integrity is what binds the principles of a real political community—where people have real commitments to one another and where political authority is legitimate—together[45]. Regarding political community and territory, Dworkin's view of integrity concerns the concept that a State is sovereign if its authority is exercised effectively and homogeneously on the territory, with legal prerogatives that are respected throughout the territory[46].

At this point, however, it is essential to specify that the strong relationship between the State and its territory and the development of the concept of State and territorial integrity does not mean, as the cases under analysis will later show, that there cannot be territorial divisions within modern States. Territorial divisions can take many different shapes, exist in both federal and unitary governments, entail divisions based on a number of different criteria, and can either be more extensive or restricted to a single area within a nation[47]. Given the intimate relationship between territory and sovereignty, the existence of territorial splits, however, might present dangers[48]. Territorial divisions can pose serious obstacles to establishing peace, and discussions about peace will necessarily include discussions about constitutional structure[49]. Territorial splits could, at one extreme, be a threat to secession, violence, or both[50]. On the other extreme, absorption into a centralized, unitary state with no local autonomy is a possibility[51]. There are other conceivable arrangements in between these two, which constitutional design aids in organizing[52]. Here, in addition to describing how agreements will be evaluated and upheld, national constitutions must also address how arrangements may change over time, after providing the necessary authorities, responsibilities, and degree of autonomy[53].

Sub-state nationalism may result from territorial splits, and it is unclear how constitutions can address these issues[54]. The response is frequently seen as a decision between two constitutional design models: integrating as opposed to accommodating[55]. The integration

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[44] *Ibidem*, 5.
[45] *Ibidem.*
[46] *Ibidem.*
[47] Tom Ginsburg, 'Constitutional Design for Territorially Divided Societies' (2018), August Issue, Constitution Brief https://www.idea.int/sites/default/files/publications/constitutional-design-for-territorially-divided-societies.pdf accessed 21 September 2023.
[48] *Ibidem*, 1.
[49] *Ibidem.*
[50] *Ibidem.*
[51] *Ibidem.*
[52] *Ibidem.*
[53] *Ibidem.*
[54] Alex Schwartz, 'Patriotism or Integrity? Constitutional Community in Divided Societies' (2011) 31(3) Oxford Journal of Legal Studies 503, 503.
[55] John McGarry and others, 'Integration or Accommodation? The Enduring Debate in Conflict Regulation' in Sujit Choudhry (ed), *Constitutional design for divided societies – Integration or Accomodation?* (1st edn, Oxford University Press 2008).

approach, which implicitly invokes the concept of 'constitutional patriotism', aims to overcome divisions by uniting opposing groups under a broad and inclusive conception of citizenship (in the sense of identification as an only population, as every federal conception involves a federal citizenship)[56]. On the other hand, accommodationists work to reunite sub-state nationalists with the state through territorial autonomy, power sharing, and other group-specific arrangements[57]. These arrangements typically reject the notion of a unitary citizenship in favour of the concept of 'deep diversity'[58]. At this juncture, concerns and criticisms regarding the viability and sustainability of a democracy without a people with a shared political identity emerge[59]. These reservations appear to provide some evidence in favour of the integrationist critique of accommodation, which contends that constitutionally recognizing and accommodating sub-state nationalism will simply deepen existing differences[60]. It might be claimed, however, that such issues can be addressed, given that those who interpret the constitutional system are appropriately guided by the unique political virtue referred to as 'integrity' by Dworkin, where integrity is also moral coherence[61]. In fact, even in the absence of a shared political identity, Dworkin's idea of 'law as integrity' demonstrates how a divided society might aspire to be a 'community of principle'[62]. However, some may contend that maintaining integrity would be inappropriate in light of the tolerance of national pluralism[63]. They can contend that an integrationist paradigm should be adopted rather than the constitutional provision that accommodates national heterogeneity[64]. Public interpreters, however, have a duty to make efforts to resolve conflicts where procedures for accommodating national pluralism have previously been the focus of a *modus vivendi*[65]. This duty also presents a chance to rebuild the constitutional order as a community of principles[66]. It is difficult to see how the rest of the polity could ever come to view a plurinational constitutional arrangement as anything other than a tactical bargain between opposing parties unless public interpreters take up this cause and engage in constructive interpretation[67].

Constitutions encompass provisions that facilitate the management of territorial

[56] Alex Schwartz, 'Patriotism or Integrity? Constitutional Community in Divided Societies' (2011) 31(3) Oxford Journal of Legal Studies 503, 504.
[57] *Ibidem.*
[58] *Ibidem.*
[59] *Ibidem.*
[60] *Ibidem.*
[61] Ronald Dworkin, *Law's Empire* (1st edn, Hart Publishing 1998).
[62] Alex Schwartz, 'Patriotism or Integrity? Constitutional Community in Divided Societies' (2011) 31(3) Oxford Journal of Legal Studies 503, 505.
[63] *Ibidem*, 525.
[64] *Ibidem.*
[65] *Ibidem.*
[66] *Ibidem.*
[67] *Ibidem.*

differences and societal variations within a State, serving as instrumental tools in establishing and maintaining stable governance structures[68].

Among the mechanisms used for addressing geographic disparity and social variety within a single state, there is federalism[69]. Within the framework of a federal system, a constitutional delineation of powers exists between a central governing body and one or more subordinate entities[70]. This arrangement entails that certain subject matters shall be subject to the jurisdiction of the subordinate units, irrespective of any contrary stance adopted by the central authority[71]. The concept of federalism is frequently delineated as a system that embodies the principles of both 'self-rule' and 'shared-rule'[72]. This statement elucidates the crucial concept that federalism encompasses not solely domains of self-governance for subordinate entities, but also their inclusion in the process of making determinations at the national level, frequently accomplished by means of a bicameral legislature wherein the composition of the second chamber is territorially delineated (even though there exist numerous alternative constitutional mechanisms to ensure a plurality of perspectives at the core)[73]. Indeed, undoubtedly, the doctrine of federalism possesses the potential to ameliorate territorial schisms and foster national unity[74]. Conversely, it is plausible that such a phenomenon could potentially engender novel avenues for the establishment of individual and collective identities, facilitation of political mobilization, and the emergence of societal discord[75]. In this particular context, it is imperative to ensure the adequate representation of subunits within the central government, as it constitutes a crucial measure in the pursuit of establishing a system of shared governance[76].

A second mechanism used for dealing with territorial differences and societal diversity within a single state is decentralization, which differs from federalism in that it entails the transfer of power from the central government to local levels of administration, but those local units often do not have higher authority in any area of policy[77]. The phenomenon of decentralization, which is currently observed as a prevailing global governance trend, possesses the inherent capacity to mitigate conflicts and enhance governmental efficacy[78].

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[68] Tom Ginsburg, 'Constitutional Design for Territorially Divided Societies' (2018), August Issue, Constitution Brief, 1 https://www.idea.int/sites/default/files/publications/constitutional-design-for-territorially-divided-societies.pdf accessed 21 September 2023.
[69] *Ibidem.*
[70] *Ibidem,* 2.
[71] *Ibidem.*
[72] *Ibidem.*
[73] *Ibidem,* 3.
[74] *Ibidem.*
[75] *Ibidem.*
[76] *Ibidem.*
[77] *Ibidem,* 4.
[78] *Ibidem.*

Territorial cleavages stimulate a distinct set of institutional arrangements that pertain to the central authority. These arrangements can be classified into four distinct subcategories, namely rights, redistribution, representation, and recognition[79]. These subcategories are not inherently contradictory, but rather possess the capacity to be utilized in various permutations[80]. The paramount objective of the rights is to safeguard the fundamental interests that hold utmost significance to individuals, thereby rendering them pertinent to territorial demarcations[81]. Robust safeguards for rights have the potential to diminish the inclination to withdraw from the prevailing political framework[82]. Rights, whether they pertain to collective entities or individuals, frequently constitute a significant element within constitutional frameworks that bear relevance to a given jurisdiction[83]. While it is improbable that robust rights alone can effectively address territorial divisions, they possess the capacity to complement alternative mechanisms in facilitating the establishment of peaceful governance[84]. The concept of redistribution pertains to the equitable apportionment of financial resources across a given jurisdiction[85]. The potential exacerbation of territorial cleavages may arise from the existence of valuable resources in distinct regions within a country[86]. The implementation of mechanisms pertaining to fiscal redistribution may serve to alleviate certain tensions, particularly in instances where a region endowed with abundant resources and/or wealth creation exhibits a population of fewer means in comparison to the rest of the nation[87]. Conversely, if a particular geographic area possesses an abundance of natural resources, it may endeavour to curtail the outflow of economic prosperity to other regions[88]. The matter of redistribution between areas of varying wealth often garners significant constitutional scrutiny, particularly when the presence of oil or other valuable natural resources is involved, thereby prompting explicit constitutional provisions such as guarantees[89]. The significance of fiscal rebalancing, despite its implicit nature, cannot be understated within the context of a constitutional settlement[90]. The inclusion of regional representation within central institutions serves as a mechanism that

[79] *Ibidem*, 5.
[80] *Ibidem.*
[81] *Ibidem.*
[82] *Ibidem.*
[83] *Ibidem.*
[84] *Ibidem.*
[85] *Ibidem.*
[86] *Ibidem.*
[87] *Ibidem.*
[88] *Ibidem.*
[89] George Anderson, *Fiscal Federalism: A Comparative Introduction* (1st edn, Oxford University Press 2010), 23.
[90] Tom Ginsburg, 'Constitutional Design for Territorially Divided Societies' (2018), August Issue, Constitution Brief, 5 https://www.idea.int/sites/default/files/publications/constitutional-design-for-territorially-divided-societies.pdf accessed 21 September 2023.

establishes a binding connection between various regions and the broader political entity[91]. Conversely, it is noteworthy that disparities in representation, whether based on population or regional distribution, have the potential to produce discontentment feelings[92]. One prevalent method of giving expression to subordinate entities situated at the core is by means of their representation in an elevated chamber, the purview of which may primarily center on the enactment of laws that impact federal structures[93]. With regard to the matter of recognition, it is customary for a constitution to not only delineate the contours of the political community but also enumerate a series of emblematic representations of the nation-state, such as the national flag[94]. The divergent narratives associated with these characteristics may exhibit disparities between dominant factions and marginalized communities; hence, the act of constitutional acknowledgment may engender discord for groups that are geographically concentrated[95]. It is conceivable that such individuals may assign importance to the recognition of their own distinctive symbols, and/or the presence of national symbols that accurately represent the multifaceted composition of the nation[96].

A fourth mechanism to deal with territorial cleavages concerns the central government design, specifically guarantors and dispute resolution[97]. There are numerous ways to monitor and enforce all constitutional commitments[98]. Territorial disputes are common in nations with territorial divisions, where constitutional courts occasionally play a significant role in protecting national integrity and the rights of subnational units (particularly in federations)[99]. Particularly, they played a significant role in the jurisprudence of the German Constitutional Court, the American Supreme Court, and others[100]. Finally, international agreements can aid in resolving institutional issues associated with territorial divisions by developing solutions, encouraging cooperative agreements, observing how agreements are being carried out, and even assisting in their enforcement[101]. Of course, they can also create confusion by imposing agreements before all parties are prepared to do so[102].

Given what has been mentioned thus far, conflict resolution and lasting peace will invariably include some form of constitutional reform where conflict is founded on

[91] *Ibidem*, 6.
[92] *Ibidem.*
[93] *Ibidem.*
[94] *Ibidem*, 7.
[95] *Ibidem.*
[96] *Ibidem.*
[97] *Ibidem*, 8.
[98] *Ibidem.*
[99] *Ibidem.*
[100] *Ibidem.*
[101] *Ibidem.*
[102] *Ibidem.*

disagreements between one or more territorially concentrated groups[103]. As demonstrated, there are numerous constitutional methods for resolving territorially based issues[104]. However, the best allocation option in any given circumstance may be very contextual[105].

Until now the theme of territorial and State integrity was examined and also the constitutional design used to limit the possible fragmentation risks of States characterised by pluralism and the possible violation of their territorial integrity were shown. At this point, it is interesting to mention that, while territory is coessential to the State, the majority of constitutions do not attempt to define the national area in any detail[106]. In actuality, only 14% of national constitutions make any attempt to precisely define a national territory, despite the fact that 87% of them make some explicit mention to it[107]. Indeed, it is thought that national constitutions do not need to define territory explicitly [108]. It was said that although the territorial reach of legal systems is a matter of constitutional law, it cannot be specified directly by constitutional language and the issue was dealt with using the idea of constitutional silence[109]. Instead, legal systems rely on a final standard of recognition that unavoidably includes a spatial referent that reflects the State's territorial scope[110]. Here, the requirement of the geographic referent indicates that, once defined as a normative concept, the ultimate rule of recognition determines the territorial reach of its legal system[111]. This reasoning explains why the majority of national constitutions explicitly assume that their national territory is understood without attempting to define it[112].

1.1.2 State integrity in international law.

When referring to international law and State integrity it is necessary to make some previous clarifications. States assume a primary role in international relations, as they are the main subjects of international law[113]. According to the Montevideo Convention on the Rights and Duties of States of 1993, article 1, a State possesses the following qualifications: 'a) permanent population; b) a defined territory; c) government, and d) capacity to enter international relations with other States'[114]. This article clearly highlights a characteristic of

[103] *Ibidem,* 9.
[104] *Ibidem.*
[105] *Ibidem.*
[106] Oran Doyle, 'The silent constitution of territory' (2018) 16(3) International Journal of Constitutional Law 887, 887.
[107] *Ibidem,* 888.
[108] *Ibidem.*
[109] *Ibidem,* 891.
[110] *Ibidem.*
[111] *Ibidem,* 902.
[112] *Ibidem.*
[113] Natalino Ronzitti, *Diritto Internazionale* (6th edn, Giappichelli Editore 2019), 162.
[114] Montevideo Convention on the Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934) 37 OAS, Law and Treaty Series 127.

integrity that must be possessed by an entity in order to be considered a State. Such an integrity must be possessed under different points of view. However, it should be noted how not only independent and sovereign States participate to international relations as territorial entities, as also insurgents participate as such[115].

Starting from the first characteristic considered necessary in order to legitimately consider an entity as a State, here international law requires the control over a permanent population, which is not required to be homogenous, as there is in international law a protection and respect of population diversity and of minorities[116]. In fact, the doctrine poses substantial limits over the action of a State in its internal order linked to the principle of self-determination of peoples[117]. This principle is considered by a large portion of the doctrine as a principle of *ius cogens*[118], but it must always adapt to the principle of territorial integrity. This is what has always been defended by the General Assembly, that, in the first anti-colonial resolutions, recognised the self-determination principles of peoples, but also affirmed the principle of territorial integrity[119]. This value was considered as an exception to the principle of self-determination[120].

With reference to territorial integrity, this idea became a universal tenet of international law over the course of the 19th century[121]. The protection of territorial integrity is nowadays specifically mentioned in the United Nations Charter as a component of the prohibition of the use of force[122] and the principle is the subject of several UN resolutions[123] and of treaties, both at the multi- and at the bi-lateral level[124]. The protection of the principle of territorial integrity has several implications. First and foremost, it ensures that a State will continue to exist within its present borders and makes any unilateral changes to that territory made by third parties using force against them illegal under international law[125]. However, the idea guards against more than just alterations to state borders. Political independence is associated with territorial

[115] Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, Cambridge University Press 2005), 273.
[116] Benedetto Conforti, *Diritto Internazionale* (12th edn, Editoriale Scientifica 2021), 165.
[117] Natalino Ronzitti, *Diritto Internazionale* (6th edn, Giappichelli Editore 2019), 183.
[118] Ius cogens norms are norms of higher status then the ones adopted by agreement or custom. See Natalino Ronzitti, *Diritto Internazionale* (6th edn, Giappichelli Editore 2019),181.
[119] See UNGA, Res. 1514 (XV) (14 December 1960).
[120] See UNGA, Res. 2624 (XXV) (13 October 1970).
[121] Christian Marxsen, 'The Concept of territorial integrity in international law- What are the implications for Crimea?' (2014) 75 Heidelberg Journal of International Law 32, 34.
[122] United Nations General Assembly, 'Charter of the United Nations' 1945.
[123] See UNGA, Res. 3314 (XXIX) (14 December 1974); UNGA, Res. 2625 (XXV) (24 October 1970).
[124] See, for example, United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994).
[125] Christian Marxsen, 'The Concept of territorial integrity in international law- What are the implications for Crimea?' (2014) 75 Heidelberg Journal of International Law 32, 35.

integrity in practically all legal documents[126]. Particularly, it is acknowledged that the territory is more than merely a prerequisite for statehood. Since the territory is acknowledged as the physical foundation and essential precondition for the accomplishment of political independence, the legislation as it exists closely links territorial integrity and independence of the government[127]. The territory is the sole area in which a State's political independence may exist, and where, on moral grounds, foreign governments are prohibited from interfering, according to the principle of non-intervention in a State's internal affairs[128]. As a result, preserving territorial integrity calls for more than just defence against long-term changes to borders, but also defence against other outside intrusions[129]. According to H. Lauterpacht, territorial integrity is, 'especially where coupled with political independence, (…) synonymous with territorial inviolability'[130]. Thus, the need for the potentially difficult identification of what the protected political will and its territory genuinely are is illustrated by the strong relationship between the ideas of territorial integrity and political independence. Historical debates regarding who has the right to control a certain region have long been fuelled by the intrinsic importance of political independence over and within a given territory[131]. By treating the *de facto* reality as controlling for territorial claims, international law attempts to avoid these potentially endless and unproductive historical claims[132]. The *uti possidetis* general principle states that the relevant territory is delineated by the borders that were in place at the time a state attained independence[133]. Since the borders at the time of independence may have been ambiguous, this approach is obviously not appropriate to resolve all potential disagreements, but it does preclude a wide variety of historically based arguments that may otherwise be used.

Government and the capacity to enter international relations with other States are the last characteristics affirmed by the Montevideo Convention in order to define an entity as a State[134]. Such disposals pose important features to distinguish Member States of a federal State, which are considered to be among the most frequent subjects of secessionist movements for their characteristics, from the central State. In fact, a Member State of a Federal State usually

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[126] *Ibidem.*
[127] Benedetto Conforti, *Diritto Internazionale* (12th edn, Editoriale Scientifica 2021), 197.
[128] International law protects territorial sovereignty, as each activity exercised in foreign territory without the consent of the territorial sovereign or not admitted by international law is considered illicit. See Natalino Ronzitti, *Diritto Internazionale* (6th edn, Giappichelli Editore 2019), 77.
[129] *Ibidem.*
[130] Lassa Oppenheim, 'International Law' in Hersch Lauterpacht (ed.), *Disputes, War and Neutrality* (Cambridge University Press 1952), 173.
[131] Christian Marxsen, 'The Concept of territorial integrity in international law- What are the implications for Crimea?' (2014) 75 Heidelberg Journal of International Law 32, 37.
[132] *Ibidem.*
[133] Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2003), 85.
[134] Montevideo Convention on the Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934) 37 OAS, Law and Treaty Series 127.

has all the characteristics retained necessary to be considered a State according to international law: it has a permanent population, a defined territory and a local government[135]. However, this government does not possess all the powers that are usually in the hands of a central government, as some of its powers are partially devolved and, significantly, a Member State of a Federation cannot enter international relations with other States[136]. Indeed, a Member State cannot be a Party of international treaties, nor at the multi-, neither at the bi-lateral level[137]. For example, the State of Florida cannot be part of an international Treaty: only the United States of America can. This highlights another element of the integrity required by international law for a State. State integrity with reference to government does not mean that international law does not allow the creation of a decentralized government. Instead, it means that international law, while defending and allowing the creation of models of decentralised government (federations, regional States…), it still preserves the role played by the central entity that is present in each form of decentralised organisation of government in the several States existing[138].

Indeed, when talking about state integrity in international law, it is a subject that does not possess an only and single dimension. Instead, state integrity can be seen by several points of view. Surely, it can be affirmed that the territorial integrity of a State is sometimes considered to be an element of primary importance in the literature and is the element that can take a central position in questions of secession, as it is the first and most evident consequence of secessionist movements together with the creation of an autonomous government that guarantees the protection of the interests of a minority[139].

1.1.3 Methodology and choice of the cases.

The present work has the objective of challenging the constitutional dimension of state integrity, by focusing on the theme of secession with regard to three cases. These three examples of secessionist attempts[140], of which only one had as final result the creation of a new State[141],

[135] Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2003), 94.
[136] *Ibidem.*
[137] *Ibidem.*
[138] Benedetto Conforti, *Diritto Internazionale* (12th edn, Editoriale Scientifica 2021), 184.
[139] In cases regarding minorities, it can be seen that the displacement of sovereignty is the effect of claims made by minority groups of a right to independence that is a function of its identity qua minority or of an appeal to legitimacy of a victimised minority. Rather than with secession, the protection of minorities may be obtained with an increased minority protection, a degree of autonomy, federalism or other outcomes. See Tom Sparks, *Self-determination in the international legal system. Whose Claim, to What Right?* (1st edn, Hart Publishing 2023).
[140] The case of Quebec in Canada, Catalonia in Spain and Kosovo, that was once part of Serbia, will be examined.
[141] The place of Kosovo, a territory with a predominantly Albanian population, was part of the Republic of Serbia in Yugoslavia from 1946 until 1989 with an autonomous status. After 1992, Kosovo was incorporated in the State of Serbia and Montenegro. In all these years, Kosovo claimed an independence that was internationally recognised only in 2008. See Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2010) 15(6) The International Journal of Human Rights 926.

are all characterized by different peculiarities and will be used as models for a comparison with an event that has marked the history of the European Union and the world in general: the exit of United Kingdom from the European Union, better known as Brexit[142].

Such a comparison will help understand whether Brexit can be considered as an example of secession, or not. Indeed, Brexit is an example of a State that has left an entity that is complex and that is hard to define for its characteristics. Surely, European Union cannot be considered as a State, nor as a Federation, the territorial entities that are usually protagonist of secessionist events, but it has been said several times[143] that European Union possesses characteristics that are proper of a State, of a Federation, of a Confederation and of an International Organisation (in this case a regional one). Indeed, European Union can be considered as an entity *sui generis*[144] and its characteristics allow possible theorization about the similarities between secessionist events and the withdrawal of a State from European Union, like happened with Brexit.

Focusing on the three instances of secession that have been selected to conduct the present work, it is important to mention that the reason behind the choice of the three cases of Quebec, Catalonia and Kosovo is that these three are examples of secessionist attempts that differentiate in many characteristics. These differences will be better shown in the following paragraphs, but the most important element that must be underlined here is that these are three examples of secessionist attempts that happened in three states with different forms of government, they used means that differentiate broadly and these three cases caused different reactions from the original entity of which they were part and from the international community in general.

Particularly, the example of Quebec is extremely peculiar. This is considered by many as the prototypical model for asymmetric and secessionist dynamics[145]. The State of Canada is characterized by being in an advanced evolutionary phase of federalism[146], that is sometimes erroneously considered as strictly linked with secessionist movements. Particularly, Canada is

[142] Brexit is the name used for referring to the withdrawal of United Kingdom from the European Union. The process started as a consequence of the referendum held in UK in 2016, which asked to the population whether it was their wish or not to see the UK remain in the EU. After that the leaving option won the referendum, in March 2017 the negotiations for the exit between the EU and UK started. On 31st of January 2020, UK left the EU and a period of transition started. This transition lasted until December 2020. See Swati Dhingra and Thomas Sampson, 'Expecting Brexit' (2022) 14 Annual Review of Economics 495.

[143] See Olivier Costa and Nathalie Brack, *How the EU really works* (2nd edn, Routledge 2019); Jan Klabbers, 'Sui Generis? The European Union as an International Organization' in Dennis Patterson and Anna Södersten (eds.), *A Companion to European Union Law and International Law* (1st edn, Wiley-Blackwell 2016).

[144] Olivier Costa and Nathalie Brack, *How the EU really works* (2nd edn, Routledge 2019), 33.

[145] Giacomo Delledonne and Giuseppe Martinico, *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019).

[146] *Ibidem.*

the example of a State where its Supreme Court endorsed the possibility to allow a right to secede and the Canadian one is an order that decided to be 'fluid' in treating secession, proved by the adoption of the landmark judgement of the Supreme Court of Canada 'Reference Re Secession of Quebec'[147]. This judgement regarded the legality, under Canadian and international law, of a unilateral secession of Quebec from Canada[148]. Later, a legislative proposal, the Clarity Act[149], was approved to regulate secessionist referendums.

On the other side, Catalonia is an historical Community of Spain, a State part of European Union that is characterized by the classical European regionalism, characterized by a sort of 'myth' for the constituent power that is absent in the Canadian reality[150]. Decision 42 of 2014[151], pronounced by the Constitutional Court of Spain, is emblematic of the vision about secession of the Spanish system, as it says that the Constitution of Spain does not allow secession, but secession of a Spanish territorial entity can happen in a lawful manner[152]. This manner can be put into practice if there is a total revision of the Spanish Constitution. In this case, the constitutional amendment that is demanded to legitimize secession has never been put into practice in the Spanish history, as it requires special majorities in the Parliament, its early dissolution, new elections and a mandatory referendum, that should be made at national level, not just in Catalonia[153]. Hence, this is an approach that is very different from the Canadian one and that is very strict. Such a strictness is also influenced by the external pressure linked to the fact that Catalonia aims to independence but also wishes to remain part of European Union[154].

Thus, these two examples of Canada and Spain have a significant and different impact on how secession is conceived: while in Canada the will of Quebec has been considered as legitimate, in the Catalonian case, and in general in the European culture, the fragmentation of

[147] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[148] *Ibidem.*
[149] The Supreme Court of Canada, in the Québec Secession Reference, underlined the need for clarity, and the Clarity Act (also known as C-20) puts that need into effect. According to the Court, after a referendum that a province or territory initiates in order to secede from Canada, the federal government must return to "political actors" the authority to determine, among other things, what constitutes a question and a clear majority. According to Article 3 of Bill C-20, if a vote meets the Act's conditions for clarity, the federal government has a political obligation to negotiate a secession. The Bill was first introduced on 13 December 1999, and it was finally passed on 29 June 2000. See 'The Clarity Act (BILL C-20)', *The Canadian Encyclopedia* (2014) https://www.thecanadianencyclopedia.ca/en/article/the-clarity-act-bill-c-20 accessed 21 September 2023.
[150] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 10.
[151] Case 42/2014, *Sentencia de 25 marzo 2014* [2014] 87 BOE 77.
[152] Josep Maria Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec' in Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019), 72.
[153] *Ibidem.*
[154] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 197.

sovereignty and of the constituent power is hardly accepted[155]. Indeed, the Canadian example shows the case of a State order and of a Supreme Court that is open to dialogue about the possibility of secession and that even agrees to authorize the separation under certain, more flexible, conditions. On the other side, the Spanish case shows a tendency that is common to almost all European countries, where secession is believed to need a domestication by bringing it back into the 'rationalizing' and 'reassuring' tracks of the constitutional reform, thus limiting its revolutionary nature and constitutive power through positive law[156].

While the cases of Quebec and Catalonia have differences but also analogies, the example of Kosovo has its own peculiarities. The first peculiarity is that, contrary to the other two cases, the secession of Kosovo had a positive outcome, and it came after a Unilateral Declaration of Independence announced by the Assembly of Kosovo, not after a popular referendum that expressed the wish of independence of the population[157]. Also, the state of Kosovo was created after the dissolution of former Yugoslavia, so it can be said to be the result of a continuous secessionist process, an historical characteristic that is unique of this case in the present work. A last important peculiarity that will later be analysed more deeply is the fact that the instance of secession that happened in Kosovo had very strong international aspects and has also obtained the legitimation by the international community, something that was not obtained by the Quebecoise and the Catalonian instances[158].

These three instances, with their peculiarities, will help to make a more precise and extensive evaluation on the possibility of considering Brexit as an instance of secession. This will be made by making a work of comparison of each of them with Brexit, after having analysed them singularly in detail.

1.1.4 The different possible approaches of public law to State integrity: the examples of Canada, Spain, and Serbia.

When referring to state integrity, it is necessary to clarify that not all state systems treat the subject the same way. Indeed, different systems have different approaches to the subject, and, in the present work, the focus will be on how the constitutions of Canada, Spain and Serbia treated state integrity and, as a consequence, secession in the time of interest for the research. Indeed, later in the work the secessionist attempts happened in these three States will be examined and knowing the provisions regulating each case seems convenient. Spain and Serbia have a constitution, which is the supreme law of the State, that is written, while Canada has a

[155] *Ibidem.*
[156] *Ibidem.*
[157] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2010) 15(6) The International Journal of Human Rights 926, 927.
[158] *Ibidem.*

constitution that is composed by numerous elements that are mainly written. Undeniably, the three cases under examination have three fundamental laws that have structural differences.

Canada has a constitution that is made of multiple elements. The Constitution Act of 1982 affirms, in article 52(2), that 'the Constitution of Canada includes: (a) the Canada Act of 1982, including this Act, (b) the Acts and order referred to it in the schedule'[159], a wording that mainly includes the Constitution Act of 1867, 'and any amendment to any Act or order referred to in paragraph (a) or (b)'[160]. However, the Supreme Court of Canada affirmed the non-exhaustive nature of this provision, affirming that other laws or orders could be part of the Constitution, with unwritten parts, like constitutional conventions, and unwritten principles, like the rule of law and democracy[161].

Spain has a single-document constitution. The constitution we will refer to here is the current constitution of the Kingdom and is not the first constitution adopted in Spain. It counts 169 articles; it was adopted in 1978 and had a key role in the country's transition to democracy after Franco's death[162].

Lastly, Serbia has the most recent constitution among the three mentioned, as it was adopted in 2006, after the dissolution of Serbia and Montenegro, and is made of 206 articles. This last constitution has been amended quite often since its adoption[163].

At this point, it is necessary to analyse whether these constitutions contain provisions about their states' integrity and also about secession. Regarding secession, generally speaking, constitutions adopt different approaches, as constitutions may either forbid secession, leave the topic unaddressed, or permit secession for one or more subunits under specific circumstances[164]. It is quite rare to have a permission of secession in constitutions and it could be found in the Soviet Union and in Yugoslavia, while the practice of prohibiting secession, like in the cases of Ecuador or Myanmar, and silence on the matter, like happens in the United States, can be found more often[165].

Focusing on the constitution of Canada, it may be emphasized that it contains several written provisions regarding the unity and integrity of Canada as a federal country. First, the Constitution Act of 1867 affirms in its preamble that 'the Provinces of Canada, Nova Scotia,

[159] Canada's Constitution Act of 1982.
[160] *Ibidem.*
[161] Adam Dodek, *The Canadian Constitution* (2nd edn, Dondurn Press 2016), 19.
[162] Eduardo Garcia De Enterria, 'La Constitución y las autonomías territoriales' (1989) 25 Revista Española de Derecho Constitucional 17, 21.
[163] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 34.
[164] Tom Ginsburg, 'Secession' (2018), August Issue, Constitution Brief https://www.idea.int/sites/default/files/publications/constitution-brief-secession.pdf accessed 21 September 2023.
[165] *Ibidem.*

and New Brunswick have expressed their desire to be federally united into one dominion'[166] and later contains a part, the second, that is named 'Union' and that reaffirms the unity of the provinces under the name of Canada. Also, the Constitution Act of 1982 affirms in many passages the multi-ethnic and the bilingual characteristics of the country, which are preserved together with the State's integrity, affirming also that changes in the territorial organisation of the country, like the creation of new provinces or the extension of existing ones into the territories, might be permitted only after an amendment of the Constitution by general procedure[167]. Regarding whether the Canadian constitution forbids, remains silent or allows secession, the Canadian constitution does not contain, neither directly nor implicitly, any provision about secession. Indeed, the constitution does not refer to the possibility of a territorial separation and it does neither forbid nor allow secession, and this is also one of the reasons why, when Quebec tried to secede from Canada, the Governor in Council of Canada referred to the Supreme Court[168]. In fact, as will be later further examined, it was asked to the Court: 'Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?'[169]. In this case, the Supreme Court affirmed that it was necessary to give an interpretation to answer the question, as no provision regulated the subject[170]. The interpretation of interest will later be investigated[171].

For what regards Spain, the Spanish constitution of 1978 contains an article named 'unity of the nation and the right to autonomy'[172]. This is article 2, which affirms that 'the Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all'[173]. Indeed, this article recognizes the presence of nationalities and regions with autonomy, but also preserves the unity and indissolubility of the Spanish nation[174]. In addition, it preserves the cultural differences that are present in Spain[175]. This is an article that does not openly mention secession, but it regulates the matter indirectly. In fact, the article, by affirming the indissolubility of the Spanish nation goes deeper in the matter than the wording used by the Canadian supreme law and effectively neglects the possibility to secede. However, in Spain the

[166] Canada's Constitution Act of 1867.
[167] Article 42 (1) of Canada's Constitution Act of 1982.
[168] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[169] *Ibidem.*
[170] *Ibidem.*
[171] See, particularly, Chapter 2 of the present work.
[172] Article 2 of the Spanish constitution of 1978.
[173] *Ibidem.*
[174] *Ibidem.*
[175] *Ibidem.*

Constitutional Court affirmed that secession is not impossible, even if, based on the current legal sources, it is illegal[176]. In fact, as will be better explained later, it was affirmed that secession may be permitted only if the constitution is amended and a clause permitting secession is introduced[177].

Lastly, Serbian constitution of 2006 contains a provision about state integrity in article 8. This provision affirms that 'the territory of the Republic of Serbia is inseparable and indivisible. The border of the Republic of Serbia is inviolable and may be altered in a procedure to amend the Constitution'[178]. This approach is very similar to the Spanish one, even if in this case the amendment provision is provided already by the Constitution, something that misses in the Spanish case. Indeed, even if the Serbian Constitution does not formally mention secession, it does not remain silent about the subject, allowing it in certain circumstances[179]. This wording may be explained by the fact that the constitution of Serbia is very young and was adopted in a historical moment that was already characterized by strong secessionist insurgencies. It should also be remembered that Serbia was created after the dissolution of two states, Yugoslavia first and Serbia and Montenegro later, and has communist roots. Indeed, as already mentioned, communist experiences like the URSS and Yugoslavia used to include a right to secession in their supreme law[180]. However, here secession is in practice much difficult to happen if the procedure affirmed by the constitution is followed, as amending the constitution is a complex procedure. Actually, the Kosovar secession from Serbia happened and the State was largely recognized internationally, but its secession is not recognized by Serbia as legal, as the Kosovar secession did not happen following an amendment of the Serbian constitution[181].

The cases under analysis, particularly the Serbian one, will show the importance of the role played by the international community in questions regarding secession, both for what regards the results given by the secessionist attempts and also for the 'inspiration' given by each experience to the other. For this reason, it seems appropriate to also consider the position about secession taken by international law.

[176] Case 42/2014, *Sentencia de 25 marzo 2014* [2014] 87 BOE 77.
[177] *Ibidem.*
[178] Constitution of Serbia of 2006.
[179] The constitution does not mention with precision the circumstances that could allow secession but affirms that it can happen after that a procedure of amendment of the constitution is completed. *Ibidem.*
[180] Tom Ginsburg, 'Secession' (2018), August Issue, Constitution Brief https://www.idea.int/sites/default/files/publications/constitution-brief-secession.pdf accessed 21 September 2023.
[181] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 928.

1.2 Secession in contemporary democracies.

1.2.1 Searching for a definition of secession.

Regarding its etymology, the word secession derives from '*secedere*', a Latin verb that means any act of withdrawal[182]. Only after, particularly with the American Civil War, this term took a political connotation, with reference to territory, and the modern discourse on secession was launched[183].

Since the first modern Constitution was adopted[184], secession has always been a critical issue for constitutional design[185]. In fact, in the juridical tradition and in liberal constitutionalism[186], secession has been transformed in a sort of constitutional taboo[187], especially after the American Civil War of 1861[188]. According to many authors, this conception was first conceived by the decision White v. Texas[189], which contributed to consolidate an idea of refusal of secession and its confinement among the *extra-ordinem* facts, like revolutions and coup d'états[190]. In this decision, the US Supreme Court affirmed how the Constitution was commanded 'to form a more perfect Union'[191], denying the possibility for a State to claim a right to withdraw from the Union. In recent times, the idea expressed by the Supreme Court is not as popular[192] and secessionist attempts became more usual and, nowadays, the theme of secession is strictly linked with the ideal of popular wish, to be subject of a popular referendum about self-determination[193]. Particularly, political self-determination consists of a process at the end of which the political communities are governed by themselves, choosing how to act in an autonomous way, based on a relationship between how members of a political community

[182] Benedetto Conforti, *Diritto Internazionale* (12th edn, Editoriale Scientifica 2021), 198.
[183] Susanna Mancini, 'Secession and Self-Determination' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 481.
[184] The first modern Constitution was adopted in 1789 in the United States. See Dieter Grimm, *Constitutionalism: past, present, and future* (1st edn, Oxford University Press 2016).
[185] Tom Ginsburg, 'Secession' (2018), August Issue, Constitution Brief https://www.idea.int/sites/default/files/publications/constitution-brief-secession.pdf accessed 21 September 2023.
[186] For further details on the subject see: Costanza Margiotta, *L'ultimo diritto: profili storici e teorici della secessione* (1st edn, Il Mulino 2005).
[187] Susanna Mancini, 'Costituzionalismo, federalismo e secessione' (2014) 4 Istituzioni del federalismo 779, 784.
[188] Susanna Mancini, 'Ai confini del diritto: una teoria democratica della secessione' (2015) 1 Osservatorio AIC 3, 8.
[189] The present decision, decided in 1869, was not directly about secession, but had an important influence on the subject. For further details see: Cory Genelin, 'On Secession: An Analysis of Texas v. White' (*American Thinker*, 10 January 2013) < https://www.americanthinker.com/articles/2013/01/on_secssion.html> accessed 21 September 2023.
[190] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 41.
[191] Texas v White [1868] 74 US Supreme Court 700.
[192] Susanna Mancini, 'Secession and Self-Determination' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 488.
[193] Riccardo De Caria, 'I referendum indipendentisti' (2014) 16 DPCE 1611; Laura Frosina, 'Profili giuridici e aspetti problematici dei referendum secessionisti. Un'analisi comparata' (2017) 3 Nomos 1854, 1861.

exercise their individual agency and how that community exercises its collective agency[194]. To achieve the self-determination of a people, the means used in the process may be various, such as secessionist attempts or also the end of a colonial rule. This last event is considered by some authors as the main element behind the relevance of self-determination in the contemporary debates about the topic of secession, as the introduction of self-determination in public debates has been particularly relevant in the second half of the 20th century, after the end of colonialist experiences[195]. Indeed, the United Nations General Assembly was convinced that 'the continued existence of colonialism prevents the development of international economic cooperation (…) and militates against the United Nations ideal of universal peace'[196], so the trend immediately after World War II was to give independence to the colonies. Thus, in this context, the process of decolonisation began in earnest and the fervour for independence of those days was shared by many in the international arena, with the granting of independence to many former colonies[197]. In this context, it is hard to deny that there are some analogies between the desire of independence proper of some parts of States though secession and the drive for independence in colonials[198]. However, secession and the independence of former colonial territories have been distinguished by the practice of United Nations[199], as decolonisation has been defined as a simple reassertion of an original and legitimate sovereignty that had never disappeared, but that was quiescent during the colonial occupation[200]. Indeed, the access to independence of colonial territories was not considered, as it is the case for secessionist events, a violation of the territorial integrity of a State and it could not be considered as a secession according to the definition provided by international law[201].

Generally speaking, secession can be defined as 'a method of creation of States, the most conspicuous and probably the most common until 1914'[202], and it consists in 'the creation of a State by the use or threat of force without the consent of the former sovereign'[203]. As already mentioned before in the present work, the assertion of secessionist demands can exert significant strain upon the delicate fabric of the constitutional compact, thereby necessitating a

[194] Massimo Renzo, 'Why colonialism is wrong' (2019) 72(1) Current Legal Problems 347, 350.
[195] *Ibidem.*
[196] Donald W. Livingston, 'The Very Idea of Secession' (1998) 35 Soc'Y 38, 47.
[197] Frederick V. Perry and Scheherazade Rehman, 'Secession, the Rule of Law and the European Union' (2015) 31 Conn J Int'l L 61, 72.
[198] *Ibidem.*
[199] See UNGA, Res. 1514 (XV) (14 December 1960); UNGA, Res. 1541 (XV) (15 December 1960).
[200] Costanza Margiotta, *L'ultimo diritto: profili storici e teorici della secessione* (1st edn, Il Mulino 2005), 73.
[201] Alain Pellet, 'Quel avenir pour le droit des peuples à disposer d'eux-mêmes?' in M. Rama Monraldo (ed.), *El Derecho Internacional en un Mundo en Transformación* (Fundación de Cultura Universitaria 1994), 97.
[202] James Crawford, *The creation of States in International Law* (2nd edn, Oxford University Press 2007), 183.
[203] Krystyna Marek, *Identity and Continuity of States in Public International Law* (2nd edn, Librairie Droz 1968), 207.

careful examination of the various approaches adopted by Constitutions in addressing the matter of secession[204]. Such approaches are mainly three: constitutions may either (a) forbid secession, (b) leave the topic unaddressed, or (c) permit secession for one or more subunits under specific circumstances[205]. This latter case makes several questions arise and it creates a real right to secession[206]. Thus, examples of secession may be very different. However, a characteristic that is common to all secessionist attempts is the fact that this phenomenon is intended as involving a State breaking off, usually to form a new State, but sometimes to join another one that is geographically near[207]. This last characteristic is the main peculiarity of secession that differentiates it from the phenomenon of devolution. However, the two events have been and are still easily confused, even if they differentiate in some elements, of which the most evident is the fact that devolution does not usually challenge the integrity of the nation-state's boundaries, as does secession[208]. Yet, especially in some circumstances[209], it can be artificial to make a distinction between the two[210], as elements that are typical of secession may be present in cases of devolution and vice versa[211].

Despite the fact that many States in the international community are multinational, national separatism is not a threat in most of them[212]. Many breakaway movements have arisen, with varying degrees of success[213]. There are a number of unanswered questions surrounding the secession phenomenon. Within this context, it is pertinent to consider the utilization of statehood criteria in circumstances where the status of statehood is contested by the previous governing authority[214]. Additionally, the examination of the validity of secession within the framework of contemporary international law is of utmost importance. Lastly, due attention must be given to the legal facets surrounding the progression through which a seceding entity

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[204] Tom Ginsburg, 'Secession' (2018), August Issue, Constitution Brief https://www.idea.int/sites/default/files/publications/constitution-brief-secession.pdf accessed 21 September 2023.
[205] *Ibidem.*
[206] *Ibidem.*
[207] Tom Ginsburg, 'Secession' (2018), August Issue, Constitution Brief https://www.idea.int/sites/default/files/publications/constitution-brief-secession.pdf accessed 21 September 2023.
[208] Montserrat Guibernau, 'National Identity, Devolution and Secession in Canada, Britain and Spain' (2006) 12(1) Nations and Nationalism 51, 62.
[209] James Crawford, *The creation of States in International Law* (2nd edn, Oxford University Press 2007), 172.
[210] Generally speaking, devolution happens in a State where powers are transferred from national to local government. It does not entail the creation of a new State, as the original one remains the only State existing. On the other side, secession includes the creation of a new State, without any links with the previous State of which its territory was part before. See Natalino Ronzitti, *Diritto Internazionale* (6th edn, Giappichelli Editore 2019), 103.
[211] See the cases of Indonesia and Eritrea, where elements of forcible seizure and free grant of independence have been combined. For more details: James Crawford, *The creation of States in International Law* (2nd edn, Oxford University Press 2007).
[212] Bridget Coggins, 'Secession, recognition and the international politics of statehood' (Dissertation, The Ohio State University 2006), 8.
[213] Among the secessionist attempts that have had a positive outcome, the cases of Indonesia, North Korea, North Vietnam, Bangladesh, Guinea Bissau and Eritrea can be taken as examples.
[214] James Crawford, *The creation of States in International Law* (2nd edn, Oxford University Press 2007), 107.

achieves international recognition[215]. In order to make the issue more clear and to add more importance to the integrity of the analysis, the present work will note that these questions have been handled by numerous authors[216].

1.2.2 Secession as an infringement of the rule of law.

According to Johnson, 'the great undertaking of the last millennium was the establishment of the rule of law within nation states and the project for the new millennium is to build the rule of law on the international or global level'[217]. The theme of secession is often connected with the subject of the rule of law. This because secession has been considered as an infringement of the rule of law, not only in a judicial dimension, but also for reasons connected with territorial integrity and the respect of the constitutional order. In order to understand in which way secession can be considered an infringement of the rule of law, it seems proper to first address here what the rule of law is and later highlight why secession is considered an infringement of the rule of law.

After the collapse of communism, many observers believed that a new age was about to start, one characterized by the domination of the Western ideas of freedom, democracy, individual rights and capitalism[218]. This is what has also been defined as "The End of History"[219], where peace and prosperity would have reigned. Among the characteristics proper of the Western political tradition, a defining one is "freedom under the rule of law"[220], considered not only as the enhancement of liberty, but also as something connected to the sustainable economic development. The rule of law now has widespread support not just in Western countries but also in a wide variety of other societies representing a wide diversity of cultures and economic and political structures[221]. The unprecedented level of apparent consensus in favour of upholding the principles of legal governance is a matter of great significance, as it stands unparalleled in the annals of history[222]. Consequently, a certain degree of scepticism has emerged regarding the genuineness of certain individuals' professed dedication to these principles[223]. Anyway, the advocacy of the rule of law maintained

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[215] *Ibidem.*
[216] Among them, see James Crawford, *The creation of States in International Law* (2nd edn, Oxford University Press 2007).
[217] Paul Johnson, 'Laying Down the Law' (2000) 18 September Wall Street Journal < https://www.wsj.com/articles/SB122574713733294381> accessed 21 September 2023.
[218] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004), 48.
[219] Francis Fukuyama, *The End of History and the Last Man* (Avon Books 1992), 77.
[220] Judith N. Shklar, *Legalism* (Harvard University Press 1964), 98.
[221] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004), 102.
[222] *Ibidem.*
[223] *Ibidem.*

worldwide and this is also why it is believed that the use of this term has become meaningless[224]. In fact, the rule of law seems to be the preeminent legitimating political ideal of today's worldwide system, without a real agreement upon what the rule of law exactly is and means[225]. Sometimes the rule of law is strictly connected to liberalism and capitalism, but this idea seems to disregard the fact that many non-Western societies wish to implement the rule of law without being or wishing to be liberal or that many Western societies are devoted to the social welfare state while applying the rule of law[226]. Also, the rule of law is sometimes considered to be a danger, as it is believed that one of the dangers connected to the rule of law is that it can become instead a rule by judges and lawyers[227].

The tradition of the rule of law has developed over many years. In many countries that have historically lacked the tradition of the rule of law, there are signs that government officials and the general populace are beginning to accept and learn to take the worth and appropriateness of the rule of law for granted[228]. Nowadays, the rule of law has also become a fundamental requirement of membership in the European Union[229]. This because the rule of law is considered to be the fundamental justice in common law jurisdictions, and it is intended to provide a legal protection and security against arbitrariness coming from those who hold powers[230]. The security that comes from the rule of law enables social and governmental cooperation and it makes credible public and private promises and expectations[231]. The rule of law is also considered to be what gives legitimacy to a system of commands, a minimum that makes law into a system, into 'legal', being a matter of legitimacy[232]. Among the outcomes proper of the rule of law, one that is of particular relevance is the protection of the equality of all persons before the law and the strong human-rights inspired commitment[233].

At this point, it can be investigated the reason why secession is considered an infringement of the rule of law. The rule of law provides a legal protection against arbitrariness of the power holders[234] and secession is, in most of the cases, an arbitrary act, that is made

[224] Judith N. Shklar, 'Political Theory and the Rule of Law' in Allan C. Hutcheson and Patrick Manahan (eds.), *The Rule of Law: Ideal or Ideology* (Carswell 1987),7.
[225] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004), 82.
[226] *Ibidem.*
[227] Andras Sajó, 'The Rule of Law' in Roger Mastermann and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 261.
[228] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004), 38.
[229] Andras Sajó, 'The Rule of Law' in Roger Mastermann and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 263.
[230] *Ibidem.*
[231] *Ibidem.*
[232] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004), 41.
[233] Andras Sajó, 'The Rule of Law' in Roger Mastermann and Robert Schütze (ed.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 263.
[234] *Ibidem.*

without the consent of the former sovereign[235]. Through the rule of law there should be a planning of citizens' life[236], that is not possible with an event that is unpredictable and that entails the use or threat of force, like secession[237]. With regard to the use of force or the threat of force, it should be noted that such a custom may easily violate human rights, both of the population of the secessionist portion of State and of the other co-nationals. The rule of law entails a protection of human rights, and this is surely another aspect that can make secession a violation of the rule of law principles[238]. Indeed, the Canadian Supreme Court, in the Reference re Secession of Quebec case[239], appealed for reasonable regulations that include the principles of the rule of law, federalism, and minority protection when establishing the legal framework for potential secession negotiations remained restricted to Canadian territory[240]. The use of the referendum as the primary tool for constitutional reform, or rather for constitutional challenge, i.e., for secession claims, elsewhere has overridden such principles, even though they are occasionally mentioned in judicial judgements on secession claims. Also, generally speaking, the respect of the constitutional order is violated by secession, as it should be taken into account that a constitutional clause allowing secession is relatively rare[241]. Indeed, way more usually, constitutions prohibit secession or remain silent on the topic[242]. In addition, secessionist attempts may not consider and respect the authority of the judiciary power, that is a prominent aspect protected by the rule of law[243]. Regarding the territorial integrity, this is another aspect that can be regulated by Constitutions[244]. Secession entails an infringement of the territorial integrity of a State and, in some cases, of the Constitution itself or of secondary laws. Generally speaking, this is an infringement of the rule of law, as no one is considered to be above the law according to the principles proper of a rule of law system[245]. Also, the deprivation of State integrity, through secession, is an act that has a relevance with regard to the aspects of

[235] Krystyna Marek, *Identity and Continuity of States in Public International Law* (2nd edn, Librairie Droz 1968), 106.
[236] Andras Sajó, 'The Rule of Law' in Roger Mastermann and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 264.
[237] Krystyna Marek, *Identity and Continuity of States in Public International Law* (2nd edn, Librairie Droz 1968), 107.
[238] See Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[239] *Ibidem.*
[240] Francesco Palermo, 'Proceduralizing territorial conflicts in the name of constitutionalism' (2021) IDEES < https://revistaidees.cat/en/proceduralizing-territorial-conflicts-in-the-name-of-constitutionalism/> accessed 21 September 2023.
[241] Tom Ginsburg, 'Secession' (2018), August Issue, Constitution Brief https://www.idea.int/sites/default/files/publications/constitution-brief-secession.pdf accessed 21 September 2023.
[242] *Ibidem.*
[243] Andras Sajó, 'The Rule of Law' in Roger Mastermann and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 270.
[244] See, for example, the Italian Constitution of 1948.
[245] Andras Sajó, 'The Rule of Law' in Roger Mastermann and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 271.

international law, that will be investigated in the following lines.

1.2.3 Secession as a right according to international law and its limits.

Nowadays, one of the most heated debates between experts of international law pertains to the right of segments of States to secede[246]. Here, it seems significant to highlight that at the end of World War II, there were 51 States in the world, while today there are nearly 200, with 26 being formed since 1990[247]. This is a sign of how the concept of State evolved in history. Particularly, secession became of major relevance in international law when examples of secessionist attempts became more and more frequent. In the contemporary era, the phenomenon reached its greatest expansion, with the presence of around 70 separatist movements at the world level[248].

To give a general and fast answer to the question about whether there is or not a right to secession in international law, it can be said that, notwithstanding the potential acknowledgment of a nation-state arising from a triumphant secessionist endeavour by global organizations and the international collective, such a partition contravenes established norms and principles of international jurisprudence.[249]. However, the subject needs to be further explored.

As already mentioned briefly, secession is a concept that is related to that of self-determination. The aforementioned concept made its debut on the global stage during the initial years of the 20th century, concomitant with the advent of the First World War and the Bolshevik Revolution[250] and it became a legal principle only after World War II, as before it only had a political dimension[251]. Indeed, self-determination is mentioned in Article 1 (2)[252], in Article

[246] Frederick V. Perry and Scheherazade Rehman, 'Secession, the Rule of Law and the European Union' (2015) 31 Conn J Int'l L 61, 64.
[247] Brian Beary, 'Separatist Movements: should nations have a right to self-determination' (2008) 2 (4) CQ Global Researcher < https://sk.sagepub.com/books/issues-in-peace-and-conflict-studies/n2.xml > accessed 21 September 2023.
[248] *Ibidem.*
[249] Susanna Mancini, 'Secession and Self-Determination' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 487.
[250] Before, the principle of self-determination was already mentioned in the American Declaration of Independence of 1776 and in the French Revolution of 1789. See Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (1st edn, Cambridge University Press 1995), 109.
[251] United Nations General Assembly, 'Charter of the United Nations' 1945.
[252] The article reads as follows: 'The purposes of the United Nations are: (…) 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace (…)'.

73[253] and in Chapter XII of the Charter of the United Nations[254] and the actions made by the UN 'can be seen as having ultimately established the legal standing of the right in international law'[255]. According to the scholar Antonio Cassese[256], the concept of self-determination of peoples has achieved universal recognition within the framework of treaties to such a degree that it may now be deemed as a general principle of international law[257] and a plausible derivative of the entitlement to self-determination may encompass a prerogative of secession, notwithstanding the fact that secession 'goes unopposed in rare, exceptional cases'[258].

A distinction is usually made between external and domestic self-determination. The entitlement to external self-determination was conferred exclusively upon collectivities known as 'peoples' who were subject to colonial governance and whose identification was predicated not upon ethnic or national characteristics, but rather upon political and territorial considerations, such as the amalgamated political majorities comprised of diverse ethnic groups within the colonial context[259]. The latter were regarded as an indivisible whole, in conjunction with the regions demarcated by the colonial powers, thereby resulting in a conflict with the inherent aspect of individual self-determination[260]. The conceptualization of the right to self-determination for non-colonial 'peoples' was framed within a 'domestic' context, underscoring its 'democratic' nature[261]. In the present context, it is evident that the conservative international principles have triumphed over the right to secede. It is incumbent upon the States, therefore, to fulfil the duties inherent in the entitlement to self-determination of all peoples, whereby the right to self-determination safeguards the interests of individuals who constitute minority groups, who ought not to be precluded from engaging in political processes[262]. In accordance with a particular tenet of the doctrine, it is only in instances where the aforementioned guarantees are absent or significantly constrained that a right to self-determination may arise,

[253] The article reads as follows: 'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: (…) b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement (…)'.

[254] United Nations General Assembly, 'Charter of the United Nations' 1945.

[255] Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (1st edn, Cambridge University Press 1995), 154.

[256] *Ibidem.*

[257] See UNGA, Res. 2625 (XXV) (24 October 1970).

[258] Malcolm N. Shaw, *International Law* (8th edn, Cambridge University Press 2017), 62.

[259] Margaret Moore, *National Self-Determination and Secession* (1st edn, Oxford University Press 1998), 21.

[260] *Ibidem.*

[261] *Ibidem.*

[262] Diane F. Orentlicher, 'International Responses to Separatist Claims: Are Democratic Principles Relevant?' in Steven Macedo and Allen Buchanan (eds), *Secession and Self-Determination* (NYU Press 2003), 76.

thereby transforming into a right to secede[263].

In accordance with certain scholars, it appears that in contemporary times, the legal framework governing secession tends to exhibit a contradictory nature, as it conceals its revolutionary essence while endorsing its conservative aspect[264]. This is achieved by means of state formation within the confines of a novel sovereign entity[265]. Within the framework of the post-Second World War international legal regime, the principle of self-determination was formulated as an inherent entitlement bestowed upon all distinct groups of individuals[266]. However, the indeterminate nature surrounding the recipients of this entitlement, coupled with the prevailing aversion towards secession manifested in international practice, effectively nullified the prospective efficacy of self-determination, rendering it naught but an illusory concept[267].

During the temporal span encompassing the cessation of World War II and the termination of the Cold War, the act of secession was an infrequent occurrence. This can be attributed to the prevailing perspective within the realm of international law, which regarded the demarcations of State boundaries as enduring elements of the international State system[268]. Additionally, the conduct of States and the United Nations served as a deterrent to the expansion of the 'external' or nationalistic facet of the right to self-determination beyond the confines of the colonial world[269]. It is worth noting that alterations to territorial boundaries in said colonial world were subject to evaluations of suitability and acceptability by the dominant 'great powers'[270]. Following the pivotal year of 1991, a profound transformation transpired, characterized by the dissolution of socialist federations and the subsequent global dissemination of the ethnic revival phenomenon[271]. In this context, self-determination and secession became central in the international debate. Indeed, the European Union developed some guidelines to recognize new States in Eastern Europe and that were part of Soviet Union[272]. These guidelines affirmed the criteria for State recognition, which included adherence to democracy, the rule of law, human rights, the rights of minorities, the inviolability of borders, and the peaceful

[263] Aurelio Cristencu, *The Right to Self-determination: Historical and Current Development on the Basis of United Nations Instruments* (1st edn, UN 1981), 89.
[264] Susanna Mancini, 'Secession and Self-Determination' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 493.
[265] *Ibidem.*
[266] *Ibidem.*
[267] *Ibidem.*
[268] *Ibidem.*
[269] Aurelio Cristencu, *The Right to Self-determination: Historical and Current Development on the Basis of United Nations Instruments* (1st edn, UN 1981), 107.
[270] Susanna Mancini, 'Secession and Self-Determination' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 490.
[271] *Ibidem.*
[272] *Ibidem.*

resolution of disputes[273]. The importance of self-determination and secession was bolstered by these principles, but they never materialized into legally binding international norms. A trend toward legitimizing secession under specific procedural or substantive criteria emerged at this time, as seen by the situations in Montenegro and Kosovo.

In these most recent instances, Montenegro saw no problems gaining international recognition[274]. For what regards the Kosovar case, in 2008, the General Assembly requested an advisory opinion from the International Court of Justice on the legality of Kosovo's independence from Serbia[275]. This example of secession will be further explored later in this work[276], but here it is important to put in evidence the fact that the Court, in this case, it is crucial to note here that the Court in this instance expressed an opinion that the unilateral declaration of independence by the Kosovars did not violate international law[277]. However, the ruling in question exhibits a notable omission in the form of a section that would have offered prospective guidance regarding various scenarios.[278] This omission is particularly significant due to the ruling's apparent allowance for a potential violation of State sovereignty and inviolability. Specifically, the ruling addresses the issue of secession's legitimacy under international law in a manner that can be characterized as equivocal, suggesting a reliance on contextual factors to determine its permissibility[279]. Here, some academics worry that permitting such a process could turn UN-led governments into 'nothing but a road towards secession'[280], while others defend Kosovo as an example of 'earner sovereignty'. The 'earner sovereignty' approach holds that a newly independent entity does not automatically qualify for recognition as a new State upon its separation or pursuit of separation, but rather must "earn" its sovereignty by proving it is capable of acting independently and would be a trustworthy sovereign partner in international affairs[281].

Later, the Supreme Court of Canada was eventually asked for its opinion on whether or not Quebec has a legal right to secede[282]. In this judgment, which will be analysed in further

[273] *Ibidem.*
[274] Malcolm N. Shaw, *International Law* (8th edn, Cambridge University Press 2017), 93.
[275] See UNGA, Res. 63/3 (8 October 2008).
[276] See Chapter 2 of the present work.
[277] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) International Court of Justice 22 July 2010.
[278] Frederick V. Perry and Scheherazade Rehman, 'Secession, the Rule of Law and the European Union' (2015) 31 Conn J Int'l L 61, 71.
[279] *Ibidem.*
[280] Susanna Mancini, 'Secession and Self-Determination' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 488.
[281] James R. Hooper and Paul R. Williams, 'Earned Sovereignty: The Political Dimension' (2003) 31 Dev. J. Int'l L. and Pol'y 355, 360.
[282] Sujit Choudhry and Robert L. Howse, 'Constitutional Theory and the Quebec Secession Reference' (2010) 13 Canadian Journal of Law and Jurisprudence 143, 157.

depth below, the Court reaffirmed the existence of the right to secession under international law, but only in the context of 'people' being discriminated against, treated unfairly, and lacking effective democratic representation[283].

The prevailing dispositions towards secession in the post-Cold War era indicate a discernible alteration in the realm of international law and the customary conduct of the global community, wherein the option of secession is increasingly accorded legitimacy[284]. However, it is imperative to note that such legitimacy is contingent upon the adherence to democratic principles, a comprehensive conception of citizenship that embraces pluralism, and the provision of adequate assurances that the act of secession will not compromise geopolitical equilibria[285].

1.3 The integrity of European Union according to European Law.

1.3.1 The peculiar constitutional nature of European Union.

Now that State integrity and secession have been analysed with reference to single States, it is necessary to examine how the integrity is regulated in European Union, in order to better understand Brexit and its analogy with secessionist instances.

First, it is necessary to give a definition of European Union and show its evolution into what is today: an entity with a peculiar constitutional nature.

The concept of a cohesive European continent was originally advocated throughout the 19th century, but a practical implementation of the project became real only towards the end of the Second World War[286]. The integration in the European continent started in 1948 within the realm of military affairs and later expanded to the economic and political, cultural and social collaboration between late 1948 and 1949[287]. This intergovernmental cooperation has facilitated the Western European States in attaining significant outcomes within a limited temporal span[288], but the system had some limits[289].

To surmount these limits, six European States[290] established, with the Treaty of Paris of 18 April 1951, the European Coal and Steel Community (ECSC)[291]. The present community represents the foundational framework upon which the prospective European Union is

[283] *Ibidem.*
[284] Susanna Mancini, 'Secession and Self-Determination' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 489.
[285] *Ibidem.*
[286] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 2.
[287] *Ibidem*, 5.
[288] *Ibidem*, 7.
[289] René Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna* (2nd edn, Harper and Row 1973), 623.
[290] Belgium, Federal Republic of Germany, France, Italy, Luxembourg, Netherlands.
[291] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 9.

predicated. Very soon, in light of the progresses achieved by the ECSC, the Member States established an additional community, the European Defence Community (EDC), by means of a Treaty signed in Paris on the 27th of May 1952[292]. However, it failed to come into effect due to France's refusal to ratify the said Treaty[293].

After this failure, with the Conference of Messina in June of 1955[294], two treaties, namely the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (EAEC or Euratom), were formally executed in Rome in 1957[295]. At this juncture, three distinct Communities were founded in Europe, establishing a significant nexus with a majority of European nations.

Later, with the signing of the Treaty of Maastricht on 7th February 1992, the main community, the EEC, was officially named European Community[296]. As a result, it ensued that the aforementioned treaty underwent a transformation, assuming the nomenclature of the Treaty establishing the European Community (TCE), thereby acquiring the status of the official instrument establishing the European Union[297].

However, it is pertinent to note that the Community experience in the European context reached its culmination only after 2009, thereby paving the way for the emergence of the European Union[298].

This significant development was realized upon the enforcement of the Lisbon Treaty[299]. The Treaty of Lisbon effectively introduced amendments to the pre-existing foundational treaties of the European Union, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)[300]. Indeed, these foundational treaties were initially established by the Treaty of Maastricht in 1992 and the Treaty of Rome in 1957, respectively[301].

The nations which initially assumed the roles of principal actors in the process of European integration were six, namely Germany, France, Italy, the Netherlands, Belgium, and

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[292] *Ibidem*, 10.
[293] *Ibidem*.
[294] *Ibidem*, 12.
[295] René Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna* (2nd edn, Harper and Row 1973), 643.
[296] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 12.
[297] *Ibidem.*
[298] Laurent Pech, Joelle Grogan and others, 'Unity and Diversity in National Understandings of the Rule of Law in the EU' (*Reconnect*, 30 April 2020) https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf accessed 21 September 2023.
[299] *Ibidem.*
[300] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 13.
[301] *Ibidem.*

Luxembourg[302]. However, in the following years many States joined the integration process. Here, it seems necessary to mention the first addition to the six founding members, that was made in 1973 with the enlargement to Denmark, Ireland and United Kingdom[303]. After the addition of Hungary in 2013, the European Union comprised a total of 28 constituent entities. However, in 2020, the United Kingdom withdrew from the European Union, thereby producing a reduction in the numerical count of member states within the European Union for the first instance in history[304].

In conjunction with the main historical steps that were briefly mentioned in the previous lines, European Union experienced an important development. Indeed, it can be said that it was initially founded as an international organisation that combined different States in Europe, mainly in an economic perspective[305]. Later, the organisation developed into a reality that is more complex[306]. Indeed, in the past it could be defined as an international organisation, as the ones envisaged by international law, but it is now an entity that has developed a supranational identity, as, for example, Member States renounce to part of their sovereignty for it to be possessed by European Union[307]. Also, European Union possesses some characteristics that make this entity very similar to a State. Among such, it is possible to mention the citizenship of European Union, that is possessed by any person that holds the nationality of an EU country, the binding nature of the Charter of Fundamental Rights of the EU, the presence of a EU Parliament, that is elected directly by the EU citizens, and the majority legislative process[308].

Because of its peculiarity, defining European Union can be problematic, yet it is possible to affirm that it is a reality that possesses together elements that are proper of States, federations, confederations and international organisation and that has no equal[309]. Reasonably, the best way to define European Union is as a *sui generis* entity[310].

1.3.2 The regulation of withdrawal from the EU in the Treaty of Lisbon.

The mentioned peculiarity of the EU nowadays causes a debate about the definition of European Union and several scholars believe that defining it as an international organisation can be too restrictive[311]. However, the EU has a characteristic that is proper of most

[302] René Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna* (2nd edn, Harper and Row 1973), 627.
[303] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 14.
[304] *Ibidem.*
[305] *Ibidem.*
[306] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 31.
[307] Olivier Costa and Nathalie Brack, *How the EU really works* (2nd edn, Routledge 2019), 26.
[308] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 39.
[309] *Ibidem.*
[310] *Ibidem.*
[311] *Ibidem*, 28.

international organisations: it was created on the basis of a treaty[312]. European Union, in fact, is the result of an evolutionary process that started in 1951 and that saw the succeeding of numerous treaties. Particularly, the organisation was formally created with the name and most of the characteristics that has today with the ratification of the Treaty of Maastricht of 1993[313]. This treaty, together with the Treaty of Rome of 1957, was amended by the Treaty of Lisbon of 2007[314].

This last Treaty marked an extremely significant change in the EU. Indeed, the entry into force of this agreement in 2009, that introduced the Treaty on European Union (TUE, previously referred to as Treaty of Maastricht) and the Treaty on the Functioning of the European Union (TFUE, previously referred to as Treaty of Rome) as the constitutional basis of EU[315], established an important innovation that is particularly significant for this work: article 50 of TUE, the exit clause from European Union[316]. The Treaty on European Union also contains other provisions that are relevant for the definition of the complex entity: article 1 underlines that 'the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe'[317], article 2 makes a reference to the values that found European Union, among which there is also the respect for the rights of 'persons belonging to minorities'[318] and in article 3 there is a reference to the promotion, by the Union, of an 'economic, social and territorial cohesion', in addition to that of 'solidarity among the Member States'[319].

Focusing on the recession clause, it should be mentioned that before the Treaty of Lisbon was ratified the possibility of withdrawal from European Union of a Member State was not expressly recognised by any Treaty, although it was not considered as an impossible event excluded *a priori*[320]. Anyway, it should be also considered that the European Court of Justice affirmed an irreversible nature of the European Union in the past[321], but with much caution. In fact, in spite of the acclaimed irreversibility, membership of the EU cannot and could not, of course, take precedence over a State's desire of withdrawal. Such a caution is also justified by the fact that, before 2009 and after the Court's pronunciation, there has been a partial example

[312] Jan Klabbers, *Advanced Introduction to the Law of International Organisations* (1st edn, Edward Elgar Publishing 2015), 87.
[313] *Ibidem.*
[314] Robert Schütze, *European Union Law* (2nd edn, Cambridge University Press 2018), 103.
[315] Roberto Baratta, *Lezioni di Diritto dell'Unione Europea* (3rd edn, Luiss University Press 2019), 92.
[316] Article 50 (1) of TUE reads as follows: 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'.
[317] Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
[318] *Ibidem.*
[319] *Ibidem.*
[320] Robert Schütze, *European Union Law* (2nd edn, Cambridge University Press 2018), 107.
[321] Case 6/64, *Costa v Enel* [1964] European Court reports 585.

of withdrawal from European Union: that of Greenland in 1985[322]. Such an event shows the flexible nature of the European Union. This because the Treaty of Lisbon has simply regulated what, until that moment, was regulated by norms of general international law and by the Vienna Convention on the Law of Treaties. In fact, article 50 enabled any Member State to withdraw from EU on the basis of its own constitutional requirements[323]. The provision of a clause of withdrawal until that moment was believed to be a utopia, as there was the fear, according to Hal S. Scott[324], of someway promoting the withdrawal among the Member States, by giving an idea on withdrawal much more simplified and justified[325]. Anyway, it should also be mentioned that, before the Treaty of Lisbon was adopted, it was rare to find an instrument similar to that introduced by article 50 in any other statutes of other international organisations[326].

Given what has been said until now, it might be asked why, then, a clause of withdrawal was introduced in the Treaty. Article 50 is the result of the process that aimed to the creation of a European Constitution. Such a project did not have the expected result, as a European Constitution was never approved. However, in the circumstances of elaborating a Constitution, United Kingdom claimed the introduction of such a clause[327]. Later, this provision was introduced for the first time in the Treaty of Rome of 2004 and remarked in the treaty of Lisbon with some revisions[328]. Article 50 is now the normative basis that disproves the so-called rigid nature of European Union[329].

Focusing on the content of the article, it affirms that any State wishing to leave European Union needs to notify this will to the European Council without the need to justify this choice or to satisfy any substantive requirements [330]. This last characteristic differs from article 49

[322] Roberto Baratta, *Lezioni di Diritto dell'Unione Europea* (3rd edn, Luiss University Press 2019), 87.
[323] Consolidated Version of the Treaty on European Union [2008] OJ C115/13.
[324] Phoebus Athanassiou, 'Withdrawal and expulsion from the EU and EMU: some reflections' (2009) 10 Legal Working Paper Series 9, 13.
[325] *Ibidem.*
[326] Among the international organisations that did not provide for a recession clause there is the NATO (with its North Atlantic Treaty) and the Council of Europe (with its Statute). This because the subject was considered regulated by article 54 of the Vienna Convention, that reads as follows: 'The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States'.
[327] Federico Savastano, 'Prime osservazioni sul diritto di recedere dall'Unione europea' (2015) 22 Federalismi.it <https://www.federalismi.it/ApplOpenFilePDF.cfm?artid=30808&dpath=document&dfile=26112015093410.pdf&content=Prime%2Bosservazioni%2Bsul%2Bdiritto%2Bdi%2Brecedere%2Bdall%27Unione%2Beuropea%2B%2D%2Bstato%2B%2D%2Bdottrina%2B%2D%2B> accessed 21 September 2023.
[328] Roberto Baratta, *Lezioni di Diritto dell'Unione Europea* (3rd edn, Luiss University Press 2019), 102.
[329] Nick Snavely, 'Should We Leave the Backdoor Open?' (2004) UMKC Law Review 213, 221.
[330] Julia Told, '(Br)EXIT from the EU: A Legal Perspective' (2017) 3 ECFR 490, 497.

TUE[331], which regulates the procedure of admission of any State to European Union[332]. The withdrawal agreement is negotiated by European Union and the Member States, and it is the Council that deliberates the agreement with a qualified majority, after the approval from the Parliament. Here, it is missing a veto power proper of the Member States, which makes the process of withdrawal easier[333]. In the light of the guidelines given by the Council, the Union negotiates and concludes an agreement with the interested State in order to define the modalities of withdrawal. Such an agreement must follow the provisions of article 218, paragraph 3 of TFUE[334]. Article 50 also makes a provision about temporal limits for the withdrawal process to be completed: the process must be concluded in two years, starting from the notification of the wish to recede, even if an agreement is not found[335]. This shows the unilateral nature of the withdrawal process.

After the exit from European Union, a State may ask to re-join European Union, but will have to follow the procedures affirmed in article 49 of TUE without any exception, like any other Candidate.

About the possibility to change the intentions in the process of withdrawal, article 50 seems to not clarify whether it is possible for the withdrawing State to revoke the wish of exit. This subject was also theme of discussion and the Court of Justice of the European Union, in the Wightman decision[336], affirmed how it is possible to revoke such a will, but only with an official and formal written communication to the European Council. This idea expressed by the Court was supported by the interpretation of international law, particularly of the Vienna

[331] Article 49 TUE reads as follows: 'The European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements'.

[332] In order to become a Member State, the Candidate must satisfy the following requirements: a) Be a State in accordance to International Law b) Be geographically located in the European continent c) respect for the values of European Union stated in article 2 TUE and promote them. Also, in 1993, the European Council of Copenhagen established a principle according to which a state must also satisfy other criteria to join EU: the political criteria, the economic criteria and the legal criteria. See Roberto Baratta, *Lezioni di Diritto dell'Unione Europea* (3rd edn, Luiss University Press 2019), 132.

[333] Roberto Baratta, *Lezioni di Diritto dell'Unione Europea* (3rd edn, Luiss University Press 2019), 134.

[334] The article reads as follows: 'The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team'.

[335] Phedon Nicolaides, 'Withdrawal from the European Union: A Typology of Effects' (2013) 20 Sage Journals 6, 12.

[336] Case C-621/18, *Wightman and others v. Secretary of State* [2018] European Court Reports 300.

Convention, which, in articles 65[337] and 67[338], affirms that there is the possibility to recess from a Treaty by communicating this wish to the other Parties and, in article 68, recognizes a right for the State that wishes to remove its obligations and rights connected with the Treaty, to revoke the notification, as long as it did not produce any effect yet[339]. Anyway, this position does not completely reflect the point of view expressed by the Commission and by the Council, which affirmed that this possibility can be contemplated only after a unanimity approval by the European Council, as they were concerned about the possibility of abuses of article 50 by the member States[340].

[337] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
[338] *Ibidem.*
[339] Case C-621/18, *Wightman and others v. Secretary of State* [2018] European Court Reports 300.
[340] Irene Amoroso, 'Brexit, la decisione id lasciare l'UE è revocabile?' (2019) Altalex < https://www.altalex.com/documents/news/2018/12/13/brexit-la-decisione-e-revocabile> accessed 21 September 2023.

Chapter 2.

Comparing different cases of secession.

2.1 The secessionist attempt of Quebec.

2.1.1 Secession in Federal states: an overlook.

When referring to federal States, it is necessary to first make some clarifications. The term 'federalism' is used to refer to many diverse historical events and there are both static-structural and dynamic-procedural dimensions of the term[341].

Giving a definition of federalism may be problematic, as several States have assumed a federalist dimension, with different characteristics. However, here the definition given by Friederich may be useful in order to better understand federalism in general. According to the scholar, federalism concerns 'the process of federalizing a political community, that is to say, the process by which a number of separate political communities enter into arrangements for working out solutions, adopting joint decisions on joint problems, and, conversely, also the process by which a unitary political community becomes differentiated into a federally organised whole. Federal relations are fluctuating relations in the very nature of things'[342]. Particularly, the concept of federal State[343] is used to indicate a certain type of legal system, characterised by a particular territorial organisation. Generally speaking, it seems convenient to say that federalism means 'the coexistence within a compound polity of multiple levels of government, each with constitutionally grounded claims to some degree of organisational autonomy and jurisdictional authority'[344]. Indeed, the traditional view of federal State seems to be a solution that admits at least two levels of sovereignty (federal State and member States), in which there is a constitution that is the result of a political decision made once and for all that, in principle, does not admit secession (contrary to what happens in confederations) and guarantees autonomy to the local governments[345]. In such a constitution, the boundaries between the different levels of government are stated. To cite Wheare, 'Federation principle is the method of dividing powers so that a central and regional governments are each, within a

[341] Raffaele Bifulco, 'Federalism' in Roger Mastermann and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 312.
[342] Carl J. Friedrich, *Trends of federalism in theory and practice* (1st edn, Pall Mass Press 1968), 7.
[343] Also referred as Federation or, in the German experience, Bundesstaat. See Raffaele Bifulco, 'Federalism' in Roger Mastermann and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019).
[344] Peer Zumbansen, 'Carving Out Typologies and Accounting for Differences Across Systems: Towards a Methodology of Transnational Constitutionalism' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 8.
[345] Herbert Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition of the National Government' (1954) 54 Columbia Law Review 543, 544.

sphere, coordinate and independent'[346].

However, it must be stressed that there is not a single model of a federal state to be identified[347]. This is so not only because each federal experience is unique, but also because of the interaction that develops between a federal organization and other central institutions (form of government), intermediate State-society institutions (parties), and local communities[348]. In addition, a federal state's structure and manner of operation tend to develop and shift throughout time[349].

Focusing on the reasons behind the adoption of federalism, there are several explanations behind this adoption. Particularly, federalism may be a model assumed by States to accommodate ethnocultural diversity, as in the case of Canada with Quebec[350]. However, it is also important to mention that not all federalist experiences are characterized by being created to accommodate an ethnocultural pluralism. Indeed, some federal systems can be defined as 'uni-national' (as opposed to 'multi-national' federations), where the federal units do not correspond with distinct ethnocultural groups[351]. These two experiences differentiate as usually uni-national federalism refers to the practice of delegating authority on a territorial basis inside a single nation, while in the case of multinational federalism the purpose of a federal solution is to accommodate minority self-government[352].

In general, federalism, like other systems of government, is the protagonist of criticism[353] and, among the critics made to federalism, it seems appropriate to highlight here the criticism that comes from the issues related to secession. In fact, the success of federal experiences is sometimes measured by a criterion that can be contested: the absence of secessionist mobilization[354]. In fact, it may be believed that any state reform is to be considered successful if it removes secession from the political agenda[355]. As a result, many federations cannot be regarded as successful attempts because secessionist movements and attempts are still there[356]. However, using this criterion as a benchmark for measuring democratic

[346] Kenneth Wheare, *Federal Government* (1st edn, Oxford University Press 1946), 10.
[347] Raffaele Bifulco, 'Federalism' in Roger Mastermann and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 324.
[348] *Ibidem.*
[349] *Ibidem.*
[350] Will Kymlicka, 'Federalism and Secession: at Home and Abroad' (2000) 12 Can J L and Jurisprudence 207, 210.
[351] This is the case, for example, of Brazil or Germany. See Will Kymlicka, 'Federalism and Secession: at Home and Abroad' (2000) 12 Can J L and Jurisprudence 207, 210.
[352] *Ibidem.*
[353] Raffaele Bifulco, 'Federalism' in Roger Mastermann and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 324.
[354] Will Kymlicka, 'Federalism and Secession: at Home and Abroad' (2000) 12 Can J L and Jurisprudence 207, 207.
[355] *Ibidem.*
[356] *Ibidem.*

multination states can be misleading[357]. In fact, as already indicated, national minorities have occasionally been accommodated through the adoption of federal types of territorial autonomy[358]. These minorities are ethnic or racial groups that had established fully developed communities on their historical homeland before becoming a part of a bigger state. According to the traditional vision, stateless nations and indigenous peoples are two types of national minorities.[359]. The term 'stateless nation' refers to a group of people (with its own identity) who do not have their own sovereign state but instead must coexist with members of other groups (like the Quebecois in Canada).[360]. Indigenous peoples, on the other hand, are those whose traditional territories have been overtaken by colonizers and who are now represented by states governed by 'foreigners' (i.e., Native Americans in the United States)[361]. Both stateless nations and indigenous peoples have historically battled for the right to govern themselves, since the two groups' members wanted the freedom to pursue their own economic and political interests within their respective cultural contexts[362]. This might range from calls for partial independence with the creation of regional or territorial autonomies (more often) to calls for the creation of new nations (in rare cases)[363]. In some countries, like Canada, this territorial autonomy was achieved by adopting a federal system.

Even though it is believed that the trend towards a federalist experience has been beneficial and quite successful, if measured by criteria such as peace and individual security, democracy, individual rights, economic prosperity and inter-group equality, some authors still criticize the tendency[364]. Indeed, federations have not succeeded in removing secession from their political agenda, since it is a regular occurrence in several federations[365]. Actually, secessionist parties participate to elections, and in some cases, notably in Quebec, voters may be offered the option of voting for a division in a referendum[366]. Today, none of these referendums have been successful in the Western legal systems, which is encouraging evidence that the introduction of federalism really decreased the risk of secession[367]. Although federalism

[357] *Ibidem.*
[358] Raffaele Bifulco, 'Federalism' in Roger Mastermann and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 320.
[359] Will Kymlicka, 'Federalism and Secession: at Home and Abroad' (2000) 12 Can J L and Jurisprudence 207, 207.
[360] *Ibidem.*
[361] Ibidem.
[362] Ibidem.
[363] Olivier Beaud, 'Secession from a federation: a plea for an autonomous concept of federative secession' in Jorge Cagiao y Conde and Alain Gagnon (eds) *Federalism and Secession* (Peter Lang 2021), 77.
[364] Will Kymlicka, 'Federalism and Secession: at Home and Abroad' (2000) 12 Can J L and Jurisprudence 207, 212.
[365] *Ibidem.*
[366] *Ibidem.*
[367] *Ibidem.*

has helped reduce the likelihood of secession, it is still very much a part of current politics[368]. The issue of secession has not been resolved. The goal of prohibiting secession has been largely abandoned by Western democracies, which once considered that eradicating any threat of secession was important[369]. Today, secessionist movements are recognised by States as a sort of inevitable and not dangerous phenomenon and the inclusion of secession on the political agenda only raises serious concerns if it poses a danger to fundamental liberal values[370]. In fact, the evidence suggests that enabling separatist movements to run for office has no negative effects on liberal values[371]. Instead, the attempt to stop secession puts such ideals in danger because it can only be accomplished by stifling political discourse, restricting democratic rights, and stepping up police surveillance[372].

Hence, it can be affirmed that Western countries became less alarmed by the presence of secessionist mobilization. This because, given that independence movements are less likely to break away in a democratic nation than in one that has adopted illiberal policies, allowing secessionists to mobilize freely may lessen the risk of secession[373]. Also, adopting federalism seems to reduce the stakes of secession. In fact, the self-governing national minority in federations, especially the "multi-nation" ones, has its symbols embraced at the substate level, is the dominant group in its self-governing region, and its language is employed as the primary language of public institutions[374]. All these traits are typically the ones expected by secessionist groups in event of secession. National minorities may be less likely to secede from a federation than they would be from a traditional nation-state since they stand to earn less from doing so[375]. Even said, a decrease in fear around secession does not necessarily indicate that the public supports separatist movements. They are generally viewed as suspect, on the other hand.

At this point, a distinction regarding federal systems might be regarded. A federal system might be characterized by symmetry or asymmetry. This is a concept that was theorized

[368] Julian Castro-Rea and Jessica Weller, 'Is the Québec Secession Movement Dead? Perspectives After Canada's 2015 Federal Election' in Alberto Lopez-Basaguren and Leire Escajedo San-Epifanio (eds), *Claims for Secession and Federalism: A Comparative Study with a Special Focus on Spain* (Springer 2019), 104.
[369] Indeed, in democratic states, movements that are pro secession co-exist with other political entities in the same context. See Will Kymlicka, 'Federalism and Secession: at Home and Abroad' (2000) 12 Can J L and Jurisprudence 207, 213.
[370] *Ibidem.*
[371] Julian Castro-Rea and Jessica Weller, 'Is the Québec Secession Movement Dead? Perspectives After Canada's 2015 Federal Election' in Alberto Lopez-Basaguren and Leire Escajedo San-Epifanio (eds), *Claims for Secession and Federalism: A Comparative Study with a Special Focus on Spain* (Springer 2019), 107.
[372] *Ibidem.*
[373] Lawrance M. Anderson, 'The Institutional Basis of Secessionist Politics: Federalism and Secession in the United States' (2004) 34 Publius 1, 12.
[374] Will Kymlicka, 'Federalism and Secession: at Home and Abroad' (2000) 12 Can J L and Jurisprudence 207, 215.
[375] Lawrance M. Anderson, 'The Institutional Basis of Secessionist Politics: Federalism and Secession in the United States' (2004) 34 Publius 1, 13.

by Charles Tarlton, who affirmed that this distinction resides in the relations that are created between federated States and between such states and the federal government[376]. In his theorization, Tarlton expressed the idea that, while a symmetric system is characterized by a 'level of conformity and commonality in the relations of each separate political unity of the system to both the system as a whole and to the other component units'[377] and harmony, an example of asymmetric federalism shows a variety of different characteristics among the political units part of the federation, 'corresponding to differences of interest, character and makeup that exist within the whole society'[378]. To make the idea of the difference between the two models even more clear, it might be said that the symmetric model is one characterized by harmony, while an asymmetric federation is characterized by having a strong conflict potential[379]. This idea of symmetry and asymmetry might be regarded as related to cultural, social and economic differences and similarities. Such an asymmetry was later defined as *de facto* asymmetry by Watts, who associated to it the concept of *de jure* asymmetry[380]. This typology of asymmetry is one that is noticeable in systems where 'constituent units are treated differently under the law'[381] and this is an asymmetry that is 'embedded in constitutional and legal processes'[382]. An asymmetrical federal system is one characterized by the coexistence of diversity and where this diversity may be reflected in the different treatment of the constituent units under the law, a society which, focusing on the idea of secession, might encourage the creation of secessionist trends more than a federal model characterized by symmetry.

Growth in federalist experiences may be correlated with a decline in citizens' fear about secessionist politics and a rise in the view that the presence or absence of secessionists is not the criterion for evaluating political systems, but rather the fundamental values of liberty for all, democracy, peace, and respect for one another[383]. On the basis of these criteria, federalism in the West is regarded as a successful experiment in which secessionist movements coexist with a liberal and democratic form of government[384].

2.1.2 The peculiarities of the secessionist attempt in Quebec.

To deeply analyse the 1995 secessionist attempt of Quebec from Canada, it seems

[376] Charles Tarlton, 'Symmetry and Asymmetry as Elements of Federalism: a theoretical speculation' (1965) 27(4) The Journal of Politics 861, 861.
[377] *Ibidem,* 867.
[378] *Ibidem,* 869.
[379] *Ibidem.*
[380] Ronald Watts, 'A Comparative Perspective on Asymmetry in Federations' (2005) 4 Asymmetry series 1, 1.
[381] *Ibidem,* 2.
[382] *Ibidem.*
[383] Will Kymlicka, 'Federalism and Secession: at Home and Abroad' (2000) 12 Can J L and Jurisprudence 207, 217.
[384] *Ibidem.*

appropriate to first briefly mention the history of Quebec and Canada in general, with reference to the ethno-cultural division proper of the situation under study.

Europeans first settled in what is now Canada during the 16th century[385]. Although the process of colonies was drawn out and uneven, the French were the first to begin exploring and colonizing several regions of Canada[386]. Yet, the English had also taken over the region, and soon the French occupation of Quebec was in stark contrast to that of the English[387]. Later, this competition was ended by France's complete defeat, despite the fact that French-speaking people continued to make up a significant share of the territory's population. Around the time when the military conquest phase came to an end, in the 1760s, the British developed a political-administrative structure for the nation, introducing a general assembly and judicial systems based on the system of the motherland[388]. Already in this historical phase, the relationship between French and English-speaking population was problematic in the colony and required several interventions to establish a balance that could make the co-existence of these two ethno-cultural realities easier. Indeed, a division of the territory and concessions regarding the use of French language and the practice of Catholic religion were applied[389]. However, later, with the entry into force of the Act of Union in 1841[390], a crucial period in Canada's democratic history began. In fact, the Act allowed for the unification of Quebec and Ontario, which are French- and English-speaking provinces, on the legislative and executive levels[391]. It also penalized the French component, particularly in light of the French language being no longer recognized as an official language and the sparsely represented population in the elected chamber[392].

In this moment, the independence from Great Britain was nearby. In fact, the process of governing the Province of Canada became characterized by stalemates, as different political priorities emerged between French-speaking and English-speaking territories. Since there were more English speakers than French speakers in the country by 1851, the French were overrepresented in the legislature[393]. A catastrophic situation developed as a result of this circumstance, which prolonged the political impasse from 1858 until 1864, when the parties

[385] Margaret Conrad, *A Concise History of Canada* (1st edn, Cambridge University Press 2012), 77.
[386] The area was once called New France.
[387] Margaret Conrad, *A Concise History of Canada* (1st edn, Cambridge University Press 2012), 83.
[388] Paola Di Napoli, 'A right to secede? The Canadian Supreme Court's Reference on the Secession of Quebec in a Comparative Constitutional Perspective' (Dissertation, Luiss University 2020), 18.
[389] David Bordeleau and Mathieu LeBlanc, 'Quebec' (2022) 45(4) Canadian Parliamentary Review 61, 67.
[390] The Act of Union, originally the British North America Act of 1840 was approved by Parliament in 1840 and proclaimed in 1841.
[391] David Bordeleau and Mathieu LeBlanc, 'Quebec' (2022) 45(4) Canadian Parliamentary Review 61, 67.
[392] William H. McConnell, 'Constitutional History of Canada', *The Canadian Encyclopedia* (2006) <https://www.thecanadianencyclopedia.ca/en/article/constitutional-history#ConstitutionalEvolutionPostConfederation> accessed 21 September 2023.
[393] *Ibidem.*

finally established a Great Coalition[394]. The plan was to create a federal structure, but this notion was abandoned until four years later, in favour of a Confederation movement. Consequently, the organization of the Parliament and the division of authority between the federal and provincial governments were determined upon at the Quebec Conference of 1864[395]. At this point, the Quebec Resolutions were to form the basis for the Canadian Constitution and some guarantees such as the protection of the French language and culture and the protection of minorities were approved. The British Parliament's passage of the British North America Act, also known as the Constitution Act of 1867[396], which recognized the federal structure of the state formed by the union of the four provinces of Ontario, Quebec, New Brunswick, and Nova Scotia, marked the culmination of this process in March 1867[397]. The government and parliament, whose duties related to matters of public concern, were required to be based in Ottawa under the terms of this act, which also gave each province a wide degree of autonomy[398]. The Act of 1867 granted the Queen, represented by the Governor General and the Privy Council, the administrative power, while the federal parliament in Ottawa received the legislative power[399].

In the year 1914, Canada, acting in concert with the United Kingdom, made the decision to participate in the First World War. At the juncture in question, Canada had duly forged a discernible national identity that remained unencumbered by any discernible schism from the autonomist assertions posited by the French-speaking contingent. It is incontrovertible that the exertion of autonomist pressures precipitated a momentous acknowledgment, whereby Canada commenced its involvement in consequential international Conferences[400]. A pivotal juncture in the trajectory of constitutional evolution materialized in the year 1969, wherein the federal Official Languages Act was duly promulgated, thereby affirming the status of English and French as the official languages of Canada.

In 1976, the province of Quebec introduced French as the official language and on May

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[394] *Ibidem.*
[395] David Bordeleau and Mathieu LeBlanc, 'Quebec' (2022) 45(4) Canadian Parliamentary Review 61, 68.
[396] Originally, the British North America Act, 1867 renamed in 1982 the Constitution Act, 1867, in the wake of the patriation of the Canadian Constitution and the 'Canadianization' of the ensuing constitutional laws. See William H. McConnell, 'Constitutional History of Canada', *The Canadian Encyclopedia* (2006) <https://www.thecanadianencyclopedia.ca/en/article/constitutional-history#ConstitutionalEvolutionPostConfederation> accessed 21 September 2023.
[397] Tania Groppi, *Canada. Si governano così* (1st edn, Il Mulino 2006), 12.
[398] *Ibidem,* 13.
[399] This was a solution that scarified all the francophones living outside Quebec. Indeed, one of the debates that developed inside Canadian federalism is whether it was more appropriate to establish a bilingual federation or to create a francophone province, where most francophones live (Quebec). Cfr. Pierre Trudeau's ideal, see Jay Walz, 'Trudeau Campaign for Bilingualism is raising touchy Canadian issues' (1972) The New York Times 2. See also the Constitution Act 1867 (CA).
[400] *Ibidem.*

20, 1980, a referendum was held, asking voters to vote for Quebec's political independence[401]. This can be found as the first real secessionist attempt of Quebec. In this context, the idea of independence was rejected by nearly 60% of the electorate[402]. The Canadian Constitution was to be patriated along with significant revisions, according to a draft resolution that the federal government presented in October 1980. Without Quebec's consent, a deal was reached on the patriation of the Constitution on November 5, 1981[403]. This agreement resulted in the patriation of the Constitution and the Constitution Act's implementation in 1982, highlighting the crucial component of a constitution that Canada was missing: a set of values and principles that are universally and unwaveringly accepted by all citizens. The new Canadian Constitution was adopted in April 1982[404]. The guiding concepts in this case are 'federalism, democracy, constitutionalism, the rule of law, and respect for minorities'[405]. Given what has been said until now, it may be noticed how Canada embodies an example of a federal state which was born as a consequence of the aggregation of previously independent entities alongside a constitutional document[406]. The Ottawa government made an attempt to apply some revisions to the Constitution after it was promulgated without the government of Quebec's signature in order to make it acceptable to them[407]. However, such a system had little impact and did not curtail the province's desire to secede.

At this point, after having analysed the roots of the separatist movements proper of Quebec, it is now necessary to investigate the secessionist attempt of 1995 of the Canadian province, which is particularly relevant for the present work.

In fact, Quebec held a second referendum on secession in 1995. The population was invited to vote on the options of a sovereign Quebec and an optional economic and political partnership with Canada in this referendum, which was held following the *Parti Québécois'* victory in the provincial election[408]. In the meanwhile, as it was assumed that a favourable outcome would have emerged from the referendum, the National Assembly of Quebec passed

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[401] Paola Di Napoli, 'A right to secede? The Canadian Supreme Court's Reference on the Secession of Quebec in a Comparative Constitutional Perspective' (Dissertation, Luiss University 2020), 10.
[402] Sujit Choudhry and Robert Howse, 'Constitutional Theory and The Quebec Secession Reference' (2000) XMI (2) Canadian Journal of Law and Jurisprudence 143, 145.
[403] Paola Di Napoli, 'A right to secede? The Canadian Supreme Court's Reference on the Secession of Quebec in a Comparative Constitutional Perspective' (Dissertation, Luiss University 2020), 26.
[404] William H. McConnell, 'Constitutional History of Canada', *The Canadian Encyclopedia* (2006) <https://www.thecanadianencyclopedia.ca/en/article/constitutional-history#ConstitutionalEvolutionPostConfederation> accessed 21 September 2023.
[405] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217. See Constitution of Canada of 1982.
[406] Tania Groppi, *Canada. Si governano così* (1st edn, Il Mulino 2006), 45.
[407] David Bordeleau and Mathieu LeBlanc, 'Quebec' (2022) 45(4) Canadian Parliamentary Review 61, 72.
[408] The question read as follows: 'Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill respecting the future of Quebec and of the agreement signed on 12 June 1995? Yes/No' See Paul Globus, 'Questioning the question: the Quebec Referendum' (1996) 53(2) ETC: A Review of General Semantics 148.

a measure on the future of the province and the path towards secession in the interim. However, this was not the case. The 'NO' option did, in fact, garner a slim majority (50.58% of the vote).

Following the vote, the leaders of Quebec's secession movement believed that the Supreme Court of Canada may challenge any decision made by a majority of its citizens to leave Canada[409]. All Quebec separatist parties agreed to a deal in 1994 that called for the National Assembly to declare the province a sovereign nation once a secessionist referendum resulted in a majority support, followed by a proposal of a new economic and political partnership with the rest of Canada[410]. The leaders of the Quebec secession movement claimed that not even the Quebecois courts could decide whether a unilateral declaration of independence was legitimate. The federal government referred this claim to the Supreme Court of Canada as a result of this assertion[411].

The federal cabinet, acting as Governor-in-Council, posed three questions to the Court. The first one was 'Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?'[412], the second question asked 'Does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?'[413]. Lastly, it was questioned: 'in the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?'[414]. The Quebec government declined to participate, and the Supreme Court appointed an *amicus curiae* to represent the secessionist position[415].

2.1.3 The implications of the Reference re Secession of Quebec case.

The Supreme Court's judgment was handed down on August 20, 1998. In its ruling, the Court disagreed with the amicus curiae's assertion that it was outside the scope of its authority

[409] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 11.
[410] Jean Leclair, 'Legality, Legitimacy, Decisionism and Federalism: An Analysis of the Supreme Court of Canada's Reasoning in Reference re Secession of Quebec, 1998' in Alberto López Basaguren and Leire Escajedo San Epifanio (eds), *Claims for Secession and Federalism* (Springer 2019), 69.
[411] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 15.
[412] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[413] *Ibidem.*
[414] *Ibidem.*
[415] Patrick Dumberry, 'Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada' in Marcelo G. Kohen (ed), *Secession* (Cambridge University Press 2006), 419-20.

to comment on Quebecers' political and democratic rights to self-determination[416]. The Court confirmed that the reference question was focused on legal problems, to which the Court was in fact qualified to respond[417]. The Court also rejected the argument that it was powerless to decide how international law should be applied to Quebec's unilateral right to secede as well as the notion that the questions were now irrelevant or hypothetical[418]. Later, in the unanimous decision, the Court responded to the reference-related queries[419]. About the first one, the Court affirmed as follows: 'The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession'[420]. A decision like that could be regarded as historical because its effects would extend well beyond the case's actual decision[421]. Prior to elaborating on the aforementioned unwritten principles, the Court decided that a unilateral secession would be incompatible with Canada's constitutional system since it would change how Canada's territory is governed[422]. Additionally, it said that the Constitution would need to be amended in order to address the Quebecer secession, but it remained silent on the procedure of amendment required[423]. The Court further stated that Quebecers had to indicate their desire to secede in a clear and unambiguous manner[424]. This is related to the assertion that secession cannot be implemented without a clear majority on a clear question, making reference to the unwritten democratic ideal in this case and alluding to a lack of democratic legitimacy in the formulation of the 1995 referendum question[425]. The Court then made its landmark decision, which may have stunned

[416] *Ibidem.*
[417] *Ibidem.*
[418] *Ibidem.*
[419] David P. Haljan, 'Negotiating Québec Secession' (1998) 31(1) Revue belge de droit international 190, 193.
[420] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[421] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 23.
[422] *Ibidem.*
[423] Patrick Dumberry, 'Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada' in Marcelo G. Kohen (ed), *Secession* (Cambridge University Press 2006) 423.
[424] *Ibidem.*
[425] Barry Came, 'Referendum question unveiled', *The Canadian Encyclopedia* (2003) < https://www.thecanadianencyclopedia.ca/en/article/referendum-question-unveiled> accessed 21 September 2023.

many national governments[426], stating that: 'The democratic principle and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means. (...) 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'[427]. Such an affirmation should be read considering the principles to which the Court made reference in the decision, which are 'the principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities'[428]. While certain individuals have expressed admiration for the Court's development of this constitutional novelty[429], alternative perspectives have highlighted the absence of legitimate authority to substantiate the obligation to engage in negotiations, as well as the insufficiency of its explanation[430]. The Canadian Supreme Court's commendable establishment of a pragmatic pathway to secession may garner widespread acclaim from individuals across the globe[431]. However, it is imperative to note that these individuals may not possess an adequate understanding of the Court's notably rigorous constraints pertaining to the duty to engage in negotiations[432]. In the present context, it is evident that the Court recognizes, within the initial segment of the adjudication, the profound ramifications that the principles and conventions of international law and customary practice would exert upon the ultimate determination of a triumphant plebiscite for secession[433]. The Supreme Court subsequently undertook the task of addressing the second inquiry. In the present matter, the Court, in its examination, reiterated that international law, from the outset, has not definitively established a conclusive stance, either affirmatively or negatively, with

[426] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 25.
[427] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[428] *Ibidem.*
[429] Among them, see Patrick Dumberry, 'Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada' in Marcelo G. Kohen (ed), *Secession* (Cambridge University Press 2006), 429; David P. Haljan, 'Negotiating Québec Secession' (1998) 31(1) Revue belge de droit international 190, 208-210.
[430] Among them, see Warren Newman, *The Quebec Secession Reference: The Rule of Law and the Position of the Attorney General of Canada* (1st edn, York University 1999), 83-89; Jean François Geudreault-DesBiens, 'The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy and Identity' (1999) 23 Vt. L. Rev. 793, 828-838.
[431] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 26.
[432] *Ibidem.*
[433] *Ibidem.*

respect to the unilateral entitlement to secession[434]. Conversely, the entitlement in question would be contingent upon the widely recognized prerogative of self-determination as stipulated by international legal norms[435]. However, its application has constantly been deemed to be exercised 'within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those [sovereign] states'[436]. The Court contends that the Quebec separatists' arguments must be understood 'in the context of the national political, economic, social, and cultural setting in which they were made in a liberal democratic sovereign state like Canada'[437]. Moreover, it is contended that the purported entitlement of a collective entity, commonly referred to as a 'people', to the full realization of their self-determination prerogative, while concurrently safeguarding the territorial wholeness of extant nation-states, such as Canada, is not intrinsically incongruous[438]. This section of the ruling has been argued to be one of the most significant international legacies resulting from the Court's decision[439]. The Court, in its capacity as an internationally recognized authority, is conferring its imprimatur upon the assertion that, in the context of the majority of liberal democracies, the concept of self-determination ought to be primarily construed as an inherent entitlement of present nation-states to exercise internal governance or to enjoy enhanced internal autonomy, rather than as an external entitlement to pursue secession and attain independence[440]. The Court's discernible intent was to establish a foundation for the ultimate determination that the unique circumstances necessitating the conversion of an internal entitlement to self-determination into an external entitlement culminating in secession were categorically inapplicable to the province of Quebec[441]. The Court, in its discernment, deems it necessary to establish an exception whereby the potential existence of a right to external self-determination may be acknowledged, albeit in the most exceptional circumstances[442].

The Court, having provided negative responses to the first and second inquiries in the reference, deemed it superfluous to address the third question claimed by the federal

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[434] *Ibidem.*
[435] Patrick Dumberry, 'Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada' in Marcelo G. Kohen (ed), *Secession* (Cambridge University Press 2006), 26.
[436] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[437] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217. See Stephane Dion, 'Why is Secession Difficult in Well-Established Democracies? Lessons from Quebec' (1996) 26(2) British Journal of Political Science 269, 272.
[438] *Ibidem.*
[439] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 27.
[440] *Ibidem.*
[441] *Ibidem.*
[442] *Ibidem.*

government[443]. Notwithstanding, it is pertinent to underscore that the Court here appears to endorse the possibility of a remedial secession in instances where the rights of minority groups are violated. It is worth noting, however, that such a prerogative is not sanctioned under international law, which explicitly acknowledges said right solely for populations residing in colonial territories[444].

Finally, it is imperative to note that the Court unequivocally dismissed the argument put forth by the amicus curiae, asserting that the province of Quebec possessed the requisite legal power to unilaterally secede, despite the absence of such authority under both Canadian domestic law and international law[445]. The present argument was firmly rooted in the contentious principles of effectivity within the realm of international law, along with the inherent challenges associated with the establishment of sovereignty predicated upon the acknowledgment of other states[446]. It was affirmed by the judges that these dubious notions have 'no constitutional or legal status in the sense that it did not provide an *ex-ante* explanation or justification for an act'[447]. In other words, the Court, in its pronouncement, posited that the term 'effectivity' pertains to a state of affairs grounded in factual circumstances rather than being predicated upon legal considerations[448]. In light of the historic decision rendered by the highest court of the nation, the federal government has enacted legislation in contemplation of prospective endeavours by the leaders of Quebec's secession movement to initiate a subsequent referendum, with the aim of achieving triumph on the third occasion[449]. Indeed, it is worth noting that the Clarity Act, a legislative enactment promulgated by the federal government within the Parliament, effectively delineated the Canadian government's unwavering commitment to discerning the precise circumstances that would necessitate engaging in negotiations pertaining to the prospective secession of Quebec[450]. The paramount significance lies in the lucidity of forthcoming plebiscite inquiries and the legislative body's function in ascertaining the parameters that define a 'distinct manifestation' of the will of Quebecois to

[443] Mary Dawson, 'Reflections on the Opinion of the Supreme Court of Canada in the Quebec Secession Reference' (1999) 11 National Journal of Constitutional Law 5, 7.
[444] *Ibidem.*
[445] *Ibidem.*
[446] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 26.
[447] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[448] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 28.
[449] *Ibidem.*
[450] Stephane Dion and others, 'The Clarity Act Debate in the House of Commons' (2000) 23(2) Canadian Parliamentary Review 20, 22.

pursue secession[451]. The Clarity Act of 2000 elucidated two distinct characteristics of the verbiage that would impose a prohibition on the obligation to engage in negotiations and, consequently, impede a province from seceding from Canada: 'a) A referendum question that only seeks a mandate to negotiate without directly asking the people of that province if they want to leave Canada; or b) A referendum question that considers options other than the province's secession from Canada, such as cooperative economic or political relations with Canada, that conceal a clear statement of the populace's preference over whether the province should leave Canada'[452]. The Clarity Act proceeded to an even greater extent, declaring that when assessing whether a question provided clarity, the Canadian House of Commons would also take into account the perspectives of the other provinces part of the federation[453]. The enactment of the Clarity Act by the federal government can be attributed to an imperative need to address the deliberate misrepresentation of the 1995 referendum query, potentially precipitating the disintegration of the Canadian nation-state[454].

Now that the Reference re Secession of Quebec decision and the consequences it had at the Canadian level have been analysed, it seems necessary to highlight the implications that this case had at the international level and on other examples of secession. Indeed, this decision had a pivotal role in the reading given to secession after 1998, not only in Canada but also in the rest of the world.

This judgement played a significant role in the examination of secession as it marked the first instance in which a Supreme Court shown the audacity to confront the sensitive issue of unilateral secession and challenge its prevailing taboo[455]. In undertaking this task, the Canadian judges did not proceed in isolation, but was accompanied by a group of highly skilled international lawyers in order to properly answer, particularly, Question 2[456]. This represents the initial instance of cooperation between Canada and international law[457]. Indeed, the decision[458] has initiated the funding of a comparative constitutional law approach to

[451] *Ibidem.*
[452] Clarity Act 2000 (CA).
[453] Stephane Dion and others, 'The Clarity Act Debate in the House of Commons' (2000) 23(2) Canadian Parliamentary Review 20, 22.
[454] *Ibidem.*
[455] Luigi Crema, 'The Reference Re Secession of Quebec, the Kosovo Advisory Opinion and the Questions They Leave Open: The Right to Decide, the Principle of Stability and the Duty to Negotiate' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 90.
[456] *Ibidem.*
[457] *Ibidem.*
[458] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.

secession[459]. Prior to that time, the prevailing belief in constitutional theory was that constitutions were founded upon a fundamental concept of self-preservation[460]. According to Weinstock, the Canadian Reference introduced a functional and procedural strategy for addressing secession[461]. This approach sought to rationalize the highly politicized and emotionally charged matter of secession by establishing a legal framework to guide the process[462]. In fact, according to proponents of the functional approach[463], stigmatizing secession and establishing it as a constitutional prohibition can inadvertently strengthen separatist demands[464]. Therefore, it is reasonable to anticipate that the majority of nations confronted with secessionist demands would have implemented a comparable intricate legal structure to encompass secession inside a sophisticated procedural framework[465]. Nevertheless, despite the passage of more than two decades, this assertion remains unsubstantiated[466]. Instead of implementing procedural and substantive mechanisms to regulate secession, there has been a notable increase in the number of sovereignty referendums, frequently unofficial and hence subject to dispute[467]. The pronouncement made by the Canadian Supreme Court, wherein it espoused the necessity for equitable regulations that duly consider the tenets of the rule of law, federalism, and safeguarding the interests of marginalized groups, with regard to the establishment of a potential framework for secession negotiations, was expressly limited to Canada[468]. In other jurisdictions, the aforementioned principles, though sporadically alluded to in judicial decisions pertaining to assertions of secession, have been superseded by the prevalence of referenda as the preeminent, if not exclusive, mechanism for effecting constitutional modifications or challenge[469].

What the Reference re Secession of Quebec decision left as major legacy is the approach

[459] Francesco Palermo, 'Towards a Comparative Constitutional Law of Secession?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 265.
[460] Cass Sunstein, 'Constitutionalism and Secession' (1991) 58(2) University of Chicago Law Review 633, 633.
[461] Daniel Weinstock, 'Constitutionalizing the Right to Secede' (2001) 9(2) The Journal of Political Philosophy 182, 184.
[462] *Ibidem.*
[463] Susanna Mancini, 'Secession and Self-Determination' in Michael Rosenfeld and András Sajó (eds), The Oxford Handbook of Comparative Constitutional Law (1st edn, Oxford University Press 2012), 482.
[464] *Ibidem.*
[465] Francesco Palermo, 'Towards a Comparative Constitutional Law of Secession?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 266.
[466] *Ibidem.*
[467] Fernando Mendez and Micha Germann, 'Contested Sovereignty: Mapping Referendums on Sovereignty Over Time and Space' (2018) 48(1) British Journal of Political Science 141, 147.
[468] Francesco Palermo, 'Towards a Comparative Constitutional Law of Secession?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 266.
[469] *Ibidem.*

to unilateral secession. Indeed, while being flexible in treating secession, the Court remained rigid about the unlawfulness of unilateral secession. Indeed, in relation to the first reference question, the Court addressed the fact that the textual part of the Canadian Constitution did not address the subject of unilateral secession[470]. The Court's handling of this gap has laid a historical opinion that will have an impact much beyond the case's final outcome[471]. On the matter, the Court found that unilateral secession would be incompatible with Canada's current constitutional arrangements since it would purport to modify the control of the Canadian territory[472]. It was reiterated that a change to Canada's territory requires the approval of all of the country's provinces and that a territory's sheer desire to secede, demonstrated by a favorable vote in a separatist referendum, is alone insufficient[473]. Subsequently, the Court could have explicated its stance, elucidating that it was not incumbent upon it to delve into the remaining matters, as unilateral secession was deemed to be in violation of the constitutional framework. According to the view of Mendes, the Court's decision to persistently focus on the manner in which uncodified principles may furnish a framework for endeavours to secede is intrinsically linked to the establishment of a robust foundation for prospective secession endeavours within the Canadian context[474]. The Court may have also sought to convey a salient instruction to secessionist factions in disparate global territories with respect to the significance of legitimacy[475]. The Supreme Court's determination that there is a constitutional obligation 'to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces'[476] is likely the main constitutional innovation in the Secession Reference[477]. This duty follows naturally from the privilege granted to federal actors to propose, but not to implement unilaterally, constitutional reform[478]. This obligation must, however, be preceded by a 'democratic expression of a desire for change'[479]

[470] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 15.
[471] *Ibidem.*
[472] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[473] *Ibidem.*
[474] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 16.
[475] *Ibidem.*
[476] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[477] Jean-François Gaudreault-DesBiens, 'The Law and Politics of Secession: From the Political Contingency of Secession to a "Right to Decide"? Can Lessons Be Learned from the Quebec Case?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 39.
[478] *Ibidem.*
[479] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.

in it to be fulfilled[480]. Notwithstanding, the Court did not desist from asserting that the act of unilateral secession was deemed illicit in accordance with the law of Canada; instead, it unequivocally upheld that Quebec lacked any entitlement to engage in unilateral secession under both Canadian domestic law and international law[481].

The enduring legacy engendered by the decision of 1998 resides also in the jurisprudential framework governing the conduct of referendums pertaining to secessionist occurrences[482]. The utilization of referendums in secessionist occurrences has engendered institutionalized quandaries that, so far, have remained extraneous to the purview of legal frameworks[483]. The inherent constraint of referendums, nevertheless, resides in their propensity for oversimplification and triviality[484]. In the case at hand, it is noteworthy to highlight the independence referendum conducted in Quebec in 1995, that did not necessitate the attainment of a special majority threshold[485]. The outcome of the referendum yielded an outcome wherein a slim majority of 50.58% expressed their dissent and, subsequent to the referendum, a considerable degree of controversy ensued, primarily revolving around the tabulation of votes, the enumeration of eligible participants, and sundry related apprehensions[486]. In order to mitigate the potential hazards associated with majoritarian and plebiscitary referendums, the Quebec Secession Reference decision has undertaken a prudent course of action in accordance with constitutional principles[487]. Particularly, it was affirmed by the Court the necessity, in order to consider a referendum valid, to pose a clear question and to obtain a clear majority[488], even if this formulation has caused debate in the doctrine and among the political actors[489]. This course of action entails the development of a legally structured framework to address secession

[480] Jean-François Gaudreault-DesBiens, 'The Law and Politics of Secession: From the Political Contingency of Secession to a "Right to Decide"? Can Lessons Be Learned from the Quebec Case?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 39.
[481] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 23.
[482] Francesco Palermo, 'Towards a Comparative Constitutional Law of Secession?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 274.
[483] Jon Elster, 'Constitution-Making and Violence' (2012) 4(1) Journal of Legal Analysis 7, 10.
[484] Francesco Palermo, 'Towards a Comparative Constitutional Law of Secession?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 274.
[485] *Ibidem.*
[486] *Ibidem.*
[487] *Ibidem*, 275.
[488] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[489] Sujit Choudhry and Robert Howse, 'Constitutional Theory and The Quebec Secession Reference' (2000) XMI (2) Canadian Journal of Law and Jurisprudence 143, 143.

claims[490]. The inclusion of a referendum as an inevitable manifestation of democratic expression by the populace is imperative[491]. However, the inherent deficiencies of the referendum render it unsuitable as the sole determinative juncture, particularly in the absence of procedural safeguards[492].

In light of the Canadian experience, it is noteworthy that legal scholars have increasingly directed their focus towards this particular phenomenon, while concurrently advancing propositions concerning the harmonious integration of constitutional principles and secession[493]. The fundamental element in this context entails the amalgamation of processes that yield outcomes surpassing basic, plebiscitary majoritarianism[494].

What is clear is that the Quebec Secession Reference delineates a burgeoning endeavour that is progressively formulating an initial framework of principles aimed at governing secession via lawful mechanisms[495]. The referendum, undoubtedly, serves as the archetype for such legislative measures; however, it is imperative to acknowledge that more sophisticated and captivating instruments are perpetually emerging[496]. Consequently, it is not arduous to prognosticate that this domain will witness substantial progressions in the times ahead[497].

2.2 The Catalonian case.

2.2.1 Secession in regional States: an overlook.

The present section analyses the theme of secession by making reference to concrete cases of secession. In the following subparagraph, a focus on the case of Catalonia will be made. The first factor that distinguishes this case from the one previously analysed of Quebec is the State organisation. Indeed, the State of Canada is a federal State, while Spain is not, being a decentralised unitary country.

According to the traditional theory of federalism, in federal solutions, federated states, which often have their own constitutions[498], parliament, and government, share sovereignty

[490] Francesco Palermo, 'Towards a Comparative Constitutional Law of Secession?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 275.
[491] *Ibidem.*
[492] *Ibidem.*
[493] Among others, see David Haljan, *Constitutionalising Secession* (1st edn, Hart 2014) and Giuseppe Martinico, 'Populismo e democrazia costituzionale: l'attualità della lezione canadese' (2018) 1 Ordines 54.
[494] Francesco Palermo, 'Towards a Comparative Constitutional Law of Secession?' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 274.
[495] *Ibidem*, 279.
[496] *Ibidem.*
[497] *Ibidem.*
[498] The Canadian example does not see the presence of constitutions in the Provinces and Territories. However, local constitutions are found in other federations, like in the United States. See Bruce Hodgins and others, *Federalism in Canada and Australia* (1st edn, Wilfrid Laurier University Press 1978).

with the federal government[499]. Also, in a federation, the federal government cannot unilaterally decide to change the component states' status as self-governing entities[500]. Additionally, the federal government and the federated States are given certain rights and obligations either through a constitutional provision or by judicial interpretation[501]. In general, federated States have broad competencies, whereas federal administrations have specific, stated duties.[502] On the other hand, a State that is administered by a single power, with the central government having ultimate authority, is referred to as a unitary State[503]. As "one and indivisible" entities, the unitary States do not share sovereignty. This indicates that inhabitants are ruled by a single, consistent authority throughout the entire country[504]. Next to these categories, it is possible to mention another form of State organisation, which might be affirmed as an 'intermediate solution' or, according to some scholars, as a 'smoother' version of federal States[505]. In these cases, also known as regional States, it is possible to find the presence of subnational governments next to a central one. These subnational governments are usually directly chosen by the people and have some political and administrative independence[506]. However, subnational governments typically only use the authority that the national government or national constitution chooses to assign or devolve[507]. Thus, the degree of subnational authorities, responsibilities, and resources, as well as the level of autonomy they have over these various components, determine whether unitary regimes are more or less decentralized[508]. Subnational units can be established, revoked, and have their authority widened or curtailed by the central government in a unitary State[509], while in other experiences the existence of such subnational entities is strongly protected also from the reasoning of structural or primary sources of law (Constitutions)[510]. Some unitary nations recognize autonomous areas and cities

[499] Bruce Hodgins and others, *Federalism in Canada and Australia* (1st edn, Wilfrid Laurier University Press 1978), 153.
[500] *Ibidem.*
[501] John Kincaid and JW Leckrone, *Teaching federalism: multidimensional approaches* (1st edn, Edward Elgar Publishing 2023), 35.
[502] *Ibidem.*
[503] Sergio Bartole, 'Internal Ordering in the Unitary State' in in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 611.
[504] *Ibidem.*
[505] See, among others, Erin Ryan, 'Secession and Federalism in The United States: Tools for Managing Regional Conflict in a Pluralist Society' (2016) 96 Oregon Law Review 123, 172 and Sergio Bartole, 'Internal Ordering in the Unitary State' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 611.
[506] OECD Multi-level Governance Studies (ed), *Making Decentralisation Work* (OECD Publishing 2019).
[507] *Ibidem.*
[508] Claire Charbit and Maria Michalun, *Mind the gaps: Managing Mutual Dependence in Relations among Levels of Government* (1st edn, OECD Publishing 2009), 26.
[509] *Ibidem.*
[510] See, for example, the case of Italy, where regions cannot be dismantled, but only, at the limit, fused together or deprived of a part of their territory according to article 132 of the Italian Constitution.

that, for reasons related to geography, history, culture, or linguistics, have greater authority than other local governments[511].

Spain is sometimes recognized as having a "quasi-federal" State structure, which is defined as an intermediate condition[512]. Unitary nations with a tendency toward federalism fall under this classification[513]. Here, independent regions have less flexibility than federated states in federations to define and reform local government functioning. Also, national constitutions frequently include fundamental provisions governing local government operations and funding and even while primary and/or secondary legislative powers may grant autonomous regions a significant amount of autonomy in relation to lesser levels, this authority is frequently shared with the central power[514]. In fact, Spain, a unitary state, gives its provinces (called Autonomous Communities) a lot of autonomy. For instance, the Autonomous Communities are alone in charge of organizing the municipalities and provinces within the regional territory and changing municipal boundaries, although their roles and budgets are governed by national legislation[515].

The prevalent framework of a decentralized unitary nation is widely observed throughout continental Europe, wherein a scholarly examination was conducted during the nineteenth century[516]. Here, it is possible to mention an example of this model in Italy, in addition to Spain. As happens with federalism, it is sometimes affirmed how this tendency can encourage the development of secessionist sentiments.

Particularly, the Autonomous Communities and the Regions in Spain and Italy have several legislative and administrative responsibilities that have been delegated to them from the national level of government (the constitutions)[517]. However, it is important to make a differentiation between the Italian and the Spanish models of decentralized unitary nations, in order to better understand the uniqueness of the Spanish model.

The peculiarity of the Spanish decentralized model can be found, particularly, in the 8th part, chapter III, of the Spanish Constitution of 1978, entitled 'The Autonomous Communities'[518]. The content of this chapter formulates a model of autonomy that is difficult

[511] OECD Multi-level Governance Studies (ed), *Making Decentralisation Work* (OECD Publishing 2019).
[512] Sergio Bartole, 'Internal Ordering in the Unitary State' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 611.
[513] Another example that can be defined as a quasi-federal State is South Africa.
[514] Ramon Maiz and others, 'The Hidden Counterpoint of Spanish Federalism: Recentralization and Resymmetrization in Spain' (2010) 20(1) Regional and Federal Studies 63, 66.
[515] Spanish Constitution, art 148.
[516] Sergio Bartole, 'Internal Ordering in the Unitary State' in in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 611.
[517] *Ibidem.*
[518] Daniele Calabria, 'L'autonomia differenziata iberica come modello: analogie e differenze tra il sistema di differenziazione regionale spagnolo e quello italiano' (2020) 3 Gruppo di Pisa 377, 379.

to ascribe to the traditional doctrinal categories of the regional or federal state[519]. What the Spanish Constituent Assembly of 1978 did is to not mandate a specific form of vertical state but use a formula that was voluntarily flexible enough to accommodate the evolution of multiple future scenarios[520]. This led to the establishment of a state system that lacked a constitutionalized model in the vertical sense[521]. Instead, it included provisions that allowed for the self-determination of territories in the pursuit of autonomy[522]. It is evident that this differs from what was established by the Italian Constituent in 1948, where the political-regional administrative subdivision was already clearly defined, including the specific number and names of the regions[523]. On the contrary, the creation of the *Comunidades* is a procedure 'from the bottom'[524]. Indeed, article 143 first affirms that: 'in the exercise of the right to self-government recognised in Article 2 of the Constitution, bordering provinces with common historical, cultural and economic characteristics, island territories and provinces with historical regional status may accede to self-government and form Autonomous Communities (…)'[525] and later outlines the fundamental steps of the procedure, which directly involves local authorities, putting them at the center of the initiative phase[526]. The provision shows how the access to autonomy in Spain presupposes a strong cultural identity and, in this context, it is explained why there are *Comunidades* that were created immediately after the adoption of the 1978 constitution, like Catalonia, and others that were founded in different occasions[527]. Indeed, the Spanish one is a decentralized approach of creation of autonomies, that makes the Spanish regional case unusual if compared to the 'typical' model of European regionalism[528]. These characteristics of the Spanish regionalism are very important to keep in mind from the perspective of secession.

Having said that the Italian and the Spanish regional models differ in some essential elements, nevertheless it is believed that such instruments that give more autonomy to territorial entities, sharing some similarities, make secession more appealing and straightforward. Both constitutions, notwithstanding, prohibit secession or any analogous semblance to the mechanisms employed in the establishment of federal states, thereby ensuring enhanced

[519] *Ibidem.*
[520] *Ibidem*, 380.
[521] *Ibidem.*
[522] Camilla Buzzacchi, *Uniformità e differenziazione nel sistema delle autonomie* (1st edn, Giuffré 2003), 239.
[523] See article 131 of the Italian constitution of 1948.
[524] This procedure can be extracted from article 143 of the Spanish constitution of 1978.
[525] Article 143 of the Spanish constitution of 1978.
[526] *Ibidem.*
[527] Daniele Calabria, 'L'autonomia differenziata iberica come modello: analogie e differenze tra il sistema di differenziazione regionale spagnolo e quello italiano' (2020) 3 Gruppo di Pisa 377, 382.
[528] *Ibidem.*

autonomy and a semblance of separation: in Spain, according to Article 2 of the Constitution, 'the Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible country of all the Spaniards'[529]. Even if this assertion were to permit a federal resolution (in light of the fact that the subsequent portion of the article affirms that nationalities and regions are integral constituents of the Spanish nation), it is crucial to note that solely the entitlement of self-governance is acknowledged and safeguarded for them. Consequently, the constitutional standing of distinct nationalities and regions does not possess an autonomous and distinct legitimacy, but rather emanates from the fundamental determination rendered by the Spanish Constitution[530]. In contrast, it is noteworthy that the Italian Constitution explicitly proclaims the Republic to be 'one and indivisible', thereby establishing a framework wherein local autonomies are duly acknowledged and endorsed by the State, rather than being deemed as a foundational or inherent element in the very genesis of its formation[531]. The Regions, as stipulated in Title V of the Constitution, are self-governing entities akin to municipalities and provinces. However, their distinct mention in the Constitution confers upon them a unique safeguard, which may be invoked and upheld before the Italian Constitutional Court[532]. It is worth noting that within the context of the regional States under consideration, the constitution itself serves as a deterrent to secession.

However, this does not mean that secessionist trends and attempts did not develop in the countries. Indeed, as it will be later analysed, Spain was characterized by the attempt of secession made in Catalonia. Though, this is not the only example. In fact, in Spain another Autonomous Community, the Basque Country, developed secessionist tendencies and in Italy some regions have seen the development of secessionist parties, and, in the case of Veneto, there was also an unsuccessful regional referendum to obtain the independence from the central government[533].

Such movements, particularly the Catalan one, have reignited the international discussion on whether or not secession ought to be a viable option for resolving local conflicts[534]. Particularly, Catalan separatists affirm that the fact that Catalonia has its own

[529] Spanish Constitution, art 2.
[530] Sergio Bartole, 'Internal Ordering in the Unitary State' in in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 611.
[531] Article 5 of the Italian Constitution states: 'The Republic, one and indivisible, recognizes and promotes local autonomies'.
[532] Louis Del Duca and Patrick Del Duca, 'An Italian Federalism? The State, Its Institutions and National Culture as Rule of Law Guarantor' (2006) 54(4) The American Journal of Comparative Law 799, 805.
[533] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 28.
[534] Erin Ryan, 'Secession and Federalism in The United States: Tools for Managing Regional Conflict in a Pluralist Society' (2016) 96 Oregon Law Review 123, 176.

cultural identity that is different from the national one is a valid reason to justify the separation of the territory. Few issues are more contentious among comparative constitutional theorists than the argument over whether secession should be more or less accessible[535]. Equally intriguing is the issue of how to rule pluralist communities when fragmentation and centralization are competing forces. Unfolding turmoil in nations such as Spain raise questions concerning when subcommunities should be obliged to remain a part of a union they want to quit[536]— and conceivably, in instances where subcommunities are desirous of maintaining their membership within a union that seeks to divest itself of said subcommunities[537]. The present discourse serves as a catalyst for individuals to meticulously deliberate upon the delicate equilibrium between the contrasting assertions of regional interdependence, which underpin the cohesion of a nation, and the rationales espoused by secessionist endeavours[538]. In circumstances characterized by the exhaustion of all alternative avenues, wherein the regional community within the broader nation-state has endured severe persecution, emancipation, or marginalization to the extent that the prospects for a mutually agreed-upon resolution have been effectively eradicated, the assertions for secession assume a particularly formidable stance[539]. The cogency of the arguments supporting the preservation of national unity is equally noteworthy, particularly in instances where regional secessions foreshadow additional transgressions of fundamental human rights, engender significant ripple effects, or arise from economic collaborations that have not yet yielded advantages to the broader political entity[540].

The utilization of federalism and other decentralization frameworks presents indispensable mechanisms for addressing regional discord within the context of a pluralistic democracy, as exemplified by the circumstances in Spain, wherein the justification for secession is lacking. The prevailing perspective within the realm of international law tends to favour the concept of federalism as opposed to secession when it comes to the resolution of regional conflicts. This inclination finds support in the Québec judgment rendered by the Canadian Supreme Court[541]. In theory, federalism offers a way to strengthen self-determination and combat the tendencies toward political entropy and fragmentation that can tear states apart. Indeed, it could be argued that, as the solution of a decentralised unitary State

[535] *Ibidem.*
[536] See Donald Horowitz, 'The Cracked Foundations of the Right to Secede (2003) 14 J. Democracy 5, 14.
[537] See Joseph Blocher and Mitu Gulati, 'Forced Secessions' (2017) 80 L. and Contemp. Probs. 215, 219.
[538] Erin Ryan, 'Secession and Federalism in The United States: Tools for Managing Regional Conflict in a Pluralist Society' (2016) 96 Oregon Law Review 123, 176.
[539] Susanna Mancini, 'Secession and Self-Determination' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), 485.
[540] *Ibidem.*
[541] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.

does not seem satisfying in cases like the Spanish one, a greater decentralisation, with a federalist solution could be applied. Yet, there are some situations when federalism presents a contradictory risk[542]. The concept of federalism, while designed to prevent secessionist claims by granting legal political autonomy to constituent groups, carries the inherent risk of becoming a two-sided instrument. This is due to the fact that such autonomy can inadvertently reinforce the identification of these groups as distinct political communities, potentially fuelling aspirations for secession[543]. In an analogous vein, it can be posited that federalism possesses the capacity to concurrently serve as a catalyst for secessionist aspirations, while also functioning as a mitigating force against such inclinations. In light of the aforementioned circumstances, it has come to pass that specific nations, namely Spain and the United Kingdom, harbouring pre-existing apprehensions regarding regional discord, have exhibited a reluctance to embrace comprehensive codified federal frameworks[544]. However, the aforementioned Spanish case serves as a testament to the fact that even in the absence of a federal system, devolution of powers can still give rise to comparable hazards. In the context of devising prospective models of effective governance, it is imperative to recognize that federalism possesses the dual capacity to serve as a catalyst for secession-related conflicts, while simultaneously providing a protective barrier against secessionist assertions[545]. This realization engenders pivotal contemplations[546]. The implementation of effective federalism and other systems that allocate authority to levels of governance possessing adequate capacity engenders a vibrant regulatory environment wherein local, regional, and national viewpoints converge upon domains of decision-making in which each can exert the most significant influence on the overarching goals of sound governance[547]. As already stated for federal arrangements, the 'success' of federal experiences cannot be measured by the absence of secessionist engagements, as the success can be discovered where secessionist movements coexist with a liberal and democratic functioning of the government. The same can be said for decentralised unitary States[548].

[542] Erin Ryan, 'Secession and Federalism in The United States: Tools for Managing Regional Conflict in a Pluralist Society' (2016) 96 Oregon Law Review 123, 176.
[543] *Ibidem.*
[544] *Ibidem.*
[545] *Ibidem.*
[546] *Ibidem.*
[547] Will Kymlicka, 'Federalism and Secession: at Home and Abroad' (2000) 12 Can J L and Jurisprudence 207, 214.
[548] *Ibidem.*

2.2.2 The evolution of the Catalonian wish to secede: a historical perspective.

The Constitution of Spain of 1978[549] can be defined as probably Spain's greatest success of the 20th century[550]. This is a constitution that succeeded in establishing a departure from the previous regime and the creation of a democracy founded on consensus, on a social pact that put the basis of the system and of its development[551]. This constitution contains a part that is particularly significant here: the regulation of the Autonomous territories. With the restoration of democracy and of the fundamental rights, it can be said that the most relevant part of the Constitution from a historical and global point of view is the instauration of a system of territorial autonomies, notwithstanding the difficulty of improvisation of a system that did not possess an immediate tradition[552]. Indeed, this is a provision that goes in contrast with the centralizing tendencies of the near past[553]. When the constituent works began, it is known that the idea of a generalisation of an autonomous system, that is, of the construction of a composite State, was practically unprepared ideologically within the national parties, or on the technical level, because nobody had studied in depth such a complex construction[554]. In fact, it is well known that the regional theme had arisen in Spain not as an attempt at a global reform of the state but was launched by the Catalan and Basque historical nationalisms, with immediate origin in Carlism, but with much deeper historical roots[555]. It is around the Catalan and Basque nationalist theme that the attempt to regionalize political power will emerge[556]. Here, the focus of the analysis will be the development of the Catalonian nationalism, strictly connected with the recent secessionist events.

The historical trajectory of the Catalan 'nation'[557] or its nationalist sentiment started back in the 18th century[558]. At the time, the inhabitants of Catalonia began to cultivate a sense of collective identity, particularly with regard to their linguistic legacy[559]. The Statute of Autonomy of 1932, which followed the attempt to secede from the newly established Spanish

[549] Also referred to as EC or CE.
[550] Eduardo Garcia De Enterria, 'La Constitución y las autonomías territoriales' (1989) 25 Revista Española de Derecho Constitucional 17, 21.
[551] *Ibidem.*
[552] *Ibidem.*
[553] Laura Desfor Edles, *Symbol and ritual in the new Spain. The transition to democracy after Franco* (1st edn, Cambridge University Press 1998), 13.
[554] *Ibidem.*
[555] Eduardo Garcia De Enterria, 'La Constitución y las autonomías territoriales' (1989) 25 Revista Española de Derecho Constitucional 17, 18.
[556] *Ibidem.*
[557] Jordi Canal, 'Gli Storici e il processo indipendentista in Catalogna' (2019) 1/19 Il Mulino 83, 85.
[558] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 169.
[559] *Ibidem.*

Republic and to create with it a 'federative pact' between equals[560], institutionalized the full awareness of this national character, especially thanks to the thought and deeds of Francesc Macià[561]. Catalonia, similar to the Basque Country, endured the oppressive actions of Franco, resulting in coerced assimilation into the Hispanic culture[562]. However, subsequent to the democratic transition of 1977, the exiled President Josep Tarradellas i Joan made a triumphant return, thereby symbolically affirming the revival of the distinctive Catalan identity within the Autonomous Community[563].

First, it should be noted that the history of Catalan nationalism was strongly linked to that of its main leader, Jordi Pujol i Soley, until the early 2000s[564]. Indeed, the Pujolismo was 'an autonomist nationalism that totally rejects the separatist option'[565], despite references to the principle of self-determination. For a long time in Catalonia there was, in fact, a complete absence of secessionist impulses, which would only emerge with the new millennium[566]. Indeed, it is evident that prior to the year 2003, a notable deficiency existed within the realm of Catalonian nationalism, namely the absence of a distinct delineation of a territorial framework to be pursued, coupled with a lack of a definitive conception regarding Catalonia's rightful stance within the *Estado autonómico*[567]. The occurrence of asymmetric, institutional, and competency demands has predominantly manifested through negotiations with state executives, frequently stemming from government agreements at the national level[568]. These negotiations have entailed the subordination of support from Catalan parliamentarians to the attainment of novel proficiencies or financial agreements[569].

With attention on the growth of nationalist movements in Spain, it is essential to show that the Catalan party picture was cohesive around the concept of autonomy in the early years of the new democratic regime[570]. Undoubtedly, a persistent contention has been posited asserting the distinctiveness of Catalonia in relation to the rest of the Spanish nation-state, with the repudiation of said contention possessing the potential to engender heightened tensions with

[560] Juan José Guardia Hernàndez, 'El primer Estatuto de Autonomìa de Catalunya (1932) a propòsito de un èxito referendatario' in Pilar Folguera and others (eds), *Pensar con la historia desde el siglo XXI* (UAM 2015), 2958.
[561] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021) 169.
[562] *Ibidem*, 170.
[563] *Ibidem.*
[564] *Ibidem.*
[565] *Ibidem.*
[566] *Ibidem.*
[567] Francesc Pallares, 'Continuidad y cambio en los partidos politicos en Cataluña (1977- 2010)' in Joan Marcet and Xavier Casals (eds), *Partidos y elecciones en la Cataluña del siglo XXI* (ICPS 2011), 56.
[568] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 171.
[569] *Ibidem.*
[570] Eduardo Garcia De Enterria, 'La Constitución y las autonomías territoriales' (1989) 25 Revista Española de Derecho Constitucional 17, 19.

secessionist implications[571]. Notwithstanding the provisions enshrined within the Spanish Constitution, it is noteworthy that the Catalans did not assertively advocate for the inclusion of overtly asymmetric provisions[572]. Rather, their request centred around the pursuit of a symbolic asymmetry of an identity nature[573]. During this particular juncture, the advocacy for notions of autonomy or self-governance was espoused by a numerical minority, a sentiment which was further corroborated by Pujol's assertion that the Catalan minority had wholeheartedly embraced the Constitution[574]. Nonetheless, in the event that Catalonia's territorial claims were to dissociate themselves from any inclination towards secession, it is worth noting that Catalonia's territorial claims did not obviously call for a distinct constitutional treatment that deviated from that accorded to other regions or nationalities[575], save for the provisions outlined in Article 2 of the Spanish Constitution[576].

Support from Catalan nationalist parties for the text formulated by the 'Constituent Assembly' and their impact on the Constitution also contributed to a massive referendum in Catalonia, with one of the best electoral outcomes in Spain[577]: 67.9% participation and 90.5% vote in favour. Also, the *Asamblea de Parlamentarios Catalanes* had developed and prepared, at the same time as the Constitution, the so-called Statute of Sau, approved in 1979[578]. In the following referendum, the Statute was approved by 88.15% of voters, with a turnout of 59.7%[579]. Here, the approval of the Statute was not accompanied by separatist tensions[580].

During the temporal span encompassing the years 1980 and 2000, it is evident that the nationalist movement experienced a surge in popular backing, thereby assuming a prominent role within the political landscape of Catalonia[581]. Notably, the politically moderate autonomous nationalist union known as CiU emerged as the principal actor in the realm of Catalan politics[582]. It is imperative to acknowledge that, prior to the early 2000s, the prevailing paradigm within the context of the CiU was one that prioritized nationalism over federalism,

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[571] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 173.
[572] *Ibidem.*
[573] *Ibidem.*
[574] *Ibidem.*
[575] *Ibidem.*
[576] The article reads as follows: 'The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all'. See Spanish Constitution.
[577] Marc Carrillo, 'Reforma constitucional con el transfondo de Cataluña' in José Maria Baño Leòn and Santiago Muñoz Machado, *Memorial para la reforma del Estado* (CEPC 2016), 1529.
[578] Joaquin Tornos Mas, *Estatutos de autonomia de Cataluña* (1st edn, Portal derecho 2007), 69.
[579] Charles Powell, *España en democracia* 1975-2000 (1st edn, Plaza and Janes Esp. 2001), 250.
[580] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 175.
[581] *Ibidem.*
[582] *Ibidem.*

primarily as a means of safeguarding against the establishment of federal unity[583]. The CiU has consistently demonstrated its unwavering dedication to ensuring Catalonia's attainment of the utmost level of autonomy, acknowledgment, and deference in relation to its cultural identity[584]. Notwithstanding, it is imperative to underscore that they categorically eschew the notion of division in all conceivable scenarios[585]. At this juncture, it is discernible that a correlation exists between the repudiated asymmetries of the central government and the burgeoning proclivities or menaces of separatism[586].

As already mentioned before, 1998 is a year that is particularly relevant for secession-related issues. Indeed, on 20 of August, the Supreme Court of Canada issued the Reference on the unilateral secession of Quebec[587]. In this important decision, the Court expressed itself on secession, affirming that this phenomenon should not be regarded as illegal *a priori* and the Court endorsed the possibility to allow a right to secede. This decision had an impact on the Spanish society, as in this timespan Spain was experiencing a demand for stronger elements of asymmetry in its system[588]. However, it should be noted that the impact of the Canadian decision was quite limited until 2012, the year that signed the beginning of the Catalan crisis[589]. Before 2012, the secessionist movements were not as developed in Catalonia as they will be after 2012 or as in the Basque Country, where the strongest secessionist demands were experienced between 2004 and 2008[590]. From 2000, indeed, there were in Spain numerous endeavours in order to modify the established sovereign entity, wherein confederalist or separatist propositions have been advanced, grounded upon the principle of 'right to self determination'[591]. Before 2012, in Spain mostly scholars looked at the decision of the Supreme Court of Canada and regarded at it 'highlighting the style of argumentation, (…) the relevance

[583] Manual Caminal i Badia, 'El Pujolisme i la ideologia nacionalista de Convergència Democratica de Catalunya' in Joan Baptista Culla i Clarà (ed), *El pal de paller. Convergencia democratica de Catalunya (1974-2000)* (Editorial Portic 2001), 85.
[584] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 177.
[585] *Ibidem.*
[586] *Ibidem.*
[587] Alberto Lopez-Basaguren, 'Claims for Secession in Catalonia. Rule of Law, Democratic Principle and Federal Alternative' in Alberto Lopez-Basaguren and Leire Escajedo San-Epifanio (eds), *Claims for Secession and Federalism: A Comparative Study with a Special Focus on Spain* (Springer 2019), 367.
[588] Josep Maria Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec' in Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019), 73.
[589] *Ibidem.*
[590] Josep Maria Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec' in Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019), 74.
[591] *Ibidem.*

of the Court's ruling (…), its fundamental conclusions (…), as well as the consequences stemming from a majority will for independence in a given territory: the need to negotiate'[592].

Given what has been said until now, it is nevertheless important to mention the events of 2006 in Spain. 2006 represents a significant year for what regards autonomies in the country[593]. Indeed, in that moment Spain underwent a process of statutory reform. This process involved the modification of several autonomous community statutes. Particularly, the modification of Catalonia's Statute of Autonomy, which outlines the region's degree of self-government and its relationship with the Spanish central government, was a contentious issue during this time[594]. The reform aimed to update and redefine Catalonia's autonomy, but it sparked debates and disputes over the extent of Catalonia's self-governance and its relationship with the Spanish state[595]. The revised statute was approved by the Catalan and Spanish Parliaments in 2006[596].

The 2006 modifications introduced a recognition of Catalonia as a nation within Spain, which was a highly symbolic and controversial change[597]. However, it is necessary to remember that in this particular moment the Catalan political environment was almost completely devoid of secessionist tendencies[598]. Also, the new version of Catalonia's Statute of Autonomy saw expanded legislative powers of Catalonia in various areas, including culture, transportation, and justice[599]. Later, the statute reinforced the use of the Catalan language in Catalonia and asserted the importance of Catalan education and the modifications also sought to increase Catalonia's fiscal autonomy, allowing it to collect and manage a greater share of its tax revenue[600]. Indeed, the two primary political goals of the Statute were to grant Catalonia special legal treatment in light of its position as a nation and to expand and guarantee the *Generalitat*'s powers and financial options[601]. This modified statute, although being approved both at the local and at the national level, quickly became a subject of political controversy and legal challenges[602]. Some regions in Spain, especially those without as much autonomy, were concerned about the

[592] *Ibidem.*
[593] Roberto L. Blanco Valdes, 'Lo Statuto catalano: testo e pre-testi' (2006) 4 Quaderni Costituzionali 677, 681.
[594] *Ibidem.*
[595] *Ibidem.*
[596] *Ibidem.*
[597] *Ibidem,* 682.
[598] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 196.
[599] Roberto L. Blanco Valdes., 'Lo Statuto catalano: testo e pre-testi' (2006) 4 Quaderni Costituzionali 677, 683.
[600] *Ibidem.*
[601] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 195.
[602] Roberto L. Blanco Valdes., 'Lo Statuto catalano: testo e pre-testi' (2006) 4 Quaderni Costituzionali 677, 683.

potential precedent this could set for other regions seeking greater autonomy[603]. Surely, the 2006 modifications to Catalonia's Statute of Autonomy were a pivotal moment in the discussions about autonomy and nationhood in Catalonia and contributed to the complex and sometimes contentious relationship between the Catalan government and the Spanish state[604].

However, such modifications were subsequently challenged in the Spanish Constitutional Court, which in 2010 issued a ruling that modified some of its articles[605]. This ruling, together with the 2014 one, will be analysed in the next subparagraph.

2.2.3 The jurisprudence of the Spanish Constitutional Tribunal on the autonomy of the Catalan Autonomous Community (STC 31/2010 and 42/2014).

Some events might be regarded as essential for the development of stronger secessionist positions in Spain. As the request for a stronger asymmetry in Catalonia started to become stronger and frequent, the judgment 31/2010 by the Spanish Constitutional Tribunal, the first major rejection of the differential territorial model proposed by Catalonia[606], can be put in evidence in this regard. This decision was accepted as the umpteenth humiliation of the Catalan people[607] and generally it neutralized several of the most forward-thinking (and asymmetric) institutes proposed for Catalonia at the time [608], with a restrictive interpretation applied systemically[609]. Particularly, this ruling expressed on the constitutionality of the modified statute and, while it upheld many of its provisions, it also struck down or reinterpreted several articles[610]. According to the ruling, 14 provisions of the Statute were declared unconstitutional and 27 were subjected to a constitutionality conforming interpretation, according to which they are constitutional only if interpreted in the sense set forth in the relevant legal bases to which the judgment refers[611]. According to the decision, specific symbolic elements that are part of the preamble and preliminary title are open to interpretation in accordance with the

[603] Marc Carrillo, 'El nuevo estatuto de autonomía de Cataluña de 2006, en el marco de las reformas estatutarias en España' (2008) 1 Revista de Derecho Universidad Católica del Norte 61, 66.
[604] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 210.
[605] *Ibidem.*
[606] Giovanni Poggeschi, *La Catalogna: dalla nazione storica alla repubblica immaginaria* (1st edn, Editorial Scientifica 2018), 79.
[607] *Ibidem.*
[608] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 215.
[609] Giovanni Poggeschi, *La Catalogna: dalla nazione storica alla repubblica immaginaria* (1st edn, Editorial Scientifica 2018), 87.
[610] Josep Maria Castellà Andreu, 'La sentencia del Tribunal Constitucional 31/2010, sobre el estatuto de autonomìa de Cataluña y su significado para el futuro del estado autonòmico' (2010) 18 Federalismi.it 1, 1.
[611] Constitutional Court Judgement 31/2010, *Decision of 28 June 2010* [2010] 172 BOE 1.

Constitution[612]. This is the case with 'national symbols' (Article 8.1 of the 2006 Catalan Statute) put in relation to the Preamble's references to the 'nation' and the 'national reality of Catalonia'. This also applies to historical rights, which are seen as the 'foundation' of self-government alongside the Constitution and the basis for the *Generalitat*'s unique position in relation to civil law, language, and culture (Art. 5 of the 2006 Catalan Statute)[613]. The Court chooses to analyse the constitutionality of the Preamble in light of the examination of the Statute's articles with which it connects that were contested, and, in ruling on the Preamble in particular, the Court introduces a novelty to its established doctrine, according to which preambles cannot be the 'direct object of an appeal of unconstitutionality', given their interpretive and not normative legal value[614]. Thus, in light of the analysis of Art. 8 of the Catalan Statute, it is pointed out that allusions to nation, national reality and national symbols are to be understood as referring to 'nationality' (Art. 2 Spanish Constitution; Art. 1 Autonomous Statute of Catalonia)[615]. Therefore, in legal-constitutional terms, the only country that is known by the Constitution is Spain, without denying that a collectivity can present itself as a national reality 'in an ideological, historical, or cultural sense', and that there is a possibility of bringing this into the political debate with a view to a constitutional reform[616]. The ruling represents a balance between a ruling rejecting the appeal and a generous use of assent interpretation[617]. On the ruling, both the central government and the PSOE and PP evaluated it favourably, but citing antagonistic reasons[618]. While R. Zapatero's government stuck to the quantitative criterion, as only 5% of the challenged precepts had been evaluated by the High Court, the popular group stressed that they had essentially been proven right, since the ruling challenged most of the fundamental issues that the statute had incorporated *ex novo*[619]. This latter assessment coincided with that of most Catalan political forces (with the exception of the PP and Ciudadanos), although in this case there is a rather firm criticism of the ruling[620]. The decision can be seen as both the catalyst for a severe rupture between Catalonia (at least the relevant political and social sectors) and the state as a whole as well as the common denominator or meeting place between the major political factions[621]. Focusing on the legal aspects, it is possible to immediately

[612] Josep Maria Castellà Andreu, 'La sentencia del Tribunal Constitucional 31/2010, sobre el estatuto de autonomìa de Cataluña y su significado para el futuro del estado autonòmico' (2010) 18 Federalismi.it 1, 1.
[613] *Ibidem,* 7.
[614] *Ibidem.*
[615] *Ibidem.*
[616] *Ibidem,* 8.
[617] *Ibidem,* 18.
[618] *Ibidem.*
[619] *Ibidem,* 19.
[620] *Ibidem.*
[621] *Ibidem.*

emphasize their predictability[622]. The Constitutional Court has developed a certain continuity with the theory pertaining to the foundations of the autonomous state over the course of its thirty-year existence[623]. However, it also makes some big changes on several crucial topics at the same time. The Court has not changed any of its main jurisprudential constructions, in fact[624]. As a result, the Court judged the Catalan statute based on the interpretation it had developed up to that point and barely accepted the more substantive innovations introduced by the 2006 statute, tending to bring the new features back to its traditional doctrine[625]. Jurisprudential continuity can be felt in positing its doctrine on the adequacy of historical rights as the foundation of Catalan self-government, discarding its application beyond the region; or in tracing the Council of Statutory Guarantees to the model of advisory councils; or in addressing the regulatory functions that hold shared and executive powers, respectively; or for specific competencies such as civil law[626]. It also adheres to accepted standards for evaluating the principles governing cooperative relations between the state and the Autonomous Communities, as well as the distinction between the state's own international relations and the Autonomous Communities' external action[627]. By highlighting the attributions of the precise legislative reservations established by the Constitution, the Court does not depart from precedents with regard to the judiciary's authority and funding[628]. Regarding the rights and guiding principles of the statute, it essentially follows its earlier STC 247/2007 ruling, although it suppresses some aspects of the argument, considering them possible but not necessary contents of the statute, and emphasizing their subordination to the fundamental (or constitutional) rights and human rights contained in the agreements ratified by Spain, and their operation within the framework of the Autonomous Community's competence[629]. There are, however, some recent developments as well. In SCT[630] 103/2008, the unconstitutionality of the Basque Country's consultation law on self-determination was justified, among other things, by the absence of competence in the Basque statute, which is not the case with the Catalan statute of 2006, and there is an adjustment with regard to the judgment on the preamble, which was not evaluated by prior jurisprudence, and a new twist with regard to popular consultations by

[622] *Ibidem.*
[623] *Ibidem.*
[624] *Ibidem.*
[625] *Ibidem.*
[626] *Ibidem.*
[627] *Ibidem.*
[628] *Ibidem*, 20.
[629] *Ibidem.*
[630] Spanish Constitutional Tribunal.

referendum[631]. Yet, undoubtedly, the most relevant aspect that is innovated is the downgrading of the consideration of the constitutional function of the statute itself, in its relationship with the Constitution on the one hand, and ordinary autonomous laws on the other[632]. The judgment's sparse references to the constitutionality bloc, of which the Spanish Constitution and statutes are fundamentally a part, its omissions of the agreed-upon reform procedure and rigidity, and finally its "complementarity," aside from its subordination to the Constitution, demand attention in particular. All these issues, which emphasize special features of the statute, are instead dealt with in STC 247/2007[633]. Thus, a re-evaluation of the text of the Supreme Rule emerges, accompanied by a strengthening of the role of its Supreme Interpreter[634]. The decision recalls the STC 76/1983 concept on the distinction between constituent power and constituted powers, or the freedom of the state legislator to choose the scope of the functions of competence, in response to the need to improve the constitutional position of the Statute[635]. The difference being that it now affirms this with respect to what is provided by the Statute, not by a law of article 150 of the Spanish Constitution or ordinary law[636]. It can be affirmed that the Court seems to rule out a change of direction in the development of the autonomous state[637]. In light of the decision, one can therefore question whether it makes logical to continue to refer to a second phase of the autonomous state in Spain, as the doctrine had done[638]. In another order of considerations, the judgment leaves quite a few points ambiguous or open. The vast number of challenged articles and the challenging agreement obtained among the judges may undoubtedly be explained by the decision's extremely brief and weakly supported rationale[639]. Contributing greatly to the vagueness is also the abundant use of the technique of conforming interpretation[640]. Above all, the ruling achieves a remarkable emptying of the statute's normative content by applying the conforming interpretation[641]. In conclusion, reading the ruling reveals the Court's prudence in view of the Statute's intention to further Catalan self-government as well as the political strife it has already sparked[642]. In particular, it does so by outlining more precisely the framework of the autonomous State. Following the Constitutional

[631] Josep Maria Castellà Andreu, 'La sentencia del Tribunal Constitucional 31/2010, sobre el estatuto de autonomìa de Cataluña y su significado para el futuro del estado autonòmico' (2010) 18 Federalismi.it 1, 20.
[632] *Ibidem.*
[633] *Ibidem.*
[634] *Ibidem,* 21.
[635] *Ibidem.*
[636] *Ibidem.*
[637] *Ibidem.*
[638] *Ibidem.*
[639] *Ibidem,* 23.
[640] *Ibidem.*
[641] *Ibidem.*
[642] *Ibidem.*

Court's decision, Catalonia had to amend its Statute of Autonomy to align with the court's interpretation[643]. This was seen as an obstruction for the Catalan government and its pursuit of greater autonomy[644].

In fact, the decision was met with significant disappointment and frustration in Catalonia, as many Catalans saw it as a rejection of their aspirations for greater autonomy and recognition as a distinct nation within Spain[645]. As a consequence, protests and demonstrations occurred in Catalonia. The STC 31/2010 decision also had a profound impact on Catalan politics, as it increased the growth of pro-independence sentiment and parties in the region, notably leading to the rise of the pro-independence coalition Junts pel Sí (Together for Yes) and the far-left CUP (Popular Unity Candidacy)[646]. These parties later played a key role in the Catalan independence movement and the push for a unilateral declaration of independence in 2017. The ruling also deepened the political tensions between the Catalan government and the Spanish central government, setting the stage for further conflicts and confrontations over issues related to Catalonia's autonomy[647]. In summary, the STC 31/2010 decision had immediate consequences that included disappointment and protests in Catalonia, the growth of pro-independence movements, and continued political tensions between Catalonia and the Spanish government, but also long-term effects[648].

Later, in September 2012, the Catalan secessionist crisis saw its 'official' beginning and, after that, in that present moment, it could not be ascertained with certainty whether a federal constitutional reform pertaining to the state was probable, nor could it be established that a financial asymmetry was then in existence[649]. In this context, no space was left for any growing asymmetry in Catalonia[650].

Ultimately, the potentiality arises for the confirmation of a correlation between the negation of asymmetry and the escalation in secessionist demands[651]. Also, in this timespan the influence of the 1998 decision of the Supreme Court of Canada might be detected as stronger

[643] *Ibidem*, 24.
[644] *Ibidem.*
[645] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 223.
[646] *Ibidem.*
[647] *Ibidem*, 224.
[648] Laura Cappuccio, 'La lunga e accidentata marcia della Catalogna verso una consultazione popolare sull'indipendenza' (2014) 22 Federalismi.it 3, 7.
[649] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 222.
[650] *Ibidem.*
[651] *Ibidem.*

than before[652]. Among several examples of such influence, it seems relevant to mention, for example, when the resolution of the Catalonian Parliament mentioned explicitly the example of the Canadian province[653]. Here, it was decided to question for a *ley organica* about the possibility to move the responsibility of calling a referendum on the political future of Catalonia to the *Generalitat.* In this proposal, it was affirmed that: 'Calling a vote must be regarded as a normal scenario, fully comparable with countries with a democratic tradition and character, as is the case of Canada or Great Britain, which, faced with demands from a national community attached to a territory which is clearly defined both politically and administratively (Quebec and Scotland, respectively), consider that the best form of expression for this collective will is a referendum'[654].

However, Quebec was not the only example taken by Catalonia in its secessionist journey, as the Catalonian secessionist wave also mentioned as models Kosovo and other states[655].

The resolution that was just mentioned above is an example of the opposition between the Catalan legislature and the Spanish Constitutional Tribunal, which characterised the dialogue between these two characters for a long time, starting from 23 January 2013, when the Resolution 5/X, also known as the 'Declaration of Sovereignty', was approved[656]. In this case, the resolution was appealed and, on 8 May 2013, preliminary suspended by the Court: later it was declared unconstitutional with the judgment n. 42/2014[657]. This judgment has a particular historical value as regards the strict approach about secession of the Spanish system, as it says that the constitution of Spain does not allow secession, but secession of a Spanish territorial entity can happen in a lawful manner[658]. This manner can be put into practice if there is a total revision of the Spanish Constitution. In this case, the constitutional amendment that is demanded to legitimize secession has never been put into practice in the Spanish history, as it

[652] Josep Maria Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec' in Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019), 77.
[653] *Ibidem.*
[654] Resolution 479/X of 16 January 2014 of the Parliament of Catalonia. See Josep Maria Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec' in Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019), 77.
[655] Josep Maria Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec' in Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019), 78.
[656] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 227.
[657] *Ibidem*, 229.
[658] Josep Maria Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec' in Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019), 81.

requires special majorities in the Parliament, its early dissolution, new elections and a mandatory referendum, that should be made at national level, not just in Catalonia[659]. Particularly, the ruling settles the government's challenge to the Catalan Parliament's 5/X decision under article 161, paragraph 2 of the Spanish Constitution and articles 76 and 77 (Title V) LOTC[660]. The topic that sparked the most disagreement among constitutional process participants was the suitability of Resolution 5/X to be the subject of the government's opposition, expressed under article 161.2 EC and articles 76 and 77 (Title V) LOTC[661]. The question was whether, given the nature and content of Resolution 5/X, it was one of the 'resolutions issued by any body of the Autonomous Communities' that the Government might dispute under Article 76 LOTC[662]. The Court addressed the question in the affirmative, citing grounds that some found unconvincing[663]. This reasoning was based on ATC[664] 135/2004, which acknowledges the eligibility of a non-normative legislative act, which comprises a representation of the will of the Autonomous Community, to be a 'decision' that can be disputed, perhaps resulting in a breach of constitutionality[665].

On this matter, the ruling limited itself to stating the criterion that a resolution must meet in order to be challenged in this manner: it must be feasible to view it, even indirectly, 'as a producer of legal effects' in addition to being a legal act[666]. The next step in the logic was to ensure that Resolution 5/X had 'legal and not merely political effects'[667]. The Court determined that this was not the case since the resolution lacked 'binding effect' for individuals and the government[668]. However, the judgment held that 'the legal aspect does not end in the binding aspect'[669], implying that the contested resolution can have two legal effects: one, that the invitation to a process of dialogue and negotiation contained in the Declaration 'can be understood as recognition, in favour of those who are called to carry out the process in relation

[659] *Ibidem.*
[660] Ley Organica del Tribunal Constitucional.
[661] Enric 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' (2014) 101 Revista Española de Derecho Constitucional 273, 273.
[662] *Ibidem.*
[663] See, among others, Enric 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' (2014) 101 Revista Española de Derecho Constitucional 273 and Manuel Fondevilla Maron, 'Derecho a decidir y soberania. A proposito de la STC 42/2014 de 25 de marzo' (2014) 34 UNED 587.
[664] Auto del Tribunal Constitucional.
[665] Enric 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' (2014) 101 Revista Española de Derecho Constitucional 273, 273.
[666] *Ibidem.*
[667] *Ibidem,* 274.
[668] *Ibidem.*
[669] Constitutional Court Judgement 42/2014, *Decision of 25 March 2014* [2014] 87 BOE 77.

to the people of Catalonia (...), of powers inherent in sovereignty greater than those resulting from autonomy'[670]; and two, that the Resolution 'does not allow its effects in the parliamentary sphere to be understood as limited to the strictly political sphere, since it requires the respect of specific actions and such respect is subject to parliamentary control'[671]. The reasoning, however, is considered by part of the doctrine not convincing[672].

The Court was required to analyse the merits of the case in order to determine the validity of Resolution 5/X[673]. The Court has stated on numerous occasions that unconstitutionality simply means that the two rules that follow a legal consequence are in conflict, and, based on this definition, the examination of the Resolution's constitutionality consisted in a judgment of contrast between constitutional norms and a non-normative text: a non-legislative act of the Catalan Parliament that the Court defines as a 'political act' but to which a legal nature is ascribed[674]. The Government's appeal said that Resolution 5/X was unconstitutional because it violated articles 1.2, 2, 9.1 and 168 EC, as well as articles 1 and 2.4 of the EAC in the interpretation received in STC 31/2010 and asked that it be deemed unconstitutional and invalid[675]. The Court chose to review the resolution but stated that it would only look at two aspects in it: its first principle, headed 'Sovereignty', and references to the 'right to decide of Catalan citizens'[676].

According to the Resolution, the process of making the right to decide effective is based on a first principle that declares, under the heading 'Sovereignty', that 'the people of Catalonia have, for reasons of democratic legitimacy, the character of a sovereign political and juridical subject'[677]. Aside from the Resolution's non-normative nature, its substance is a political pronouncement riddled with contradictions[678]. In short, the Declaration featured a political proclamation stating the conviction that Catalan people have the right to decide on their political future and express their desire to become a sovereign entity, but it did not proclaim sovereignty as a 'current and effective reality', as the Council of State stated in its opinion and

[670] *Ibidem.*
[671] *Ibidem.*
[672] See, among others, Enric 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' (2014) 101 Revista Española de Derecho Constitucional 273 and Manuel Fondevilla Maron, 'Derecho a decidir y soberania. A proposito de la STC 42/2014 de 25 de marzo' (2014) 34 UNED 587.
[673] Manuel Fondevilla Maron, 'Derecho a decidir y soberania. A proposito de la STC 42/2014 de 25 de marzo' (2014) 34 UNED 587, 591.
[674] *Ibidem.*
[675] *Ibidem.*
[676] *Ibidem.*
[677] Enric 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' (2014) 101 Revista Española de Derecho Constitucional 273, 275.
[678] *Ibidem.*

as the *Abogado del Estado* argued in its memoirs, which stated that this statement is 'an act of constituent power'[679].

The Court agreed with this idea, believing that the Declaration's first principle 'is drafted in terms of the present'[680] and incorporates a 'recognition of the Catalan people as sovereign'[681] that is incompatible with Articles 1.2 and 2 EC, Articles 1 and 2.4 EAC, and Articles 9.1 and 168 EC[682]. Indeed, this declaration was carried to the Judgment, where the first principle labelled 'Sovereignty' was deemed unconstitutional and null[683].

The unconstitutionality of this proclamation of sovereignty was founded on a consolidated jurisprudence that began with the STC 4/1981 of 2 February and ended with the STC 31/2010 of 28 June, with special reference to the STC 103/2008 of 11 September[684]. This doctrine is based on a single idea, expressed in various formulas: the Constitution exclusively attributes the condition of sovereignty to the Spanish people, and thus this condition cannot be attributed to any fraction of this people, as the people of an autonomous community[685]. In fact, it is said that a project that affects the basis of the identity of the sole holder of sovereignty, the Spanish nation, would involve a revision of the established order that could only be achieved through procedures of constitutional reform[686].

The Court reasoned from this logic that 'under the framework of the Constitution, an autonomous Community cannot unilaterally call a referendum of self-determination to decide on its integration in Spain'[687]. This is due to the fact that this is not a 'conclusion' that was 'formulated by the Supreme Court of Canada in its judgment of 20 August 1998, in which it rejected the adaptation of a unilateral draft secession by one of its provinces to its Constitution and to the postulates of international law'[688]. The quotation of this exceptional decision by the Constitutional Tribunal must be seen favourably, since the Canadian pronouncement has become a world reference point because it unquestionably incorporates the most advanced constitutional doctrine on the right of secession[689].

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[679] *Ibidem.*
[680] Constitutional Court Judgement 42/2014, *Decision of 25 March 2014* [2014] 87 BOE 77.
[681] *Ibidem.*
[682] *Ibidem.*
[683] *Ibidem.*
[684] *Ibidem,* 286.
[685] Manuel Fondevilla Maron, 'Derecho a decidir y soberania. A proposito de la STC 42/2014 de 25 de marzo' (2014) 34 UNED 587, 595.
[686] *Ibidem.*
[687] *Ibidem.*
[688] Constitutional Court Judgement 42/2014, *Decision of 25 March 2014* [2014] 87 BOE 77.
[689] Enric 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' (2014) 101 Revista Española de Derecho Constitucional 273, 287.

However, it is considered by some authors that the judgment wrongly used the STC 103/2008 and the Supreme Court of Canada's advisory opinion to support the unconstitutionality of the inconsistent proclamation of sovereignty included in Resolution- 5/X and draw some questionable conclusions from it[690].

The allusions to the 'right of decision of Catalan citizens' are the second feature of Resolution 5/X evaluated in the judgment. These references can be found in the Declaration's first section, which states that the Catalan Parliament 'agrees to begin the process to make effective the exercise of the right to decide so that Catalan citizens can decide their political future'[691]; and on the various principles on which this process must take place: 'democratic legitimacy', 'transparency', 'legality', and 'participation'[692]. Resolution 5/X emphasized the necessity for the people of Catalonia to be able to freely and democratically select their common future through consultation, as stated in Resolution 724/IX[693]. In that resolution, it is stated that 'it is essential to work to equip Catalonia with a tool so that citizens can be consulted on the future of the country (...) in the exceptional moment of becoming a new State of Europe'[694]; and the Catalan Parliament proclaimed 'solemnly, as it has done on other transcendental occasions, the inalienable and inalienable right of Catalonia to self-determination'[695].

The so-called 'right to decide' is not only the focus of Declaration 5/X, but also the conceptual foundation for the political discourse that underpins the Catalan sovereign process, as well as the slogan that served to generate the massive institutional, political, social, and media (including social networks) mobilization that accompanied it[696].

The ambiguity of the expression is also acknowledged in the few theoretical constructs on the right to decide[697]. The right to be consulted is not a fundamental right of citizens guaranteed by Article 23.1 EC, nor is there a constitutional right of the Catalan people to be consulted on future collective policy or to organize any type of referendum or consultation on Catalonia's independence[698]. Of course, one can argue that the Constitution provides several avenues for holding a referendum on Catalonia's political status and that the democratic

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[690] *Ibidem.*
[691] Resolution 5/X of the Parliament of Catalonia.
[692] Enric 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' (2014) 101 Revista Española de Derecho Constitucional 273, 282.
[693] *Ibidem.*
[694] Resolution 724/IX.
[695] *Ibidem.*
[696] Manuel Fondevilla Maron, 'Derecho a decidir y soberania. A proposito de la STC 42/2014 de 25 de marzo' (2014) 34 UNED 587, 597.
[697] Enric 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' (2014) 101 Revista Española de Derecho Constitucional 273, 291.
[698] *Ibidem.*

principle (Art. 1.1 EC) requires listening to the expression of a community's will, allowing citizens to express their views on their links with a State[699]. However, this must be done using the mechanisms provided by the democratic rule of law, because 'there is no democracy without law'[700]. It cannot thus be argued that the democratic principle leads to a non-existent constitutional 'right' of the Catalan people to be consulted on any subject and by any procedure, or a right of Catalan institutions to convene unilaterally any consultation on the community's political status[701]. To put it another way, the democratic concept compels to give significant weight to the desire of a society freely expressed through constitutional and legal means, and possibly constitutional reform[702].

Resolution 5/X does not specifically indicate that the right to decide is the *Generalitat*'s unilateral right to hold a referendum asking the Catalan people for their support for Catalonia's independence[703]. Reading the text carefully reveals that all references to this right are vague: only in the preamble to the resolution does the word 'consultation'[704] appear, and not referendum; the right that is to be made effective concerns the decision 'of its collective political future'[705] not of independence; it is said that the 'majority expression of the popular will (...) will be the fundamental guarantor of the right to decide'[706], but without determining whether it will be binding or not; it states that 'there will be a dialogue and negotiation with the Spanish State'[707] but does not specify whether it will be on the convocation of the consultation or on its results; and it declares that to make this right effective 'all existing legal frameworks will be used'[708], without expressly referring to the existing constitutional framework[709].

As a result, the Court was asked to rule on the validity of these vague references to the non-existent right to decide. The Court affirmed here that 'as regards references to the 'right to decide', a constitutional interpretation is necessary'[710] because they are not linked to the principle of sovereignty, but to other principles of the Declaration, which allow for the

[699] *Ibidem,* 292.
[700] *Ibidem.*
[701] Manuel Fondevilla Maron, 'Derecho a decidir y soberania. A proposito de la STC 42/2014 de 25 de marzo' (2014) 34 UNED 587, 599.
[702] *Ibidem.*
[703] Enric 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' (2014) 101 Revista Española de Derecho Constitucional 273, 299.
[704] Resolution 5/X of the Parliament of Catalonia.
[705] *Ibidem.*
[706] *Ibidem.*
[707] *Ibidem.*
[708] *Ibidem.*
[709] Enric 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' (2014) 101 Revista Española de Derecho Constitucional 273, 299.
[710] Constitutional Court Judgement 42/2014, *Decision of 25 March 2014* [2014] 87 BOE 77.

interpretation of that right 'as a manifestation of a right to self-determination not recognised in the Constitution or as an allocation of sovereignty not recognised in the Constitution, but as a political aspiration that can only be achieved through a process in conformity with the constitutional legality in respect' of these principles[711]. It then proceeded to 'a constitutional interpretation in accordance with the (repeated) principles'[712] of the references to the 'right to decide'[713], and declared in the judgment that 'they are not unconstitutional if interpreted in the sense set out (...) by this judgment'[714]. In other words, the judgment not only made vague references to a non-existent 'right to a decision' proclaimed in a political declaration but enshrined that right by means of a consistent interpretation of those references which 'saves' partially the resolution and concluded by stating the absence of unconstitutionality[715]. An interpretative judgment on a political statement was then given.

An examination of the STC 42/2014 reveals a legal foundation in the many parts addressed, which is frequently perplexing[716]. The acceptance of the challenge forced the Court to consider the validity of a parliamentary resolution that is a non-normative text and contains a political remark[717]. The risk of controlling the constitutionality of a political text led to an inconsistent incentive to support the judgment's remarks about sovereignty and the 'right to decide'[718].

The decision established the unconstitutionality of the inconsistency of the proclamation of the sovereignty of Catalonia with the recourse to STC 103/2008, pronounced in another case of fact; and relying on the advisory opinion of the Supreme Court of Canada to draw a conclusion not drawn from that prestigious ruling, affirming that the conclusion made by the Spanish Constitutional Tribunal is 'the same as the one formulated by the Supreme Court in Canada in its pronouncement of 20 August 1998'[719], where the Court affirmed that 'a unilateral secession project presented by one of its provinces was both contrary to the Canadian Constitution and to International Law'[720]. Indeed, an implicit reference to international law is made here.

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[711] *Ibidem.*
[712] *Ibidem.*
[713] *Ibidem.*
[714] *Ibidem.*
[715] Enric 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' (2014) 101 Revista Española de Derecho Constitucional 273, 300.
[716] *Ibidem.*
[717] *Ibidem.*
[718] *Ibidem.*
[719] Constitutional Court Judgement 42/2014, *Decision of 25 March 2014* [2014] 87 BOE 77.
[720] *Ibidem.*

The Catalonian nationalism reacted to the Sentence 42/2014 of the Constitutional Tribunal on 19 September 2014[721], with the issuing by the Catalan Parliament of the law *De consultes populars no referendàries i d'altres formes de participació ciutadana*[722]. The law was immediately challenged by the central government and suspended by the Constitutional Court[723], the Catalan government then decided to use the instrument of the *procés de participació ciutadana* to carry out the consultation, but this attempt was also suspended by Constitutional Tribunal[724]. In spite of this, a consultation was also carried out with dubious legal value[725]. The consultation of 9 November saw 80.76% of the participants expressing themselves for the independence of Catalonia, with a participation of 37% of the electorate[726]. In this moment, according to Castellà Andreu, 'disobedience to State institutions and, in particular, the Constitutional Court, is encouraged'[727].

2.2.4 The 2017 referendum and its consequences.

With Resolution 1/XI of 9 November 2015, the newly elected Catalan Parliament affirmed that: 'the Parliament of Catalonia solemnly declares the beginning of the process of creating an independent Catalan state in the form of a republic'[728]. In this context, Carles Puigdemont i Casamajó was elected president of Catalunya and he announced, in 2016, the wish of having a referendum on independence in Catalunya[729]. On 1 October 2017 a referendum was held, with mobilizations happening. Around 43% of voters participated and the electoral results gave the following data: "Yes" 90.2%, "No" 7.8% and 2% of blank ballots[730]. On 10 October Puigdemont declared the independence of Catalunya with reserve[731]. Regarding such developments, it seems convenient to mention that the Catalan proposals for secession always tried to make reference and incorporate features inherent in the Reference of the Supreme Court of Canada, such as the requirement to conduct a self-determination plebiscite or engage in

[721] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 230.
[722] *Ley Catalana* 10/2014.
[723] Case TC 5829-2014, *Recurso de incostitucionalidad* [2014] 237 BOE 76901.
[724] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 230.
[725] *Ibidem.*
[726] Laura Cappuccio, 'La lunga e accidentata marcia della Catalogna verso una consultazione popolare sull'indipendenza' (2014) 22 Federalismi.it 3, 5.
[727] Josep Maria Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec' in Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019), 82.
[728] Parliament of Catalonya, seat of 9 november 2015.
[729] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 233.
[730] *Ibidem.*
[731] *Ibidem.*

negotiations with the central State[732]. However, the Reference in question has regrettably overlooked certain additional facets, namely the stipulation necessitating a lucid inquiry and the imperative for a comprehensive majority to endorse said inquiry[733].

On October 17, the Constitutional Tribunal, with its decision n. 114/2017[734], declared unconstitutional the Law No. 19/2017, which was about the binding character of an independence referendum in Catalonia and on October 27, 2017, the authorization for the application of Article 155 of the Constitution was granted by the Spanish Senate[735]. On 8 November, with judgment No. 124/2017, the Constitutional Tribunal also declared Law 20/2017, that regarded the transition from autonomous community to State of Catalunya, unconstitutional[736]. Indeed, no significant changes were applied to the asymmetries of Spain.

However, the reactions to the Catalan declaration of independence were not limited to the judicial decisions of unconstitutionality. On the contrary, the Spanish government of the time, led by Prime Minister Mariano Rajoy, intervened strongly on the matter, with the activation of Article 155 on 21 October 2017[737]. The article affirms as follows: 'If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests'[738]. Indeed, it allows the central government to take control of an autonomous region when it violates the law or threatens Spain's constitutional order.

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[732] Josep Maria Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec' in Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019), 82.
[733] *Ibidem.*
[734] Laura Frosina, 'La deriva della Catalogna verso la secessione unilaterale e l'applicazione dell'articolo 155 Cost.' (2017) 3 Nomos 2, 3.
[735] The article reads as follows: 'If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests. With a view to implementing the measures provided in the foregoing clause, the Government may issue instructions to all the authorities of the Autonomous Communities'. See Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 234.
[736] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 234.
[737] Hèctor López Bofill, 'Hubris, constitutionalism, and "the indissoluble unity of the Spanish nation": The repression of Catalan secessionist referenda in Spanish constitutional law' (2019) 17 (3) International Journal of Constitutional Law 943, 960.
[738] Constitution of Spain of 1978.

Simultaneously with the activation of Article 155, the Spanish government declared a state of alarm in Catalonia on 27 October[739]. The state of alarm is a type of emergency rule present in the Spanish system, together with the state of emergency and the state of siege[740]. These are mentioned in the Spanish constitution[741] but are regulated by the organic law 4/1981, that affirms the applicability of the state of alarm only in extraordinary circumstances and, particularly, in cases of: 'disasters, calamities or public misfortunes (...), health crises (...), cessation of essential public services for the community, when the provisions of articles 28, 2 and 37 of the Constitution are not guaranteed and (in case of) shortages of basic necessities'[742].

In the event under study, the purpose of the state of alarm was to maintain public order, restore legality, and prevent the secession process initiated by the Catalan regional government[743]. To do so, during the state of alarm, the Spanish government implemented several measures[744]. First, it dismissed of the Catalan government, removing from office the Catalan President, Carles Puigdemont, and his cabinet[745]. Also, the government dissolved the Catalan Parliament and called for new regional elections scheduled on 21 December 2017 to elect a new one[746]. Lastly, the central government took the control of Catalonia's police forces and administrative interventions were made[747]. Particularly, the central administration assumed control of various aspects of Catalonia's direction, including finance and public media[748].

The state of alarm in Catalonia lasted for a day, being lifted on 28 October 2017, after the Spanish government believed that the situation had been brought under control, and the threat to Spain's constitutional order had been mitigated, but it marked a significant and contentious period in Spanish politics and constitutional law, with lasting political and social consequences[749].

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[739] Hèctor López Bofill, 'Hubris, constitutionalism, and "the indissoluble unity of the Spanish nation": The repression of Catalan secessionist referenda in Spanish constitutional law' (2019) 17 (3) International Journal of Constitutional Law 943, 960.
[740] Tom Ginsburg and Mila Versteeg, 'States of emergency – Part I' (*Harvard Law Review Blog*, 17 April 2020) < https://harvardlawreview.org/blog/2020/04/states-of-emergencies-part-i/> accessed 21 September 2023.
[741] Article 116 of the Spanish Constitution.
[742] Organic law 4/1981.
[743] Sam Jones, Stephen Burgen and Emma Graham, 'Spain dissolves Catalan parliament and calls fresh elections' (2017) The Guardian < https://www.theguardian.com/world/2017/oct/27/spanish-pm-mariano-rajoy-asks-senate-powers-dismiss-catalonia-president> accessed 21 September 2023.
[744] *Ibidem.*
[745] *Ibidem.*
[746] *Ibidem.*
[747] *Ibidem.*
[748] *Ibidem.*
[749] *Ibidem.*

At the present juncture, the endeavour for self-determination in Catalonia has been suspended[750]. According to Mastromarino, 'the reasons for the failure of the secession of Catalonia (...) do not reside in national law. They must be looked for elsewhere, on the political-economic and political international level'[751] and it is imperative to highlight the distinct focus on the isolation of Catalan nationalism, specifically within the purview of the major European countries and the European Union[752]. With regard to the Spanish case, it is also crucial to acknowledge that numerous instances of secession or disintegration within federations have arisen due to endeavours aimed at enforcing symmetry in contexts characterized by profound diversity[753]. Also, in the perspective of a comparative work, it should be mentioned the role of model played by the decision issued by the Supreme Court of Canada. Such a reference happened by selectively and partially referencing certain points of the decision; it was asserted here that the Canadian model represented the sole correct and suitable form of democracy for the twenty-first century[754]. Simultaneously, attempts were made to apply certain standards from Canada to Spain without considering their compatibility with the Spanish constitutional framework, while disregarding other crucial aspects of the reference material[755].

2.3 The experience of Kosovo.

2.3.1 A historical perspective of the secession of Kosovo.

Kosovo, despite being a region widely acknowledged as the cradle of Serbian culture and civilization, has experienced a period of governance under Serbian authority spanning a mere two and a half centuries[756]. In particular, Kosovo was under Ottoman rule for about 500 years, and it was during this period, which began in the decade of 1450, that throughout the territory of Kosovo there was an increase in the Albanian population, who settled in the western part of the region[757]. The treatment of the Kosovar Albanians and the consequent relations with the 'cohabitees' were problematic already in the period of 'cohabitation' with the Ottomans. In

[750] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 234.
[751] Anna Mastromarino, 'La dichiarazione di indipendenza della Catalogna' (2017) 3 Osservatorio Costituzionale AIC 11, 13.
[752] *Ibidem.*
[753] Ronald Watts, 'A Comparative Perspective on Asymmetry in Federations' (2005) 4 Asymmetry series 1, 5.
[754] Josep Maria Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec' in Giacomo Delledonne and Giuseppe Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019), 83.
[755] *Ibidem.*
[756] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 30.
[757] Carole Rogel, 'Kosovo: where it all began' (2003) 17(1) International Journal of Politics, Culture and Society 167, 171.

fact, the temporal interval spanning from 1878 to 1912, which culminated in the Serbian conquest of Kosovo, has been denoted by the Albanian populace as the *Rilindje kombëtare*, signifying the epoch of the 'National Renaissance'[758].

As early as 1900, the final design of the Albanian project was to create an independent state[759]. In 1912, however, a secret alliance was signed between Bulgaria, Serbia, Montenegro and Greece, which aimed to make the Ottoman Empire disappear from the European soil[760]. Military operations began in late September, and in just one month the Serbs conquered Kosovo and part of Macedonia, the Montenegrins advanced into northern Albania, the Bulgarians into the Aegean and the Greeks into Thessaloniki[761]. The Albanians then realized that they were surrounded, and that the much sought-after autonomy could no longer be achieved in the context of the Ottoman Empire[762]. On 28 November the Albanian politician Ismail Qemal convened a national congress in southern Albania and, at the end of this, proclaimed Albania as a free state[763]. However, it was not until 1913 that independence was officially accepted by the Great Powers following the London Conference which had begun in December 1913[764].

Despite the new independence, the Albanian citizens, estimated at 800,000, saw an equal number excluded from the national borders. The most important centres of Kosovo came under the Serbian rule and the same was true for the region of Western Macedonia[765].

With the beginning of the First World War, in the newly established principality of Albania, the situation was far from stable, and armed assaults on Serbian guards on the Kosovo border were the order of the day[766]. However, neither the Serbs nor the Albanians occupied Kosovo during the war, but during the years 1915 and 1916, the Austrians and the Bulgarians divided the territory[767]. The projects of the two nations were colliding, with the first aiming at the creation of 'Greater Albania', while the second wanted to penetrate it and conquer it up to its southern territories. During the peace conference, which began in December 1918, the Kingdom of Serbs, Croats and Slovenes was created, with the undisputed Serbian leadership under King Aleksandar Karadjordjević[768]. The Albanian borders were left largely unchanged,

[758] Noel Malcolm, *Kosovo. A short history* (1st edn, New York University Press 1999), 217.
[759] *Ibidem.*
[760] *Ibidem.*
[761] *Ibidem.*
[762] Carole Rogel, 'Kosovo: where it all began' (2003) 17(1) International Journal of Politics, Culture and Society 167, 173.
[763] Giovanni Sabbatucci and Vittorio Vidotto, *Storia contemporanea. Il Novecento* (3rd edn, Laterza 2019), 302.
[764] *Ibidem.*
[765] Thomas Benedikter, *Il dramma del Kosovo. Dall'origine del conflitto fra serbi e albanesi agli scontri di oggi* (1st edn, Datanews 1998), 33.
[766] Giovanni Sabbatucci and Vittorio Vidotto, *Storia contemporanea. Il Novecento* (3rd edn, Laterza 2019), 303.
[767] *Ibidem.*
[768] *Ibidem.*

and Kosovo along with areas of Albanian-majority Macedonia remained with Serbia[769]. In this context, despite the signing of the treaty in Saint Germain on the protection of minorities in 1919 by the Kingdom of Serbs, Croats and Slovenes (Yugoslavia from 1929), respect for the rights of the Albanian minority was almost non-existent[770].

With the beginning of World War Second, the Albanian dream of unification and the end of Serbian oppression took shape in daily life: the Albanians obtained a totally autonomous administration, police and jurisdiction, schools and even political institutions[771]. In this moment, however, in Tito's projects for the region, the hypothesis of a secession of Kosovo in favour of Albanian was never considered[772].

Tito decided to enter a new treaty in January 1945 with the government of Albania, clearly providing for Kosovo-Metohija as an integral part of the Yugoslav state[773]. In September 1945, two months after the defeat of the counterrevolutionary forces, the Serbian Parliament passed a law giving the territories of Vojvodina and Kosovo-Metohija the status of autonomous regions[774]. Kosovo-Metohija ('Kosmet') had the classification of 'Autonomous Territory'[775].

After 1948, when the break between Tito and Stalin occurred, and throughout the 1950s, tensions and beatings against the inhabitants happened in the region[776]. The situation only disappeared in the early sixties, thanks to the fact that in 1963 Kosovo-Metohija was given the status of 'Autonomous Province', while remaining both integral parts of the Republic of Serbia[777].

The real turning point was in 1966, during the Brijuni meeting[778]. The new autonomous province thus entered into a state of near equality with the Yugoslav federal provinces: the only right that was less than the republics themselves was self-determination[779]. At the same time, Kosovo gave itself a constitution of its own, of course in accordance with and in compliance

[769] Thomas Benedikter, *Il dramma del Kosovo. Dall'origine del conflitto fra serbi e albanesi agli scontri di oggi* (1st edn, Datanews 1998), 36.
[770] *Ibidem.*
[771] Thomas Benedikter, *Il dramma del Kosovo. Dall'origine del conflitto fra serbi e albanesi agli scontri di oggi* (1st edn, Datanews 1998), 41.
[772] Pietro Orteco and Marcello Saija, *La guerra del Kosovo e la Questione balcanica* (1st edn, Rubbettino 2001), 10.
[773] *Ibidem.*
[774] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 38.
[775] *Ibidem.*
[776] Thomas Benedikter, *Il dramma del Kosovo. Dall'origine del conflitto fra serbi e albanesi agli scontri di oggi* (1st edn, Datanews 1998), 44.
[777] *Ibidem.*
[778] Carole Rogel, 'Kosovo: where it all began' (2003) 17(1) International Journal of Politics, Culture and Society 167, 171.
[779] Tim Judah, *Kosovo: War and Revenge* (1st edn, Yale University Press 2000), 84.

with the Yugoslav constitution and proceeded to build public institutions and a fully autonomous judiciary, as is the case in other republics[780].

In the context of the 1968 movements, the Yugoslav government decided to expand the freedoms of the autonomous provinces by granting the status of 'quasi-republics', but this, combined with the new constitution of 1974, failed to appease the desire for independence of the Kosovar Albanians[781]. Indeed, despite the 1971 census registers about 1.2 million Albanians in Kosovo (many more than the Macedonians and Montenegrins), the Belgrade government never contemplated the possibility of full autonomy of Kosovo for various reasons. The successful period that began with the end of the war, culminating in Ranković's dismissal and the drafting of the 1974 constitution, came to an end in 1981, just a year after Tito's death on 4 May 1980[782]. On 11 March 1981 a protest spread throughout Kosovo and on this occasion the government of Belgrade was not unprepared. The clashes became increasingly violent and the mobilization was so great that a state of siege was proclaimed on 2 April[783]. The climate only became peaceful during the winter season of the same year, but it was still disconcerting in public opinion for the use of the army and tanks against unarmed protesters[784]. The consequences of the protests were not long in coming. Yugoslavia undertook a major media campaign to demonize and highlight as an enemy of the federation itself Albanian counterrevolutionary nationalism[785]. From the progressive opening, from 1966 onwards, it is however undeniable that Kosovo has undergone a process of 'albanisation'[786]. In the late 1980s, however, Slobodan Milošević was the protagonist of Yugoslav and Serbian politics[787]. Milošević quickly managed to climb the ranks of the Yugoslav Communist Party, and in 1987 he became the party leader[788]. Demagogic nationalism was Milošević's most powerful weapon, which ignited the hearts of the people and claimed the sanctity of Kosovo for the Serbs[789]. In this context, in 1988, the biggest Albanian protest in the history of Kosovo took place: about

[780] *Ibidem.*
[781] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 49.
[782] Edgar Hosch, *Storia dei Balcani* (1st edn, Il Mulino 2006), 33.
[783] Noel Malcolm, *Kosovo. A short history* (1st edn, New York University Press 1999), 334.
[784] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 51.
[785] Thomas Benedikter, *Il dramma del Kosovo. Dall'origine del conflitto fra serbi e albanesi agli scontri di oggi* (1st edn, Datanews 1998), 52.
[786] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 52.
[787] Robert Thomas, *Serbia under Milosevic: politics in the 1990s* (1st edn, C Hurst and Co Publishers Ltd 1999), 21.
[788] *Ibidem.*
[789] *Ibidem.*

250 thousand people found themselves on the streets of the capital of the region[790]. Slobodan Milošević again poured more fuel on the fire and delivered a speech in Kosovo in June 1989 in which he pointed to Kosovo as the cradle of his Serbian civilization and thus the land of the state itself[791]. In response, the Provincial Parliament of Kosovo proclaimed the 'Republic of Kosova' and its secession from the Yugoslav Federation on 2 July 1990 unilaterally, but the government of Belgrade judged the decision taken unconstitutional and dissolved the provincial parliament depriving it of any power[792]. The culmination of tensions between the parties involved ultimately manifested in Serbia's unilateral decision to abolish the autonomous status previously granted to Kosovo[793].

On 28 September 1990, the new Serbian constitution came into force, bringing together Kosovo and Metohija, under the full jurisdiction of Serbia[794]. Kosovo was now suffering from the harsh Serbian policy, which contributed enormously to the destruction of the already precarious Kosovo economy, so much so that unemployment rates reached very high levels, affecting the quality of life until the early years of the new millennium[795]. Among the most important Kosovar personalities stood out Ibrahim Rugova, called the "Gandhi of the Balkans", who had the great merit of making the Kosovo issue known internationally, and to attract the sympathy of many[796]. He approached a party founded in December 1989, the Democratic League of Kosovo and he was elected with about 95% of the vote as the first president of the 'Republic of Kosova', not recognized at the federal level, in May 1992[797]. A supporter of the policy of non-violence despite the harassment and aggression suffered by his people, he knew that an excessive reaction by the Kosovar people could be used as a pretext by Milošević to intervene militarily, as was already done in Croatia, Slovenia and, since March 1992, Bosnia and Herzegovina. Rugova's political action was not particularly hampered by the Belgrade government[798]. Rugova repeatedly asked the international community to occupy Kosovo beforehand with UN and NATO troops to ensure a peaceful transition to independence[799].

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[790] Stephen Hosmer, *The Conflict Over Kosovo: Why Milosevic decided to settle when he did* (1st edn, Rand 2001), 12.
[791] Robert Thomas, *Serbia under Milosevic: politics in the 1990s* (1st edn, C Hurst and Co Publishers Ltd 1999), 197.
[792] *Ibidem.*
[793] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 927.
[794] Thomas Benedikter, *Il dramma del Kosovo. Dall'origine del conflitto fra serbi e albanesi agli scontri di oggi* (1st edn, Datanews 1998), 78.
[795] *Ibidem.*
[796] *Ibidem.*
[797] Miranda Vickers and John Fraser, 'Between Serb and Albanian: a history of Kosovo (1998) 53 (4) International Journal 792, 853.
[798] *Ibidem.*
[799] Robert Muharremi, 'Kosovo's declaration of independence: self-determination and sovereignty revisited' (2008) 33 Review of Central and East European Law 401, 404.

Though, when the war in Bosnia ended in 1995, the Dayton Accords were signed, in which there was no mention of the Kosovo issue, which was totally ignored because it was considered an internal problem in Serbia[800]. Rugova was then publicly humiliated, and his figure took second place.

At this point, the *Lëvizja Popullore për Republikën e Kosovës* (LPRK), the People's Movement of the Republic of Kosovo, which was also responsible for organizing the protests from 1981 onwards, played a key role in the 1990s[801]. In disagreement with the non-violence policy of Ibrahim Rugova and the party associated with him of the LDK, they removed from their name the noun 'Republic' when in the 1992 presidential elections he became president of Kosovo[802]. Having changed its name in the mid-nineties, the party was then called only *Lëvizja Popullore e Kosovës* (LPK) and began to foment and organize a real armed militia to respond with force to the Serbian occupation, becoming the embryo itself for the birth of the liberation army[803]. In 1996 it was presented by the party leadership a clear provision on the structuring and role that the Liberation Army had in the LPK[804]. The two points set out as objectives the liberation of Kosovo based on the principle of the self-determination of the peoples and the consequent construction of a new society that would satisfy the popular will and be in harmony with it. Moreover, it was specified that the party did not reserve itself from the use of all the means, licit and illicit, of contrast to all forms of abuse of a terrorist, racist, fascist, anarchist and anti-pacifist character[805]. The first activities related to an attempt at armed resistance were recorded in 1992 and 1993, but then classified as isolated cases. It was not until 1994 that the *Ushtria Çlirimtare e Kosovës* was formally declared, but it became known throughout Kosovo when it made its first official appearance in 1997[806]. The UÇK's modus operandi was aimed at eliminating both Serbs, military and civilians, as well as Albanians considered collaborators with the central government, with a methodology similar to mafia-style attacks[807]. Initially, although the LPK incited it, the National Liberation Army was disavowed by the ruling party, the LDK of Rugova, who preferred, in line with the philosophy of its leader, to wait for possible

[800] Sandro Provvisionato, *Uck: l'armata dell'ombra. L'esercito di liberazione del Kosovo* (1st edn, Gamberetti 1999), 41.
[801] *Ibidem.*
[802] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 58.
[803] *Ibidem.*
[804] Sandro Provvisionato, *Uck: l'armata dell'ombra. L'esercito di liberazione del Kosovo* (1st edn, Gamberetti 1999), 77.
[805] *Ibidem.*
[806] See UN International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Case No. IT-03-66-T (30 november 2005).
[807] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 58.

international intervention[808]. Following several terrorist attacks in 1997, claimed in December of the same year, the UÇK was officially recognized in 1998 by the rest of the Kosovo political world, which now saw in this the only weapon available in the defence of the people now exasperated[809]. Starting in March 1998, there was the reactivation of an international political committee already used in the conflict in Bosnia and Herzegovina, namely the Contact Group[810]. For the Kosovo crisis, the main nations were the United States, France, Germany, Great Britain, Italy and other representatives of the European Union[811]. In particular, the Belgrade government was threatened that it would incur financial sanctions if it did not implement the ceasefire within the month[812]. Despite pressure, the ceasefire was not respected and the war continued. The Contact Group, however, served as an inspiration for the United Nations Security Council, which adopted Resolution 1160 on 31 March 1998[813]. The resolution listed several points. Firstly, both the excessively violent actions of the Serbian police and the terrorist actions of the National Liberation Army were condemned indiscriminately[814]. Then the federal government was invited to seek a political way to resolve the differences and the Albanian ruling class was urged to condemn the terrorist acts[815]. Afterwards, all the abuses perpetrated against the Albanian population were listed, and Milošević was urged to withdraw all his troops from the territory, whose future would be decided following negotiations between the parties, in which the Contact Group itself would be offered as mediator[816]. As true sanctions, only the implementation of an embargo against the entire federation of Yugoslavia, including Kosovo, was carried out[817]. No more drastic measures were taken due to the firm opposition of China and Russia, both pro-Serbian. In the summer of 1998, Canada and Japan joined the Contact Group.

Over the months, however, the situation worsened, so much so that the Security Council, in Resolution 1199 of 23 September 1998, expressed great concern about the events in the area of Kosovo, now on the brink of humanitarian disaster, and therefore considered a real threat to

[808] Robert Muharremi, 'Kosovo's declaration of independence: self-determination and sovereignty revisited' (2008) 33 Review of Central and East European Law 401, 408.
[809] Thomas Benedikter, *Il dramma del Kosovo. Dall'origine del conflitto fra serbi e albanesi agli scontri di oggi* (1st edn, Datanews 1998), 114.
[810] *Ibidem.*
[811] Giovanni Sabbatucci and Vittorio Vidotto, *Storia contemporanea. Il Novecento* (3rd edn, Laterza 2019), 309.
[812] *Ibidem.*
[813] Paul Williams, 'Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo Final Status' (2002) 31 Denver Journal of International Law and Policy 387, 391.
[814] *Ibidem.*
[815] *Ibidem.*
[816] *Ibidem.*
[817] Thomas Benedikter, *Il dramma del Kosovo. Dall'origine del conflitto fra serbi e albanesi agli scontri di oggi* (1st edn, Datanews 1998), 125.

global stability and peace[818]. A ceasefire was ordered again, but this time only Serbian and Yugoslav forces were warned. An attempt at negotiation began the following year, when on 6 February 1999, representatives of Yugoslavia and Kosovo met in Paris to find an agreement on the future of the region[819]. An international NATO-led administration and the withdrawal of federal troops was proposed, and subsequently a plan, called the Hill Plan, in which Kosovo would be practically put in a state of stalemate, which could then be unblocked in the next three years, in which in the end the popular will would have been worth[820]. However, there was no mention of independence since all the Western powers agreed to grant a certain autonomy to the area, but never real independence. Both sides rejected the agreement. In fact, the Serbs would never have accepted any form of autonomy and independence for Kosovo, while the Albanians had no intention of postponing to the future a possible form of autonomy that, among other things, would never have foreseen full independence[821].

Following the failure of international diplomacy, NATO entered the military[822]. On 23 March 1999, Operation Allied Force was launched and the following day, bombing began on Yugoslav territory[823]. In fact, the operation aimed only to punish Serbia, guilty according to Western public opinion of crimes against the Kosovo Albanian component. The armed intervention was based solely on the use of air forces and the elimination of key positions for the Serbs through continuous air raids[824]. In parallel with this war, land warfare intensified. The clash between the UÇK and the federal army was much harsher, so that there were cases of ethnic cleansing. According to one estimate, in April the number of Albanians forced to leave their homes amounted to about 634 thousand people, of whom about 200 thousand found refuge in Albania[825]. The international community expected Milošević to surrender in a few days, but this only arrived on 10 June 1999, 79 days later[826]. The event that will lay the foundations for a proper management of the end of the conflict was the Petersberg G8 on 6 May 1999[827]. Here, the so-called General Principles were approved, based on the original proposals of the German foreign Minister Fischer. The principles contained seven points which were then to be applied to the Kosovar case. They called for the immediate cessation of hostilities, the withdrawal of

[818] *Ibidem.*
[819] Marc Weller, 'The Rambouillet Conference on Kosovo' (1999) 75(2) International Affairs 211, 213.
[820] *Ibidem.*
[821] *Ibidem.*
[822] Noel Malcolm, *Kosovo. A short history* (1st edn, New York University Press 1999), 350.
[823] *Ibidem.*
[824] *Ibidem.*
[825] Thomas Benedikter, *Il dramma del Kosovo. Dall'origine del conflitto fra serbi e albanesi agli scontri di oggi* (1st edn, Datanews 1998), 140.
[826] *Ibidem.*
[827] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 63.

Serbian troops and the demilitarization of the UÇK, an interim administration for Kosovo, an international presence with a UN mandate, the gradual return of refugees, the launch of a political process for the stabilisation of the area and, finally, an economic plan that would involve the entire Balkan area[828]. The project was taken up by the President of the Republic of Finland Ahtisaari who, as Plenipotentiary of the European Union, sent the document to the Parliament of Belgrade on 2 June 1999, after Milošević himself contacted the German Foreign Minister informing him of a willingness to accept the points indicated in Bonn[829]. The only difference in the new text was the addition of the condition of a NATO intervention on the territory[830]. On 3 June 1999, the parliament of Belgrade approved it, and on 9 June 1999, the attached military agreement was signed in Kumanovo[831].

On 10 June 1999, Security Council Resolution 1244 was issued, which marked the formal end of the war[832]. Resolution 1244 legitimised the interventions of international bodies in Kosovo. A NATO military corps, KFOR, and a civilian corps under the auspices of the UN, UNMIK, were dispatched[833]. Their respective tasks were to ensure security in the area and prevent a possible rekindling of the clashes and provide the tools to give life to the provisional administration provided for by the agreements. For the construction of the institutions and the coordination of the democratisation process, OSCE assistance was authorised, while, with regard to health care issues, UNHCR also played a central role in the gradual repatriation of refugees[834]. Indeed, it is imperative to acknowledge that Resolution 1244, in its prudent approach, abstained from issuing a conclusive declaration regarding the ultimate status of Kosovo. Nevertheless, it undeniably established the United Nations Mission in Kosovo (UNMIK) as an interim administration. The establishment of the United Nations Mission in Kosovo (UNMIK) served a twofold objective, specifically, the fostering of institutional advancement and the facilitation of a political trajectory aimed at achieving a consensus pertaining to the ultimate determination of Kosovo's status[835]. The UNMIK initially promulgated a doctrine commonly referred to as 'Standards before Status'. Nevertheless, as the chronological progression of events in the year 2004 transpired, it became conspicuously clear

[828] *Ibidem.*
[829] *Ibidem.*
[830] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 63.
[831] *Ibidem.*
[832] *Ibidem.*
[833] Tim Judah, *Kosovo: War and Revenge* (1st edn, Yale University Press 2000), 97.
[834] *Ibidem.*
[835] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 927. See UNSC, Res. 1244 (10 June 1999).

that the initiation of deliberations concerning the legal standing of Kosovo was an indispensable and obligatory undertaking[836].

In fact, in 2004 ethnic hatred began to emerge again, especially in the northern part of Kosovo, in the area of Mitrovica with a Serbian majority[837]. The Albanians here were the protagonists of the provocation of riots and violent attacks not only against the Serbian population, but also against the military and civilian personnel of the international missions of KFOR and UNMIK[838]. Then, there was an important intervention of the Security Council, which in 2006 gave way to the negotiations foreseen by the final phase for the stabilization of the territory. It was at this point that the UN Secretary-General appointed former Finnish President Ahtisaari as the Special Envoy to Kosovo to define the future status of Kosovo[839]. He led a series of negotiations throughout 2006 and 2007 between Belgrade and Pristina, in which he examined the wishes and demands of each side[840]. He formulated the final plan for Kosovo, also known as the 'Ahtisaari Plan'.

In its proposal, Kosovo would have adopted its own flag and anthem and would have had two official languages, Serbian and Albanian[841]. Pristina would then have substantial control over its borders and could have formed a small army. Central to the plan would be the situation of non-Albanian ethnic minorities, in particular the Serbian minority, which would be granted a certain autonomy in the management of provinces with ethnic majority and would be guaranteed the possibility of maintaining relations with the government of Belgrade[842]. Ethnic representativeness in any type of institution would be guaranteed and the Orthodox cultural heritage would be preserved through the creation of protected zones. Finally, an International Civil Representative, representing the European Union and the United Nations, would be appointed, who would have the power of veto over the Kosovo legislation and control the military contingent of KFOR[843]. While the Albanian Kosovars accepted this proposal, Serbia refused it because it was feared that this planned autonomy would eventually lead to full independence[844].

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[836] Tim Judah, *Kosovo: War and Revenge* (1st edn, Yale University Press 2000), 108.
[837] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 63.
[838] *Ibidem.*
[839] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 928.
[840] *Ibidem.*
[841] Luca Patricelli, 'Il Kosovo. Da territorio conteso a stato indipendente: analisi della nuova Repubblica' (Dissertation, Luiss University 2020), 63.
[842] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 928.
[843] Henry H. Perritt, *The road to independence for Kosovo: a chronicle of the Ahtisaari plan* (1st esn, Cambridge University Press 2010), 111.
[844] *Ibidem.*

Serbian fears were justified when, in the new elections on 17 November 2007, Hashim Thaçi's Democratic Party of Kosovo won, this time beating the Democratic League of Kosovo[845]. Bolstered by the end of the UN negotiations in December of that year, he directed his political agenda towards the full independence of Kosovo and the preparation of its phases[846]. In anticipation of the proclamation of independence, the European Union approved the day before, on 16 February, the launch of a European mission called EULEX. The purpose of the mission would be to place the new independent state under a European protectorate, which would support the existing international organizations of NATO and ONU[847].

On 17 February 2008 the parliament of Pristina unilaterally declared independence from the Republic of Serbia, which declared it illegitimate just later[848]. The United States, Albania and the European Union almost entirely, immediately supported the new republic. The opposition of Serbia was joined by that of Russia, whose mutual relations intensified after the 1999 conflict. At EU level, however, Spain, Romania, Cyprus and Greece immediately showed their aversion to recognition, concerned about the consequences that could result from the above gesture for the cases of the various regional autonomies present within these states[849].Today there are about a hundred nations that recognize Kosovo as an independent entity and, within the European Union, 22 out of 27 states recognize its authority[850]. In addition to Spain, Romania, Cyprus and Greece, Slovakia has been added in not recognising Kosovo.

Among the first works that the new republic wanted to undertake was the drafting of a new constitution, which was completed in March 2008 and subsequently approved by the Kosovo Parliament on 9 April[851]. The document would then enter into force officially on 15 July of the same year. About the world of international institutions, on 22 July 2010, the International Court of Justice expressed itself on the unilateral declaration of independence of 2008, finding no violations of international law[852]. Despite the confirmation of the Serbian opposition to the recognition, negotiations soon began, sponsored by the European Union to encourage the normalization of ties between the two state entities[853]. This series of meetings

[845] Robert Muharremi, 'Kosovo's declaration of independence: self-determination and sovereignty revisited' (2008) 33 Review of Central and East European Law 401, 407.
[846] *Ibidem.*
[847] Francesco Strazzari, 'La via dei Balcani, una strada tortuosa per l'Europa' (2008) 4 il Mulino 731, 740.
[848] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 930.
[849] Edoardo Greppi, 'La proclamazione dell'indipendenza del Kosovo e il diritto internazionale' (2008) 80 Ispi Policy Brief 1, 7.
[850] *Ibidem.*
[851] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 933.
[852] See ICJ, Advisory Opinion 64/881 (26 July 2010).
[853] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 934.

culminated in the signing, on 19 April 2013, at the United Nations, of an agreement between the governments of Belgrade and Pristina[854]. The content of the document provided for the guarantee of a certain autonomy to the Serbs of northern Kosovo, while remaining within the jurisdiction of Kosovo. At the same time, the document ensured a Serbian awareness of a certain autonomy of the region, without, however, implying an official recognisance[855].

2.3.2 What distinguishes the Kosovar case: a secession under international law.

As previously stressed, the secession of Kosovo happened after the Kosovar Assembly passed a unilateral declaration of independence from the Republic of Serbia on 17 February 2008[856]. The aforementioned Declaration was promulgated subsequent to the unsuccessful endeavours to engage in negotiations regarding the ultimate status of the province in question[857]. The legal ramifications of said Declaration continue to be a subject of controversy, as there exists a contentious debate surrounding the legality of the secession of this formerly Serbian province[858].

Now that three instances of secession have been explored, it is possible to find in the Kosovar case some peculiarities that cannot be found in the cases of Quebec and Catalonia. Indeed, both Quebec and Catalonia attempted to access secession through the use of a referendum, a mean that was not used in Kosovo, and the attempts of Quebec and Catalonia to access secession have been a failure. However, what really distinguishes the case under examine is the reaction of the international community to the wish of secession of this population. In fact, the secession of Kosovo can be defined as a secession justified by and perpetrated through international law, while in the two previous cases the international community generally condemned the attempts.

The Kosovar separation from Serbia is unprecedented in the history of international relations because it represents a secession, which is strongly discouraged by conventional international law; it was largely peaceful, which is unusual for state break-ups; and it received political support from the West, which is customarily critical of separatist movements because they threaten national borders and global stability[859]. The case of Kosovo may be examined through the prism of international law in order to judge the legality of the Kosovar declaration

[854] *Ibidem.*
[855] *Ibidem.*
[856] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 926.
[857] *Ibidem.*
[858] *Ibidem.*
[859] Milena Sterio, 'The case of Kosovo: Self-determination, Secession and Statehood Under International Law' (2010) 104 International Law in a time of Change 361, 363.

of independence and the reasons why the secession of Kosovo can be classified as a secession under international law.

Whether Kosovo had the legal right to break away from Serbia under international law is the main legal question raised by the Kosovar declaration of independence[860]. As will be more clearly stated later in this work, numerous cases indicate that a 'people' only has the right to so-called external self-determination if its central authority is not upholding its rights to internal self-determination[861]. Kosovar Albanians are undoubtedly a "people" in Kosovo because they are distinct from Serbs in terms of their ethnicity, culture, language, religion, and social ideals. Even if they had been recognized in the pre-Milosevic era, it is certain that the Milosevic-led Serbia had not upheld the Albanian Kosovars' rights to internal self-determination[862]. Finally, it is possible to state that Serbia's respect for the Kosovar people's right to internal self-determination was achieved as a result of the international community's intervention through a NATO mission.

Particularly, as it claimed that it is a new State independent from Serbia, Kosovo had to meet the four requirements for statehood under international law, which are: a defined territory, a permanent population, a government, and the ability to engage in international relations[863]. In the past, all four of these requirements appeared to be difficult for Kosovo to meet for several reasons[864]. First, because of the fierce territorial disputes between Serbia and Albania[865]. Also, due to the significant numbers of both Serbian and Albanian refugees that entered and left Kosovo, Kosovo also lacked a permanent population[866]. Third, Kosovo did have a government, but it was dependent on protection initially provided by the UN and then by the EU for its stability[867]. Finally, Kosovo's involvement with the world community was the only reason it was able to establish connections with other countries[868].

In other words, it is clear here that the international intervention had a central role in Kosovo's evolution into an independent State. Kosovo has been governed by the UN, and foreign forces have maintained its internal security[869]. As a result, Kosovo was able to trade,

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[860] *Ibidem.*
[861] Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (1st edn, Cambridge University Press 1995), 103.
[862] Enver Hassani, 'Self-Determination Under the terms of the 2002 Union Agreement Between Serbia and Montenegro: Tracing the Origins of Kosovo's Self-Determination' (2005) 80 Chi.-Kent L. Rev. 305, 320.
[863] Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2003), 105.
[864] Milena Sterio, 'The case of Kosovo: Self-determination, Secession and Statehood Under International Law' (2010) 104 International Law in a time of Change 361, 364.
[865] *Ibidem.*
[866] *Ibidem.*
[867] *Ibidem.*
[868] *Ibidem.*
[869] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 928.

import, and export commodities, as well as send its political leaders on diplomatic missions. Without this assistance, Serbian forces would have undoubtedly interfered with Kosovo's internal boundaries and cut off its access to the outside world, preventing it from engaging in any international interactions with outside parties[870]. Additionally, the new Kosovar state's existence has always been characterized as being unstable at best.

The pattern Kosovo is setting for other separatist movements throughout the world was one of the pertinent considerations in the current case[871]. Although officials have attempted to argue that Kosovo's independence is unique and that it does not establish a precedent, separatist organizations around the world have seized upon Kosovo's independence to support their own secessionist claims[872]. Separatist organizations in Moldova and Georgia, particularly in South Ossetia and Abkhazia, highlighted this 'precedent' and, in the days following the Kosovar declaration of independence, they renewed their demands for independence[873].

Lastly, it may be thought that the international community ought to have found ways to resolve the Kosovar crisis, given that Kosovar independence confronts and posed important regional stability issues as well as challenges to traditional international law[874]. Even Albanian academics have admitted that there are alternatives to total independence on the table for Kosovo's problems[875]. There were alternatives to complete independence, including the formation of an international protectorate, conditional independence, and the division of Kosovo along ethnic lines[876]. These could have avoided some of the major problems that independence faced[877]. Such alternatives would have provided fair and long-lasting solutions for this unstable region while avoiding many of the issues brought on by the rapid independence of the Kosovars[878]. However, other authors also believe that there was not a real alternative to independence for Kosovo, mainly because of the approach to the matter of Kosovars[879].

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[870] *Ibidem.*
[871] Milena Sterio, 'The case of Kosovo: Self-determination, Secession and Statehood Under International Law' (2010) 104 International Law in a time of Change 361, 365.
[872] Timothy Garton Ash, 'This Dependent Independence is the Least Worst Solution for Kosovo' (2008) The Guardian < https://www.theguardian.com/world/2008/feb/21/kosovo>, accessed 21 September 2023.
[873] Nicholas Kulish and C.J. Chivers, 'Kosovo is Recognized but Rebuked by Others' (2008) New York Times < https://www.nytimes.com/2008/02/19/world/europe/19kosovo.html>, accessed 21 September 2023.
[874] Milena Sterio, 'The case of Kosovo: Self-determination, Secession and Statehood Under International Law' (2010) 104 International Law in a time of Change 361, 365.
[875] See, among others, Zejnullah Gruda, 'Some Key Principles for a Lasting Solution of the Status of Kosovo: Uti Possedetis, The Ethnic Principle, and Self-Determination' (2005) 80 Chi.-Kent L. Rev. 353, 357.
[876] Milena Sterio, 'The case of Kosovo: Self-determination, Secession and Statehood Under International Law' (2010) 104 International Law in a time of Change 361, 365.
[877] *Ibidem.*
[878] *Ibidem.*
[879] See, among others, Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 934 and Paul Williams, 'Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo Final Status' (2002) 31 Denver Journal of International Law and Policy 387, 397.

2.3.3 The secession of Kosovo from the perspective of the right to self-determination.

At this stage in the research, it is necessary to provide evidence on the topic of self-determination and answer the question of whether Kosovo's secession can be justified based on this right. As stated in the preceding chapter, this principle is frequently used to justify independence movements, and it was also used to justify the 2008 secession of Kosovo.

The legal implications of the Kosovo Declaration of independence have been and continue to be contentious. Indeed, the question of whether Kosovo is a State or not remains unresolved, and the international community is sharply divided on the matter[880]. Indeed, it is a matter of fact that a considerable number of nations, estimated to be around 90, including but not limited to the United States, the United Kingdom, and a significant majority of European nations, have acknowledged the existence and legitimacy of Kosovo as a separate entity[881]. However, it is important to note that there exist other nations, most notably Serbia, Russia, China, and Spain, who have explicitly expressed their intention to abstain from recognizing Kosovo as an independent state[882]. The central focus of the status debate lies not in the determination of Kosovo's statehood, but rather in the examination of its legitimacy in asserting independence[883].

The self-determination right is a contentious issue, with debate regarding who may exercise the right and what doing so involves[884]. The year 1945 witnessed the inaugural enshrinement of the principle of self-determination within the United Nations Charter[885]. The provisions contained within Articles 1(2) and 55 of this legal instrument pertain to the imperative to 'develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples'[886]. However, according to Duursma, during the period of the Charter's drafting, a consensus regarding the existence of an established entitlement to self-determination was notably absent[887].

Notwithstanding the fact that it was incorporated into a legally enforceable instrument,

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[880] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 930.
[881] 'Kosovo Thanks You', < https://www.kosovothanksyou.com/> , accessed 21 September 2023.
[882] 'Which Countries recognize Kosovo's statehood?', < https://www.aljazeera.com/news/2023/2/17/mapping-the-countries-that-recognise-kosovo-as-a-state-2>, accessed 21 September 2023.
[883] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 935.
[884] Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (1st edn, Cambridge University Press 1995), 110.
[885] Helen Quane, 'The United Nations and the Evolving Right to Self- Determination' (1998) 47 (3) International and Comparative Law Quarterly 537, 542.
[886] United Nations General Assembly, 'Charter of the United Nations' 1945.
[887] Jorri Duursma, *Fragmentation and the International Relations of Micro-States. Self-determination and Statehood* (1st edn, Cambridge University Press 1996), 17.

the inclusion thereof served as a fundamental basis for its subsequent evolution[888]. Such an evolution was possible thanks to instruments such as the Resolution 1514 of the General Assembly[889], the Resolution 2625[890] and Article 1 of the International Covenant on Civil and Political Rights (ICCPR) of 1966[891]. This last instrument defined self-determination as a human right available to 'all peoples'[892]. However, the legal scope of the privilege remains uncertain[893].

At this point of the research, it is necessary to make an examination of the capacity of the Kosovo Albanians to engage in the exercise of the aforementioned right, thereby ascertaining their entitlement to employ it as a valid legal basis for their pursuit of independence. Indeed, a debate about who are the recipients of the ICCPR provision arose in the doctrine, with certain scholars affirming that the phrase 'all peoples' solely encompasses entities possessing full sovereignty, non-self-governing regions, and individuals subjected to foreign or belligerent occupation[894], while contrary perspectives are espoused by others who contend that the term 'peoples' may also encompass subordinate factions existing within sovereign nations[895].

Here, it may be underlined the inclusion of the phrase 'all peoples' inside the ICCPR serves to fortify its universal scope, extending beyond the confines of the colonial environment, and making it accessible to all peoples[896].

Also, it is crucial to acknowledge that an opposition to secession of a State shall not preclude subgroups within a State from exercising their entitlement to self-determination through means that fall short of complete independence, like the establishment of autonomous systems, self-governance frameworks, or active participation in the governing processes[897].

Furthermore, the availability of the right to self-determination to subgroups is supported by the Declaration on the Rights of Indigenous Peoples of 2007 by General Assembly[898] and

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[888] *Ibidem.*
[889] This is also known as the Declaration on Granting Independence to Colonial Peoples. See UNGA, Res. 1514 (14 December 1960).
[890] This is also known as the Declaration on Friendly Relations. See UNGA, Res. 2625 (24 October 1970).
[891] International Covenant on Civil and Political Rights (19 December 1966, entered into force 23 March 1976) 999 UN 171.
[892] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 930.
[893] *Ibidem.*
[894] See Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (1st edn, Cambridge University Press 1995), 121 and Helen Quane, 'The United Nations and the Evolving Right to Self- Determination' (1998) 47 (3) International and Comparative Law Quarterly 537, 543.
[895] See David Raic, *Statehood and the Law of Self-Determination* (1st edn, Martinus Nijhoff Publishers, 2002), Christian Tomuschat, *The Modern Law of Self-Determination* (2nd edn, Springer 1993) and Gerry Simpson, 'The Diffusion of Sovereignty: Self- Determination in the Post-Colonial Age' (1996), 32 Stanford Journal of International Law 255.
[896] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 929.
[897] *Ibidem.*
[898] UNGA, Res. 61/295 (13 September 2007).

also by judicial opinion[899].

However, since there is not an only position on the definition of 'a people', it may be difficult to determine precisely which collectives possess the prerogative to invoke the right of self-determination[900]. According to the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination, Aureliu Cristencu, the identification of 'a people' necessitates the consideration of three recurring elements: 'a social entity with its own distinct identity and characteristics, a relationship with a territory, and an entity distinct from an ethnic, linguistic, or religious minority'[901]. At this point, it may be investigated whether the Kosovo Albanians satisfy the said criteria and are thus endowed with the capacity to invoke the principle of self-determination.

About whether Kosovo Albanians are a social entity with a clear identity or not, it can be identified that characteristics such as the culture and the language distinguish Kosovo Albanians from most Serbians, as scant affiliations linking the aforementioned communities exist[902]. Furthermore, it is properly acknowledged that the assemblage of Kosovo Albanians clearly perceives itself to possess a collective identity[903], as is manifestly discernible through the diligent endeavours undertaken to safeguard group attributes within the confines of Kosovo[904]. Upon careful examination and consideration of the enumerated factors, it is plausible to deduce that the Albanian population residing in the region of Kosovo possesses the characteristics and attributes necessary to be deemed a distinct social entity[905].

Regarding the characteristic of having a relationship with a territory, it was already mentioned that Albanians have lived in Kosovo for over the course of no less than two centuries[906] and it can be said that the Albanians of Kosovo maintain a substantively strong and resilient connection with the aforementioned geographical region[907].

Regarding the requirement of being a distinct entity from ethnic, linguistic, or religious

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[899] In the Reference re Quebec decision, it was affirmed that the notion of 'a people' is manifestly limited to a subset of the populace within an established state and that a narrow construal of self-determination, one that encompasses the entirety of a nation's population, would undermine the remedial objective of said right. See Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 937 and Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.

[900] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 940.

[901] *Ibidem.*

[902] *Ibidem.*

[903] Hust Hannum, 'Rethinking Self-Determination' (1993) 34 Vanderbilt Journal of Transnational Law 1, 35.

[904] *Ibidem.*

[905] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 940.

[906] Noel Malcolm, *Kosovo. A short history* (1st edn, New York University Press 1999), 217.

[907] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 941.

minorities, such a rigorous distinction between 'a people' and a 'minority' may be unnecessary[908]. Indeed, it is to be inferred that these concepts are not inherently incompatible, but rather possess the potential for concurrent application[909]. Kosovo Albanians may be defined as both a 'people' and a 'minority' and this should not have serious implications.

At this juncture, apprehensions have been expressed regarding the potential justifiability of unilateral secession vis-à-vis the entitlement to self-determination. The principle of self-determination was invoked during the process of decolonization, premised upon the underlying assumption of attaining autonomy[910]. Nevertheless, it is evident that the pursuit of self-determination does not exclusively entail the pursuit of independence as the sole course of action.

Notwithstanding the contemporary milieu, an inquiry arises as to the extent individuals desiring to assert their entitlement to self-determination may fully explore all available alternatives, including the pursuit of independence[911]. The question of whether self-determination encompasses the right to secede assumes paramount significance, particularly in the context of Kosovo. It is evident that no legal foundation exists to categorically preclude the possibility of secession for the population residing within sovereign governments[912]. The realm of international law remains bereft of a definitive response regarding the permissibility of secession, albeit pertinent international legal instruments do affirm the right of 'peoples' to announce autonomy. There is no clear answer in international law about whether or not secession is permissible, but the relevant international legal documents do state that 'peoples' have the right to declare independence[913].

However, the right to self-determination is qualified in the articles that form its basis, pointing out that it should not be used to justify acts that violate the territorial integrity of the countries[914]. The aforementioned qualification necessitates due consideration when engaging in the interpretation of the principle at hand and posits that the concept of self-determination ought to be applied in conjunction with the preservation of the territorial integrity of sovereign states. Henceforth, one must acknowledge the arduous nature of upholding the

[908] *Ibidem.*
[909] *Ibidem.*
[910] Helen Quane, 'The United Nations and the Evolving Right to Self- Determination' (1998) 47 (3) International and Comparative Law Quarterly 537, 547.
[911] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 943.
[912] *Ibidem.*
[913] Article 1 of the ICCPR places no limitations on the ability of peoples to determine their political status. Additionally, Principle VII of the Helsinki Final Act states that 'all peoples always have the right, in full freedom, when and as they wish, to determine their internal and external political status'.
[914] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 943.

proposition that self-determination inherently encompasses the unequivocal prerogative of secession[915].

The aforementioned stance aligns with prevailing state practice, as it is widely observed that states tend to refrain from endorsing unilateral secessions that contravene the territorial integrity of sovereign states[916]. This is shown also by the fact that there is, in the doctrine, a distinction between 'internal' and 'external' self-determination, with more importance given to the self-determination happening inside the state borders[917]. Henceforth, it could be posited that the entitlement of the Kosovo Albanians is confined solely to the realm of internal self-determination[918].

At this time, it appears judicious to direct the attention towards the judicial pronouncements pertaining to the subject, which are useful to ascertain the existence of a legal norm, although incapable of engendering international law[919].

The International Court of Justice has stated in its Advisory Opinion on Kosovo that the unilateral declaration of independence by Kosovo did not violate international law, as international law does not contain any 'prohibition on declarations of independence'[920]. However, it also affirmed that 'issues relating to the extent of the right to self-determination and the existence of any right to 'remedial secession' are beyond the scope of the question posed by the General Assembly'[921], thereby avoiding to answer questions regarding the right to secession justified by the that to self-determination. Still, the Court made a few points about the subject of self-determination that were nonetheless important throughout the Opinion[922]. Remedial self-determination's legal standing remains unclear, as already indicated, although there are some signs that it may soon become a standard of customary international law[923]. The idea of remedial self-determination has a long history and is presently seeing a comeback in popularity[924]. Recently, the idea may have been mentioned in the General Assembly's Declaration on Friendly Relations[925]. Judges Cançado Trindade and Yusuf both used this

[915] *Ibidem.*
[916] Tom Sparks, *Self-determination in the international legal system. Whose Claim, to What Right?* (1st edn, Hart Publishing 2023), 174.
[917] *Ibidem.*
[918] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 940.
[919] It is identified by Article 38(1)(d) of the Statute of the International Court of Justice (ICJ), that reads: 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.
[920] ICJ, Advisory Opinion 64/881 (26 July 2010).
[921] *Ibidem.*
[922] Tom Sparks, *Self-determination in the international legal system. Whose Claim, to What Right?* (1st edn, Hart Publishing 2023), 179.
[923] *Ibidem.*
[924] *Ibidem,* 180.
[925] *Ibidem.*

Declaration as the foundation for remedial self-determination in their individual conclusions[926], even though it is unclear whether this equates to an acknowledgment of remedial self-determination[927]. However, academics and a number of states have also interpreted it in this way[928].

In recent years, two notable cases—Katangese Peoples' Congress v. Zaire and the Reference Re: Secession of Quebec—have also raised the issue of remedial secession[929]. The Commission in Katanga appears to have acknowledged the presence of the norm[930], while the Court in Quebec seems to specifically decline to pronounce on the legal status of remedial self-determination[931].

The Friendly Relations Declaration's legal standing was confirmed by the ICJ[932], but when it came to considering remedial secession, neither the Declaration nor the decisions in Quebec or Katanga were mentioned[933].

Even if they were simply incidental, the Court's remarks cast doubt on the existence of a remedial secession right under customary law[934]. This result probably does not, at least not formally, modify the legal framework surrounding remedial self-determination, but it does alter the way the argument is put forth[935]. The Court has effectively stated that there is no uniform *opinio iuris*, despite its protestations that it was not considering the matter, making it more difficult to maintain the position that a norm of remedial secession was developing or had developed after the Declaration[936].

The works of the ICJ also included the hearing of arguments previously expressed in Security Council's resolutions[937] in which it was affirmed the existence of a general prohibition

[926]Separate Opinion of Judge Cançado Trindade in ICJ, Advisory Opinion 64/881 (26 July 2010) and Separate Opinion of Judge Yusuf in ICJ, Advisory Opinion 64/881 (26 July 2010).
[927] Tom Sparks, *Self-determination in the international legal system. Whose Claim, to What Right?* (1st edn, Hart Publishing 2023), 180.
[928] Among the States, there are Estonia, Germany, Poland and Switzerland. For the authors, it is possible to mention Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1st edn, Cambridge University Press 1995), 108–19; Jorri Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (1st edn, Cambridge University Press 1996), 25 and Milena Sterio, *The Right to Self-Determination under International Law: 'Selfistans,' Secession, and the Rule of the Great Powers* (1st edn, Routledge 2013), 12–13.
[929] Tom Sparks, *Self-determination in the international legal system. Whose Claim, to What Right?* (1st edn, Hart Publishing 2023), 180.
[930] See Katangese Peoples' Congress v Zaire, African Commission on Human and Peoples' Rights, Communication no 75/92 (1995).
[931] See Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217
[932] Tom Sparks, *Self-determination in the international legal system. Whose Claim, to What Right?* (1st edn, Hart Publishing 2023), 181.
[933] *Ibidem.*
[934] *Ibidem.*
[935] *Ibidem.*
[936] *Ibidem.*
[937] One of these was the resolution 216 on Southern Rhodesia of 12 November 1965.

on declarations of independence[938]. In this context, the Court affirmed that this prohibition was justified by the Security Council in the presence of a connection of the independence declaration to another illegal act or situation[939]. Particularly, the Court here referred to an 'egregious' violation of a general international law norm[940]. At this point, doubts on what an 'egregious' violation is started to develop, together with questions on whether there is a connection between the 'egregious violations' and the norms of *ius cogens* later mentioned in the Advisory Opinion[941]. To clarify these doubts, an analysis of text was made and it can be found how the interpretation of the official text in English gives a different result of the interpretation of the French version of the same text[942]. The official version in English shows that the declaration of independence would be considered unlawful if it is 'connected with'[943] an 'egregious violation[]'[944] of a 'general international law'[945] principle, 'in particular those of a peremptory character'[946]. Which norms will be used here needs to be made clear[947]. First off, it is clear from the language that 'norms of general international law' encompass a wider range of standards than *ius cogens* norms[948]. Any violation of a norm of general international law that is 'egregious' would be acceptable[949]. Indeed, it is possible that there are no restrictions on the kind of norms that can be violated in this situation; any standard could make a declaration tied to it illegal if its violation is sufficiently 'egregious'[950]. As already mentioned, the decisions the ICJ are published in several languages, but the official and authorative version is the one published in English. However, the French version of the text may be useful to analyse the question. The French version may be read as the Court intended, in its wording, to refer only to norms of *ius cogens* and this would mean that the wording limits unilateral declarations of independence far more narrowly than the English text suggests[951].

The English text reflects a focus on the degree and severity of the transgression rather than the status of the standard and *ius cogens* violations appear to be treated the same way as

[938] Tom Sparks, *Self-determination in the international legal system. Whose Claim, to What Right?* (1st edn, Hart Publishing 2023), 176.
[939] ICJ, Advisory Opinion 64/881 (26 July 2010).
[940] Tom Sparks, *Self-determination in the international legal system. Whose Claim, to What Right?* (1st edn, Hart Publishing 2023), 176.
[941] *Ibidem.*
[942] *Ibidem.*
[943] ICJ, Advisory Opinion 64/881 (26 July 2010).
[944] *Ibidem.*
[945] *Ibidem.*
[946] *Ibidem.*
[947] Tom Sparks, *Self-determination in the international legal system. Whose Claim, to What Right?* (1st edn, Hart Publishing 2023), 177.
[948] *Ibidem.*
[949] *Ibidem.*
[950] *Ibidem.*
[951] *Ibidem.*

any other breach of a general rule of international law: only 'egregious' violations are taken into account[952]. This cannot have been the Court's intended message: from a moral or political standpoint, it may be concurred that certain *ius cogens* breaches result in more serious consequences than others and that all violations of *ius cogens* norms are, by definition, serious and equally illegal[953]. However, if the English version were to be taken literally, it would imply that only a few, more serious infractions of *ius cogens* principles would render a declaration of independence illegal[954]. According to the French version, it can be interpreted the Court as saying that a declaration will be deemed illegal if it is linked to 'egregious violations of norms of general international law'[955] and, indeed, that 'violations of *ius cogens* norms' and 'egregious violations of international law' fall under the same category[956]. Given the interpretation suggested by the English text, it could be said that a declaration of independence that is sufficiently 'related' to a violation of any international law norm may be rendered unlawful by that link if the violation reaches a certain (indeterminate) severity level[957]. It does not matter the 'strenght' of the norm[958]. It appears likely that, in accordance with the English text, there are very few instances in which a party attempting to secede would be allowed to use coercive measures without having their declaration of independence revoked[959]. Contrarily, under the French text's formulation, the seceding group's actions are more precisely and narrowly constrained: until a *ius cogens* norm is violated, international law will not have any bearing on the legality or otherwise of the act of declaring independence[960]. Regardless of the Court's intentions, both readings of the opinion's wording can be validly maintained[961].

After conducting a thorough analysis, it becomes apparent that the contemporary exercise of self-determination requires an internal expression that aligns with the tenets of international law[962]. It is crucial to recognize that customary international law does not grant a definitive right to pursue remedial secession[963]. However, even if such a right does not exist in international law, it seems that the Advisory Opinion given by the ICJ about Kosovo defends the idea that it is a practice tolerated in international law. It might be affirmed that the right to

[952] *Ibidem*.
[953] *Ibidem*.
[954] *Ibidem*.
[955] ICJ, Advisory Opinion 64/881 (26 July 2010).
[956] Tom Sparks, *Self-determination in the international legal system. Whose Claim, to What Right?* (1st edn, Hart Publishing 2023), 178.
[957] *Ibidem.*
[958] *Ibidem.*
[959] *Ibidem*, 179.
[960] *Ibidem.*
[961] *Ibidem.*
[962] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 942.
[963] *Ibidem.*

self-determination by Kosovo as a means to rationalize its unilateral separation from Serbia in the year 2008 is untenable[964], as a positive right to remedial secession does not exist, but it should be remembered that this action was defended as not opposite to international law by the ICJ.

Indeed, notwithstanding the impossibility to justify Kosovo's assertion of independence upon the principle of self-determination, it is imperative to recognize that the illegality of the action as a whole was not recognized by the International Court of Justice[965]. Indeed, as acknowledged by the Supreme Court of Canada in the matter of Reference Re Quebec Secession: 'International Law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation'[966] and the behaviour adopted by the majority of the international community, in addition to the Advisory Opinion 64/881, seem to confirm this thesis[967].

[964] *Ibidem.*
[965] *Ibidem.*
[966] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[967] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 942.

Chapter 3.

An analysis of Brexit as an example of secession.

3.1 An overview of the Brexit case in the historical evolution of the European Union.

Brexit, which represents the word used to describe the exit of the United Kingdom[968] from the European Union[969], is an event that did not have any precedents in the history of EU. Of course, Brexit was triggered by the referendum held in 2016, but it is a phenomenon that has deep historical roots and that developed until recently, when the process of 'divorce' was completed. In order to understand whether Brexit can be defined as an example of secession, after having analysed cases of secession in and outside Europe, it is now required to make an analysis of the historical evolution of the European Union in general, with a particular attention given to the elements that are part of the process known as Brexit.

The notion of a unified European continent, devoid of numerous perpetually warring states, was already espoused during the 19th century[970]. However, it is important to note that the prospect of transitioning from theoretical projects to tangible execution only materialized towards the conclusion of the Second World War[971]. In this particular context, the devastation and manifold detriments engendered by the conflict served as a persuasive impetus for the politicians of that era, leading them to conclude that the best way to avert the recurrence of such occurrences was the pursuit of European integration[972]. Here, it is imperative to emphasize that the initial impetus for European integration exclusively pertained to the western regions of Europe, while the eastern part of the continent witnessed the emergence of alternative consolidation modes, deeply connected with the Soviet Union[973]. Indeed, it was not until the collapse of the Berlin Wall and the subsequent dissolution of the Soviet Union in 1989 and 1991, that these nations began to embrace Western modes of integration[974].

The process of occidental integration within the European context commenced initially within the realm of military affairs, marked by the establishment of the Western European Union (WEU) in 1948 and the North Atlantic Treaty Organization (NATO) in 1949[975]. The

[968] From this point forward referred to as UK.
[969] From this point forward referred to as EU.
[970] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 2.
[971] *Ibidem.*
[972] *Ibidem.*
[973] Among these, the Council for Mutual Economic Assistance (Comecon) and the organisation of the Warsaw Pact. See René Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna* (2nd edn, Harper and Row 1973), 611.
[974] René Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna* (2nd edn, Harper and Row 1973), 615.
[975] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 3.

aforementioned integration also manifested itself within the economic domain, wherein the establishment of the Organization for European Economic Cooperation (OEEC) in 1948 ensued, with the primary objective of apportioning and disbursing the financial assistance provided through the Marshall Plan to the nations situated in Western Europe[976]. Subsequently, a confluence of political, cultural, and social collaboration ensued, manifesting in the formation of the Council of Europe on 5th of May 1949, led by ten sovereign Western European nations, most notably the United Kingdom[977].

Within the present framework, it is imperative to acknowledge that the intergovernmental cooperation, as observed, has facilitated the Western European States in attaining significant outcomes within a limited temporal span[978]. These outcomes, of paramount importance, span across the domains of economics, military affairs, and political-cultural spheres. Notwithstanding, it is imperative to acknowledge that the system in question had some limits, primarily attributable to the presence of a unanimity principle governing the decision-making process[979]. The imperative to surmount the aforementioned and other constraints prompted certain European states to embark upon the exploration of pioneering modes of collaboration, such as the 'Community method'[980]. This method is distinguished by the ascendancy of collective entities, the primacy of majority rule, the delegation of authority to promulgate obligatory measures, the establishment of a framework for judicious oversight of legitimacy, and the inclusion of mechanisms for democratic engagement through representative institutions[981]. The method in question was formally inaugurated on 9 May 1950, henceforth recognized as "Europe Day," when the French prime minister of that era, Robert Schuman, delivered what is now commonly referred to as the Schuman declaration, which holds significance due to its inclusion of the proposition to combine the coal and steel production of France and Germany[982].

From this proposal, six European States[983] established, with the Treaty of Paris of 18 April 1951, the European Coal and Steel Community (ECSC)[984]. The present community represents the foundational framework upon which the prospective European Union is predicated. Very soon, in light of the progresses achieved by the ECSC, the Member States

[976] *Ibidem*, 4.
[977] *Ibidem*, 5.
[978] *Ibidem*, 7.
[979] René Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna* (2nd edn, Harper and Row 1973), 623.
[980] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 7.
[981] *Ibidem.*
[982] *Ibidem*, 9.
[983] Belgium, Federal Republic of Germany, France, Italy, Luxembourg, Netherlands.
[984] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 9.

expeditiously commenced deliberations regarding the prospective establishment of an additional Community. The European Defence Community (EDC) was established by means of a Treaty signed in Paris on the 27th of May 1952, but it failed to come into effect due to France's refusal to ratify the said Treaty[985]. Subsequent to the aforementioned failure, a state of stagnation ensued, wherein the resumption of the European integration endeavour was solely realized through the convening of the Conference of Messina in June of 1955[986]. From this project, it is duly noted that two treaties, namely the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (EAEC or Euratom), were formally executed in the city of Rome in 1957[987]. At this juncture, three distinct Communities have established a significant nexus with a majority of European nations.

Later, with the signing of the Treaty of Maastricht on 7th February 1992, the main community, the EEC, was officially named European Community[988]. As a result, it ensued that the aforementioned treaty underwent a transformation, assuming the nomenclature of the Treaty establishing the European Community (TCE), thereby acquiring the status of the official instrument establishing the European Union[989].

However, only subsequent to 2009, it is pertinent to note that the Community experience in the European context reached its culmination, thereby paving the way for the emergence of the European Union. This significant development was realized upon the enforcement of the Lisbon Treaty[990]. The Treaty of Lisbon effectively introduced amendments to the pre-existing foundational treaties of the European Union, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)[991]. Indeed, these foundational treaties were initially established by the Treaty of Maastricht in 1992 and the Treaty of Rome in 1957, respectively[992].

As already mentioned, it is imperative to acknowledge that the nations which initially assumed the roles of principal actors in the process of European integration were six, namely Germany, France, Italy, the Netherlands, Belgium, and Luxembourg[993]. However, in the

[985] *Ibidem*, 10.
[986] *Ibidem*, 12.
[987] René Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna* (2nd edn, Harper and Row 1973), 643.
[988] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 12.
[989] *Ibidem.*
[990] *Ibidem*, 13.
[991] *Ibidem.*
[992] *Ibidem.*
[993] René Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna* (2nd edn, Harper and Row 1973), 627.

following years many States joined the integration process. Indeed, the first addition to the six founding members was made in 1973 with the enlargement to Denmark, Ireland and United Kingdom. Later, in 1981 Greece was added, in 1986 Portugal and Spain, in 1995 Austria, Finland and Sweden and in 2004 Estonia, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Czech Republic, Hungary and Cyprus[994]. Finally, it is worth noting that in 2007 Bulgaria and Romania and subsequently, in 2013, Hungary attained the status of the most recent entrants into the European Union[995].

At its peak, the European Union comprised a total of 28 constituent entities. However, in 2020, the United Kingdom withdrew from the European Union, thereby producing a reduction in the numerical count of member states within the European Union for the first instance in history[996].

In this context, it may be mentioned that the history of European Union is also an history of succeeding referendums. The referendum is an instrument of direct democracy which normally support instruments of representative democracy[997]. The referendum is used in European Union and, particularly, it is possible to make a differentiation within the types of referendums that have been implemented in the European context[998]. Particularly, around 60 referendums were held on European matters[999].

The initial category of referendum pertains to the membership aspect, encompassing the potentiality of either an accession or a withdrawal referendum[1000]. The candidate states duly partake in the aforementioned action subsequent to a conventionally protracted negotiation procedure. It is significant to observe that the absence of a membership referendum was a prevailing characteristic among the six founding members of the European Union[1001]. Notwithstanding, it is to be noted that said instrument has been utilized by a total of 16 out of the 22 states that have submitted their applications to become an EU Member State[1002]. The initiation of the accession referendum materialized concomitantly with the inaugural phase of

[994] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 14.
[995] *Ibidem.*
[996] *Ibidem.*
[997] Roberto Bin and Giovanni Pitruzzella, *Diritto Pubblico* (16th edn, G. Giappichelli Editore 2018),62.
[998] Fernando Mendez and Mario Mendez, 'Referendums on EU Matters, the Policy Department for Citizens' Rights and Constitutional Affairs' (2017) European Parliament's Committee on Constitutional Affairs, 19 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU(2017)571402_EN.pdf> accessed 21 September 2023.
[999] *Ibidem.*
[1000] *Ibidem.*
[1001] Roberto Baratta, *Lezioni di Diritto dell'Unione Europea* (3rd edn, Luiss University Press 2019), 32.
[1002] Fernando Mendez and Mario Mendez, 'Referendums on EU Matters, the Policy Department for Citizens' Rights and Constitutional Affairs' (2017) European Parliament's Committee on Constitutional Affairs, 19 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU(2017)571402_EN.pdf> accessed 21 September 2023.

enlargement, wherein 3 out of the 4 states aspiring to become members of the organization sought the endorsement of the population in favour of their accession[1003]. The United Kingdom was the anomaly, albeit it obtained the necessary popular consent for the continuation of its membership a mere two years subsequent to its initial entry[1004]. Among the quartet of candidate states under scrutiny, it is noteworthy to observe that solely Norway, to date, has exhibited a proclivity towards renouncing the prospect of accession[1005]. This inclination was most recently demonstrated through a referendum conducted in the year 1994, wherein the people of Norway once again voiced their opposition to membership[1006]. It can be contended that, save for a limited number of noteworthy instances, the utilization of an accession referendum has emerged as the prevailing customary practice for conferring legitimacy upon membership[1007]. The matter pertaining to the withdrawal from the European Community/European Union constitutes the focal point of the secondary category of referendum within this collective[1008]. This particular form of referendum may solely be conducted by an EU/EC Member State or a territorial entity part of a Member State of the EU[1009]. Throughout the annals of the European Union/European Community, a total of three referendums pertaining to withdrawal have been conducted, with one of them being conducted within a territory part of a member state[1010]. The first withdrawal referendum transpired in 1975, wherein the United Kingdom undertook a referendum to ascertain the will of its people regarding the perpetuation of its membership within the European Union subsequent to a series of renegotiations[1011]. This first vote on departure was conducted during a period of uncertainty regarding the lawful permissibility of a Member State's secession from the organization[1012]. The constituent part of a Member State, Greenland, which had unequivocally rejected the prospect of EU membership through a national referendum on admission in 1972, subsequently undertook the second referendum pertaining the departure from the European Union[1013]. In the late 1970s, the Kingdom of Denmark bestowed upon Greenland a certain degree of self-governance and, subsequently,

[1003] *Ibidem*
[1004] *Ibidem*
[1005] Roberto Baratta, *Lezioni di Diritto dell'Unione Europea* (3rd edn, Luiss University Press 2019), 32.
[1006] Roberto Baratta, *Lezioni di Diritto dell'Unione Europea* (3rd edn, Luiss University Press 2019), 32.
[1007] Fernando Mendez and Mario Mendez, 'Referendums on EU Matters, the Policy Department for Citizens' Rights and Constitutional Affairs' (2017) European Parliament's Committee on Constitutional Affairs, 20 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU(2017)571402_EN.pdf> accessed 21 September 2023.
[1008] *Ibidem.*
[1009] *Ibidem.*
[1010] *Ibidem.*
[1011] *Ibidem,* 21.
[1012] Phoebus Athanassiou and Stéphanie Laulhé Shaelou, 'EU Accession from Within? An Introduction' (2014) 33(1) Yearbook of European Law 335, 335-6.
[1013] Roberto Baratta, *Lezioni di Diritto dell'Unione Europea* (3rd edn, Luiss University Press 2019), 34.

in 1982, the autonomous region of Greenland conducted a plebiscite, wherein a narrow majority expressed their preference for secession[1014]. The subsequent affirmation of the aforementioned decision by the Greenland parliament engendered a course of action wherein Denmark engaged in negotiations pertaining to the territory's withdrawal, culminating in the year 1985[1015]. In conclusion, the United Kingdom's 2016 referendum pertaining to withdrawal stands as the third instance of this kind, the first (and only) subsequent to the incorporation of an explicit withdrawal provision within the Lisbon Treaty, specifically Article 50 TEU[1016]. At this point, it may be believed that the ongoing determination of the future geographic boundaries of the European Union is anticipated to be significantly influenced by the occurrence of membership referendums, whether they pertain to the accession or withdrawal of Member States[1017].

The treaty revision referendum is the second type of referendum used in the EU[1018]. These are referendums that Member States hold before ratifying a change to the EU treaties. Because a treaty revision must be ratified 'by all the Member States in accordance with their respective constitutional requirements'[1019],for it to become effective, these referendums present complications[1020]. Indeed, a referendum may be required as a condition for treaty amendment if some domestic criteria require it. Such referendums have resulted from each of the six major treaty modifications, as well as the attempted revision through the Constitutional Treaty[1021]. Only six states, though, have actually held them. Due to the fact that the Constitutional Treaty was the only modification to have been explicitly defined in strong constitutional language, three of the states to have had a treaty revision referendum (Luxembourg, the Netherlands, and Spain) did so just on that occasion[1022]. However, in a variety of Member States, attempts to compel such referendums through constitutional challenges, the parliamentary process, and bottom-up mechanisms have been frequent and growing[1023]. There is no reason to believe that this will not result in more victories

[1014] *Ibidem.*
[1015] *Ibidem.*
[1016] Fernando Mendez and Mario Mendez, 'Referendums on EU Matters, the Policy Department for Citizens' Rights and Constitutional Affairs' (2017) European Parliament's Committee on Constitutional Affairs, 22 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU(2017)571402_EN.pdf> accessed 21 September 2023.
[1017] *Ibidem.*
[1018] *Ibidem*, 22.
[1019] Article 48 TEU.
[1020] Fernando Mendez and Mario Mendez, 'Referendums on EU Matters, the Policy Department for Citizens' Rights and Constitutional Affairs' (2017) European Parliament's Committee on Constitutional Affairs, 22 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU(2017)571402_EN.pdf> accessed 21 September 2023.
[1021] *Ibidem*, 23.
[1022] *Ibidem.*
[1023] *Ibidem.*

for those who favour a popular vote[1024].

The policy referendum is the third category of referendum within the EU[1025]. The policy referendums are focused on a particular area of policy, including monetary policy, fiscal policy, or the foreign policy of the EU[1026]. In the end, this is a rather ambiguous category that is best described by clarifying what it is not: an EU referendum that is held by an EU Member State but is neither a membership referendum nor a treaty revision referendum[1027]. To distinguish policy referendums conducted by EU Member States from those of the fourth type, it is required that the referendum is held in a Member State.

The third-country referendum is the final variety of referendum[1028]. These are referendums held by non-EU nations on the issue of EU integration. For the purposes of this referendum typology, a third nation is one that neither belongs to the EU nor has candidate status, but which is nevertheless eligible to vote on EU membership[1029]. One of the most recent instances is the 2013 referendum on San Marino's accession negotiations with the EU, which was void due to a lack of quorum. The majority of third-country EU referendums are connected to treaties (or the extension of them) made with the EU[1030]. Notably, Switzerland, a nation with a long history of direct democracy, is responsible for 75% of third-country referendums[1031]. More generally, only nations bordering the EU have staged referendums in other countries to date[1032].

Now that the salient events of the European integration process have been outlined, it is possible to investigate the relationship between UK and this process and, generally speaking, between UK and the entity now called EU. This relationship has always been complex[1033]. Indeed, it can be found that the UK has always had a desire to distinguish from the European continent, also thanks to the insularity of its territory[1034]. The growing interest in the relationship

[1024] *Ibidem.*
[1025] *Ibidem*, 24.
[1026] *Ibidem.*
[1027] *Ibidem*, 25.
[1028] *Ibidem*, 26.
[1029] *Ibidem.*
[1030] *Ibidem.*
[1031] Uwe Serdült, 'Referendums in Switzerland' in Matt Qvortrup (ed), *Referendums around the world* (1st edn, Palgrave Macmillan 2014), 65.
[1032] Fernando Mendez and Mario Mendez, 'Referendums on EU Matters, the Policy Department for Citizens' Rights and Constitutional Affairs' (2017) European Parliament's Committee on Constitutional Affairs, 26 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU(2017)571402_EN.pdf> accessed 21 September 2023.
[1033] Richard T. Ashcroft and Mark Bevir, 'Brexit and the myth of British national identity' in Mark Bevir and Matt Beech (eds), *Interpreting Brexit. Reimagining Political Traditions* (Palgrave Macmillan 2022), 3.
[1034] Claudio Martinelli, 'L'Isola e il Continente: un matrimonio d'interesse e un divorzio complicato. Dai discorsi di Churchill alle sentenze Brexit' in Claudio Martinelli (ed), *Il referendum Brexit e le sue ricadute costituzionali* (Maggioli 2017), 9-10.

with continental Europe came when Winston Churchill, who had a pro-European mindset, became Prime Minister, especially after the end of World War II[1035]. Indeed, there was the desire in England, as in the rest of the world, to prevent the atrocities of war from repeating and Churchill believed that a united Europe could be the only instrument to prevent it[1036]. With regard to the matter of European integration, Winston Churchill exhibited a fundamentally equivocal stance[1037]. He assumed a pivotal position in the establishment of the Council of Europe and the subsequent endorsement of the European Convention on Human Rights[1038]. However, it is noteworthy that the United Kingdom's involvement in this undertaking was perceived by him as that of a promoter, rather than as that of a direct participant, with the primary objective being the preservation of UK's autonomy[1039]. The United Kingdom shall perpetually maintain a multifaceted association with the process of European integration. As an illustrative example, the intricate relationship resulted in the nation's decision to abstain from the act of ratifying the Treaty of Rome in the year 1957, with a period of hostility directed towards the European Coal and Steel Community[1040]. However, a notable shift in circumstances occurred during the initial years of the 1960s, when the Labour Government considered having stronger ties with its European counterparts[1041]. The accession process of the United Kingdom to the European Economic Community was complex. The French President Charles De Gaulle vehemently opposed the prospective accession of the United Kingdom to the European alliance, initially expressed in 1961 and reiterated in 1967[1042]. Indeed, only after the end of De Gaulle's presidency the UK acceded to the European Economic Community, in 1973[1043]. The English political elite, however, exhibited a lack of unanimity in its endorsement of this particular course of action[1044]. Indeed, it was deemed necessary to conduct a referendum regarding UK's continued membership within the EEC in 1975[1045]. The plebiscite conducted yielded an overwhelmingly triumphant outcome in favour of the remain option, with a multitude of

[1035] Jamie Gaskarth and Nicola Langdon, 'The dilemma of Brexit: hard choices in the narrow context of British foreign policy traditions' in Mark Bevir and Matt Beech (eds), *Interpreting Brexit. Reimagining Political Traditions* (Palgrave Macmillan 2022), 62.
[1036] *Ibidem.*
[1037] *Ibidem.*
[1038] Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection* (2nd edn, Oxford University Press 2019), 205.
[1039] Claudio Martinelli, 'L'Isola e il Continente: un matrimonio d'interesse e un divorzio complicato. Dai discorsi di Churchill alle sentenze Brexit' in Claudio Martinelli (ed), *Il referendum Brexit e le sue ricadute costituzionali* (Maggioli 2017), 13.
[1040] Giovanni Sabbatucci and Vittorio Vidotto, *Storia contemporanea. Il Novecento* (3rd edn, Laterza 2019), 175.
[1041] *Ibidem.*
[1042] Swati Dhingra and Thomas Sampson, 'Expecting Brexit' (2022) 14 Annual Review of Economics 495, 497.
[1043] *Ibidem.*
[1044] *Ibidem.*
[1045] David R. Troitino, Tanel Krikmae and Archil Chochia, *Brexit: History, Reasoning and Perspectives* (1st edn, Springer 2018), 270.

eminent personalities, notably Margaret Thatcher, lending their support to the preservation of the existing state of affairs[1046]. Thatcher's endorsement of the European Union, nonetheless, was not bereft of conditions[1047]. In fact, Margaret Thatcher believed in the project of creating a European Community, but this had to be a purely economic partnership according to her, being contrary to the idea of diminishing the national sovereignty of Member States and to create a real union[1048]. In fact, during her government, for example, she opposed to the creation of an Economic and Monetary Union (EMU)[1049].

The approaches of these UK's leaders show what is believed by some to be the general approach of UK to the European Community project[1050], one characterised by being ambiguous. In fact, while being Member of EEC before and EU later, the UK, for example, never adopted the single currency, had an ambiguous approach to the Schengen Zone and was exempted from the regulations established within the Community framework concerning the principles governing police and judicial collaboration in matters of criminal nature[1051].

Notwithstanding the aforementioned and other concessions, it is noteworthy that Euroscepticism has persevered with a substantial constituency and, in fact, has garnered additional adherents in the years[1052]. The political entity commonly referred to as UKIP, an abbreviation for the United Kingdom Independence Party, was established in the year 1993, with a clear and unambiguous objective of effectuating the disassociation of the United Kingdom from the European Union[1053]. Particularly, the UKIP achieved an extraordinary level of electoral triumph during the 2014 European elections, amassing the highest number of votes among all political parties within the United Kingdom[1054]. Consequently, the inquiry as to the desirability of maintaining membership within the European Union has ascended to the apex of the political agenda in anticipation of the forthcoming 2015 general elections, with the leader of the Conservative Party, David Cameron, embarked upon a campaign premised upon the notion of renegotiating the conditions governing Britain's continued affiliation with the EU, thereby culminating in an accord that shall be subjected to the scrutiny of the people via a

[1046] *Ibidem.*
[1047] Richard T. Ashcroft and Mark Bevir, 'Brexit and the myth of British national identity' in Mark Bevir and Matt Beech (eds), *Interpreting Brexit. Reimagining Political Traditions* (Palgrave Macmillan 2022), 9.
[1048] Annette Bongardt, Leila S. Talani and Francisco Torres, *The Politics and Economics of Brexit* (1st edn, Edward Elgar Publishing 2020), 90.
[1049] Swati Dhingra and Thomas Sampson, 'Expecting Brexit' (2022) 14 Annual Review of Economics 495, 498.
[1050] See, for example, David R. Troitino, Tanel Krikmae and Archil Chochia, *Brexit: History, Reasoning and Perspectives* (1st edn, Springer 2018).
[1051] Rudolf Adam, *Brexit: causes and consequences* (1st edn, Springer 2020), 10.
[1052] *Ibidem*, 30.
[1053] Robert Ford and Matthew Goodwin, 'Understanding UKIP: Identity, Social Change and the Left Behind' (2014) 85(3) The Political Quarterly 277, 283.
[1054] Federico Savastano, *Uscire Dall'Unione europea: Brexit e il diritto di recedere dai Trattati* (1st edn, Giappichelli 2019), 34.

referendum[1055]. Cameron wanted to overhaul the EU and change the Lisbon Treaty[1056]. In the event that this proved to be unachievable, he urged to renegotiate the EU status of his nation. He outlined four British objectives for renegotiations in a letter he sent to Donald Tusk, the president of the European Council, on 10 November 2015[1057]. The protection of the Single Market was the first demand, along with the recognition that the EU is home to various currencies on an equal footing and adequate protection for Member States that do not adopt the euro against actions by the Eurozone that might adversely affect these members' interests[1058]. The second demand was for increased competition and freer trade. Thirdly, the phrase 'ever closer union of the peoples of Europe' was rejected in this letter, and national parliaments' rights as the exclusive representatives of national sovereignty strengthened[1059]. Lastly, Cameron called for a national immigration control[1060]. The agreement with the European Union was formally concluded in February 2016, while the referendum pertaining to said agreement was conducted on the 23rd of June of the same year[1061]. Renegotiations happened in Brussels on 18 and 19 of February. The conclusion of the thirty-hour negotiations was revealed just before midnight on the nineteenth. Cameron was able to secure five concessions: a guarantee that Eurozone decisions would never jeopardize the interests of members outside the Eurozone and that the Eurozone could not impose obligations on external members; a commitment to increased competitiveness, subsidiarity, and proportionality; a reinterpretation of Article 1 of the TEU regarding the ever-closer union of the peoples of Europe as a non-binding declaration of intent, freedom of movement remained, but with some national emergency reservations, social benefits for migrants were reduced and the fact that national parliaments, collectively representing 55% of the entire EU population, can force the EU to reconsider a previous decision[1062]. After the negotiations finished, Cameron declared: 'I believe we are stronger, safer and better off inside a reformed EU, and that is why I will be campaigning with all my heart and soul to persuade the British people to remain'[1063].

However, when the referendum took place in June, the British electorate, by a narrow margin of merely 2%, expressed their collective will to withdraw from the European Union, as

[1055] Rudolf Adam, *Brexit: causes and consequences* (1st edn, Springer 2020), 75.
[1056] *Ibidem*, 78.
[1057] *Ibidem.*
[1058] *Ibidem*, 80.
[1059] *Ibidem.*
[1060] *Ibidem.*
[1061] *Ibidem*, 75.
[1062] *Ibidem*, 84.
[1063] Tim Shipman, *All Out War: The Full Story of How Brexit Sank Britain's Political Class* (1st edn, William Collins 2016), 142.

the "leave" option won[1064]. The government felt politically obligated to act on the result of the referendum, even though it served only as a consultative measure. Cameron, a conspicuous proponent of the "remain" stance, tendered his resignation as Prime Minister on 11th of July 2016 and was subsequently succeeded by Theresa May, a representative of the Conservative party who espoused a pro-Brexit position[1065]. Consequently, the executive branch has initiated the process of withdrawal; however, the phenomenon of Brexit has engendered an abundance of legal apprehensions[1066]. Indeed, a few years before to the referendum on Brexit, it is worth noting that a cohort of British constitutional scholars had undertaken a meticulous examination of the legal mechanism that would be employed to effectuate the withdrawal from the European Union[1067].

As already mentioned, article 50 of TUE, which was introduced in 2009 and went unused until Brexit, presides over the process of withdrawal from the European Union[1068]. Notwithstanding, it has been contended that the possibility of effectuating a unilateral withdrawal remained extant[1069]. The aforementioned viewpoint has not been duly deliberated upon by either the British government or the parliament, and this omission is not solely attributable to legal rationales[1070]. Rather, political and economic factors, intricately linked to the imperative of upholding relations with Union Member States, have consistently assumed primacy in this regard[1071]. Since Article 50 TEU has to be used, questions over its implementation have also arisen.

Particularly, article 50 TUE affirms in the first paragraph that 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'[1072]. In the specific case, UK is an example of a constitutional system that does not possess a written constitution, and, for this reason, problems arose with regard to the requirements necessary to withdraw from the EU[1073]. Indeed, the main questions were related to whether the Government or the Parliament had the authority to make the request to withdraw from the Union and to the

[1064] Rudolf Adam, *Brexit: causes and consequences* (1st edn, Springer 2020), 77.
[1065] *Ibidem.*
[1066] Jamie Gaskarth and Nicola Langdon, 'The dilemma of Brexit: hard choices in the narrow context of British foreign policy traditions' in Mark Bevir and Matt Beech (eds), *Interpreting Brexit. Reimagining Political Traditions* (Palgrave Macmillan 2022), 58.
[1067] Paul Craig, 'The United Kingdom, the European Union, and Sovereignty' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law* (1st edn, Oxford University Press 2013), 165.
[1068] See the Treaty on European Union.
[1069] Jamie Gaskarth and Nicola Langdon, 'The dilemma of Brexit: hard choices in the narrow context of British foreign policy traditions' in Mark Bevir and Matt Beech (eds), *Interpreting Brexit. Reimagining Political Traditions* (Palgrave Macmillan 2022), 60.
[1070] *Ibidem.*
[1071] *Ibidem.*
[1072] Treaty on European Union.
[1073] Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) Modern Law Review 1090, 1093.

involvement of the newly formed parliaments following the devolution (the ones of Scotland, Wales and North Ireland)[1074]. The British Courts addressed the issues, and, about the first mentioned issue, the debate arose from the fact that the Government had the intention to start the withdrawal procedure without even consulting the Parliament, on the basis of the royal prerogatives[1075]. On the matter, the High Court of London expressed with the sentence of 3 November 2016[1076], also known as the 'Miller case'. In this context, the Court affirmed that, to begin the process outlined in Article 50 TEU, Parliament's consent was required[1077]. To support this stance, the Court reaffirmed that it is a corollary of the principle of parliamentary sovereignty that the government cannot take away citizens' rights without the approval of Parliament[1078]. The Court also ruled against the claim that Parliament gave the Government the authority to withdraw from the Treaties by voting to join the EEC under the European Communities Act 1972[1079]. Indeed, according to the High Court's reasoning, legislation must be passed by Parliament.

As a result of this decision, Prime Minister May has chosen to file an immediate appeal to the Supreme Court[1080]. On 24 January 2017, the Court confirmed the High Court's findings that Parliament has the authority to approve the triggering of Article 50 TEU, even if the approach used by the Supreme Court was different from the one of the High Court of London[1081].

For what regards the inclusion of the newly formed parliaments in taking the decision of withdrawal, it was affirmed that the assemblies do not have a role in the approval of Brexit[1082].

At this point, Parliament passed the European Union (Notification of Withdrawal) Bill on 1 February 2017[1083]. In it, the prospect of a withdrawal notification from the EU by the Prime Minister was acknowledged and, on the basis of this Bill, Prime Minister May formally triggered Article 50 TEU by announcing the United Kingdom's intention to withdraw from the

[1074] Roberto Baratta, *Lezioni di Diritto dell'Unione Europea* (3rd edn, Luiss University Press 2019), 15.
[1075] Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) Modern Law Review 1090, 1097.
[1076] Case UKSC 5, *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768.
[1077] *Ibidem.*
[1078] *Ibidem.*
[1079] *Ibidem.*
[1080] Sionaidh Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79(6) Modern Law Review 1090, 1098.
[1081] Claudio Martinelli, 'L'Isola e il Continente: un matrimonio d'interesse e un divorzio complicato. Dai discorsi di Churchill alle sentenze Brexit' in Claudio Martinelli (ed), *Il referendum Brexit e le sue ricadute costituzionali* (Maggioli 2017), 54.
[1082] Justin Orlando Frosini, 'Una doppia secessione? Il futuro del Regno Unito dopo la Brexit' in Claudio Martinelli (ed), *Il referendum Brexit e le sue ricadute costituzionali* (Maggioli 2017), 283.
[1083] *Ibidem.*

European Union in a letter dated March 29, 2017[1084].

Article 50.3 of the TEU went into effect upon activation of the withdrawal procedure. The article affirms that 'the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period'[1085]. This means that, while an agreement on the conditions of withdrawal is expected, the Member State, if an agreement on the conditions of withdrawal is not reached within two years of the formal activation of the procedure, may withdraw unilaterally even in the absence of the same, and that unilateral withdrawal can be avoided, with the consent of both parties, through an extension of the negotiation period of two years[1086]. During the Brexit talks, this potential was used often. In fact, on November 25, 2018, a first agreement had already been reached[1087]. However, while the Government of Prime Minister May had originally planned to leave the European Union on 29 March 2019, parliamentary opposition forced her to ask for a longer delay[1088]. Disagreements within the administration over the deal ultimately led to the resignation of the Head of Government on 24 May 2019 and Boris Johnson, the incoming leader of the Conservative Party, became the new British Prime Minister on 23 July 2019[1089]. However, it was not until after the national elections of 12 December 2019 that the Tories gained a significant majority and until that moment the negotiations have continued and new offers for agreements have been made[1090].

In a remarkable turn of events, Prime Minister Johnson secured the approval and subsequent integration of the Withdrawal Agreement into the legal framework of the United Kingdom[1091]. This achievement was realized through the enactment of the European Union (Withdrawal Agreement) Bill, which, in its own right, attained the status of law on 23 January 2020[1092]. The legislative enactment known as the European Union (Withdrawal Agreement) Act 2020 has amended the 2018 Act by introducing UK ratification of the Withdrawal

[1084] Nigel Walker, 'Brexit timeline: events leading to the UK's exit from the European Union' (2021) 7960 Briefing paper 3, 5.
[1085] Treaty on European Union.
[1086] *Ibidem.*
[1087] Nigel Walker, 'Brexit timeline: events leading to the UK's exit from the European Union' (2021) 7960 Briefing paper 3, 7.
[1088] *Ibidem.*
[1089] *Ibidem.*
[1090] *Ibidem.*
[1091] Mark I. Vail, 'Political community and the new parochialism: Brexit and the reimagination of British liberalism and conservatism' in Mark Bevir and Matt Beech (eds), *Interpreting Brexit. Reimagining Political Traditions* (Palgrave Macmillan 2022), 31.
[1092] *Ibidem.*

Agreement and giving effect to the transitional period[1093].

On the European front, the European Parliament approved the withdrawal agreement on 29 January 2020 and the Council signed it the next day[1094]. On 1 February 2020, the Withdrawal Agreement entered into force[1095]. The aforementioned agreement signified the ultimate departure of the United Kingdom from the European Union[1096]. It served to establish regulations pertaining the withdrawal process, with particular emphasis placed on addressing the most intricate matters at hand[1097]. These matters notably encompassed the Irish borders and the rights afforded to European citizens residing within the United Kingdom, as well as the reciprocal rights granted to British citizens residing within the Union[1098]. In its capacity as a withdrawal agreement, it conspicuously refrained from delving into the prospective relations between the involved parties, thereby deferring the determination thereof to a subsequent agreement yet to be reached[1099]. In order to facilitate the delineation of novel relationships, the Withdrawal Agreement thus stipulated the inclusion of a transitional period, commencing upon the Agreement's enforcement and concluding at the end of 2020[1100].

At this point, the events that have occurred with Brexit may be analysed with regards to secession, in order to understand whether Brexit can be defined as a form of secession or not.

3.2 Withdrawal from the EU in the case of Brexit as a form of secession.

After having analysed the historical evolution of the British wish to secede and having seen that this was a phenomenon that developed together with the advancement of the European integration process, a process that has as fundamental step the foundation of the European Union as it is known nowadays, it is possible to investigate whether the withdrawal of the United Kingdom from the EU can be considered as a form of secession.

It might be stressed here how the British withdrawal from the EU seemed a remote possibility until very recently and how the results of the 2016 referendum shocked both the UK and the European Union in general. However, this event happened and many questions regarding the withdrawal of a Member State from the EU were posed and different points of view developed. Brexit, in particular, made the comparison between situations of difficult membership even more compelling: that of a territory seeking to exit a State of which it is part

[1093] *Ibidem.*
[1094] Roberto Baratta, *Lezioni di Diritto dell'Unione Europea* (3rd edn, Luiss University Press 2019), 19.
[1095] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019) The Official Journal of the European Union C 384 I.
[1096] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 15.
[1097] *Ibidem.*
[1098] *Ibidem.*
[1099] *Ibidem.*
[1100] *Ibidem.*

and that of a Member State seeking to exit the EU[1101].

As already mentioned, secession usually entails the separation of a territory from a State and the creation of a new, independent, one. Indeed, it may be mentioned that Brexit is surely not a classic example of secession, but it also has some characteristics proper of the phenomenon[1102]. In fact, there are certain similarities between the United Kingdom's choice to leave the EU and the most well-known and typical cases of secession.

In opposition to a breach, the act of withdrawing from an international agreement is frequently deemed lawful[1103]. Pursuant to the provisions set forth in Article 54 of the Vienna Convention on the Law of Treaties, it is established that a sovereign state retains the prerogative to terminate its obligations under a treaty, subject to the express consent of all participating parties or in strict conformity with the relevant regulations governing such withdrawal[1104]. With regard to this matter, the stipulation found within Article 50 TEU, which grants a Member State the prerogative 'to withdraw from the Union in accordance with its own constitutional requirements'[1105] may be perceived as a *lex specialis* that pertains to the overarching principle of customary international law[1106]. Actually, Helfer has persuasively demonstrated that provisions allowing withdrawal from international agreements and denunciation are not at all rare[1107].

Having said that, the EU is not a simple international organisation, but it is also a 'community of unlimited duration, having its own institutions, its own personality, its own legal capacity [and] real powers stemming from a limitation of sovereignty or transfer of powers from the [Member] States'[1108]. It is an entity *sui generis.*

However, not all authors agree on the idea that European Union is an entity *sui generis.* Among such authors, Robert Schütze affirms that, to comprehend the distinctive characteristics of European law, which cannot be solely attributed to the experiences of individual states or international organizations, European legal scholars have introduced the concept of 'supranationalism'[1109], a new word, 'and proudly announced the European Union to be *sui*

[1101] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Mamber State and withdrawal from the European Union* (Cambridge University Press 2017), 1.
[1102] Eleni Frantziou, 'Was Brexit a Form of Secession?' (2022) 13 Global Policy 69, 69.
[1103] Nikos Skoutaris 'On Brexit and secession(s)' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds), *Between democracy and law: the amorality of secession* (Routledge 2020), 195.
[1104] Vienna Convention on the Law of the Treaties, 23 May 1969, 1155 UNTS 331.
[1105] Article 50 TEU.
[1106] Nikos Skoutaris 'On Brexit and secession(s)' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds), *Between democracy and law: the amorality of secession* (Routledge 2020), 195.
[1107] Laurence Helfer, 'Exiting treaties' (2005) 91 Virginia Law Review 1579, 1584.
[1108] Case 6/64, *Costa v Enel* [1964] European Court reports 585.
[1109] Robert Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (1st edn, Oxford University Press 2009), 3.

generis'[1110]. According to Schütze, 'the *sui generis* idea is not a theory. It is an anti-theory, as it refuses to search for commonalities; yet, theory must search for what is generic (…) however, this conceptualization simply can no longer explain the social and legal reality inside Europe'[1111]. After taking these factors into account, Schütze makes the decision to employ the adjective 'federal' in order to characterize the European experience[1112]. Indeed, according to Schütze, the European Union is a federal union built on the principles of shared sovereignty and the necessity to maintain variety 'within unity'[1113].

Brexit is a process that has many similarities to secession in that it signalled the UK's exit from that community of law and the abrupt end to the symbiotic relationship between its legal system and the EU one[1114]. At the same time, Scotland and Northern Ireland, the two UK constituent states that voted to remain, may decide to secede as a result of Brexit[1115].

In some ways, even though the EU is 'under international law, precluded by its very nature from being considered a State'[1116] secessionist processes around the world are reminiscent of Brexit and the Article 50 TEU procedure[1117]. While the European Union (Withdrawal) Act 2018 ensures an easy transition between the old and new legal system, much like 'continuance clauses' in separatist experiences sometimes do, Article 50 TEU is actually akin to constitutional clauses that control secession[1118].

Additionally, discussions regarding the use of referendums, a complicated tool that has always been regarded as ambiguous by a major portion of the doctrine, were sparked by the Brexit events as well as other separatist incidents, such as the one in Catalonia[1119]. The thoughts focused mostly on some of the referendum-specific elements. The notion of majority comes first[1120]. It is thought to be an 'artificial construction'[1121]. Indeed, according to Steinbeis, 'a majority is not something you will find in nature. It is an artifact of law. You need legal rules to determine who counts, and in which way. You need legal safeguards of liberty, equality and diversity of opinion. You also need legal rules to determine what the majority will be able to

[1110] *Ibidem.*
[1111] *Ibidem.*
[1112] *Ibidem*, 4.
[1113] *Ibidem.*
[1114] Nikos Skoutaris 'On Brexit and secession(s)' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds), *Between democracy and law: the amorality of secession* (Routledge 2020), 195.
[1115] *Ibidem*, 196.
[1116] Opinion 2/13 of 2014 on the EU's Accession to the ECHR.
[1117] Nikos Skoutaris 'On Brexit and secession(s)' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds), *Between democracy and law: the amorality of secession* (Routledge 2020), 198.
[1118] *Ibidem.*
[1119] Giuseppe Martinico, 'Considerazioni comparatistiche sul referendum alla luce del caso britannico' (2017) 2 Diritto Pubblico 429, 429.
[1120] *Ibidem*, 436.
[1121] *Ibidem.*

do, which necessarily implies that the majority gets told what she is not allowed to do. In short, you need constitutional law'[1122]. This concept is connected to the idea that the majority depends on the standards that grant the right to vote, norms that appear to be neutral and objective but are actually instances of discrimination[1123]. The Canadian Clarity Act demonstrates this quality. This instrument was issued following the Supreme Court's ruling in Reference re Quebec, where it is said that 'clear' majority is the expression of 'a qualitative evaluation'[1124]. Steinbeis' assertion is supported precisely by the requirement for a non-purely quantitative examination[1125]. This provision demonstrates that the idea of majority vote is not something that is easily understood in a straightforward and unbiased manner[1126]. At this point, it may be asked whether the Brexit referendum outcome can actually be deemed democratic[1127]. It is challenging to draw conclusions in any sense, but given the factors already emphasized by the doctrine, it is difficult to regard 51.9% to be a 'clear majority' in accordance with the Clarity Act[1128]. The ban on voting for EU nationals residing in the UK was another thorny issue. Given the potential effects of the United Kingdom's exit on them, the decision to exclude UK residents who have lived abroad for more than 15 years from the vote is also debatable[1129]. It is not by accident that this ruling then led to several legal developments, among which the Shindler decision should be mentioned[1130]. On the other hand, it is vital to recognize the work that the Electoral Commission did as well as the adjustments that were made as they went along[1131]. For instance, the decision to use the verb 'remain' in place of the verb 'stay' (used instead in the 1975 question[1132]) and to avoid a "Yes vs. No" campaign, which resulted in a neutral question[1133]. Finally, the outcome of the vote constituted a significant area of doubt. In conformity with Parliament's constitutional authority, the Brexit referendum was never intended to have any kind of legal standing[1134]. However, the May government's strategy was

[1122] Maximilian Steinbeis, 'Majority is a Legal Concept' (Verfassungsblog, 18 March 2017) < https://verfassungsblog.de/majority-is-a-legal-concept/> accessed 21 September 2023.
[1123] Giuseppe Martinico, 'Considerazioni comparatistiche sul referendum alla luce del caso britannico' (2017) 2 Diritto Pubblico 429, 436.
[1124] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[1125] Giuseppe Martinico, 'Considerazioni comparatistiche sul referendum alla luce del caso britannico' (2017) 2 Diritto Pubblico 429, 436.
[1126] *Ibidem.*
[1127] *Ibidem*, 440.
[1128] *Ibidem*, 441.
[1129] *Ibidem.*
[1130] *Ibidem.*
[1131] *Ibidem*, 442.
[1132] In 1975, the question was: 'Do you think that the United Kingdom should stay in the European Community (the Common Market)?'. See Stephen Wall, *The Official History of Britain and the European Community: From rejection to referendum 1963-1975* (1st edn, Routledge 2013), 581.
[1133] Giuseppe Martinico, 'Considerazioni comparatistiche sul referendum alla luce del caso britannico' (2017) 2 Diritto Pubblico 429, 443.
[1134] *Ibidem.*

clear in that it sought to centralize the issue and justify the potential exclusion of Parliament by citing the democratic principle along with a reference to the royal prerogative, allowing the decision to be made automatically without parliamentary mediation[1135]. The British constitutional equilibrium has been compromised as a result of the real institutional conflict that has resulted from this[1136]. Here, the risks of using the referendum erroneously seem obvious, and its use needs to be restricted in representative democratic contexts with caution because there is always a risk of 'rejection' or the alteration of the balance of the constitutional system of reference[1137]. A characteristic of the English system that was made clear by the Brexit events is illustrated in this context: a tension between popular and parliamentary sovereignty that makes the system troublesome and complex[1138].

Talking about the provisions that were developed to regulate the withdrawal of a State from the EU in general and in the case of Brexit in particular, similarities between these provisions and the ones developed in cases of a territorial portion seceding from a State might be found.

As has been said earlier in this work, secession should not be viewed as a strict constitutional taboo[1139], as a democratic and consensual process of division is permitted by various constitutional provisions[1140]. Consider, for instance, Article 39 of the Ethiopian Constitution, which grants 'the unrestricted right to self-determination up to secession' to 'every nation, nationality, or people in Ethiopia'[1141]. According to Article 4 of its constitution, even Liechtenstein permits the separation of particular municipalities from the union[1142]. Similar to this, the UK's constitutional arrangement permits Northern Ireland to leave the United Kingdom and join a united Ireland if both its citizens and those of the Irish Republic, who vote separately, approve this. Likewise, according to article 50 TEU, a Member State may leave this 'community of unlimited duration'[1143].

Having noted that, there are also distinctions between Article 50 TEU and the secession-enabling constitutional provisions. First, the right stipulated in the EU Treaty is unilateral in

[1135] Albert Dicey, *Introduction to the Study of the Law of the Constitution* (1st edn, St. Martin's Press 1959), 424-5.
[1136] Giuseppe Martinico, 'Considerazioni comparatistiche sul referendum alla luce del caso britannico' (2017) 2 Diritto Pubblico 429, 444.
[1137] *Ibidem*, 462.
[1138] *Ibidem*, 464.
[1139] Susanna Mancini, 'Secession and Self-Determination' in Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012, 482
[1140] *Ibidem.*
[1141] Constitution of Ethiopia.
[1142] Nikos Skoutaris 'On Brexit and secession(s)' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds), *Between democracy and law: the amorality of secession* (Routledge 2020), 200.
[1143] Article 50 TEU.

that it 'is totally independent of the will of the EU [and] the remaining Member States'[1144]. The Canadian Supreme Court, on the other hand, held that 'a referendum unambiguously demonstrating the desire of a clear majority of Quebecers to secede from Canada, would give rise to a reciprocal obligation of all parties of the Confederation to negotiate secession'[1145] in its Reference re Secession of Quebec decision[1146].

Significantly, there is an absolute character as 'the exercise of the right to withdrawal is not subjected to any preliminary verification of conditions nor is it even conditional on the conclusion of the agreement foreseen in the provision'[1147]. According to its own constitutional conditions, a Member State may 'withdraw from the Union'[1148] under Article 50(1) TEU and, if no exit agreement has been reached two years after the Member State has notified the EU of its decision to leave, the withdrawal may occur under Article 50(3) TEU[1149].

The aforementioned statement stands in stark juxtaposition to the prevailing body of constitutional provisions that govern the act of secession[1150]. The said provisions pertain to the establishment of prerequisites concerning the structure and implementation of a plebiscite that may potentially result in secession[1151]. Additionally, they anticipate the inclusion of an *inter partes* accord as a crucial measure to conclude the procedure[1152]. Notwithstanding, it is imperative to acknowledge that the essence of the provisions bear an exceedingly striking resemblance, and such a fact cannot be disregarded.

In the second place, secessions serve as a delineation from the pre-existing constitutional framework and the establishment of a novel legal structure[1153]. Notwithstanding, in pursuit of facilitating a seamless progression from the waning former order to the nascent successor, certain constitutional frameworks elect to incorporate provisions known as 'continuance clauses'[1154]. These clauses serve the purpose of addressing potential legal voids that may arise due to the sudden termination of the preceding legal regime[1155]. In exemplification, it is noteworthy to observe that the constitutional provisions delineated in Article 4(1) of the

[1144] Carlos Closa , 'Changing EU internal borders through democratic means' (2017) 39(5) Journal of European Integration 515, 523.
[1145] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[1146] *Ibidem.*
[1147] Carlos Closa, 'Interpreting article 50: exit, voice and… what about loyalty?' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union* (Cambridge University Press 2017), 195.
[1148] Article 50 TEU.
[1149] *Ibidem.*
[1150] Nikos Skoutaris 'On Brexit and secession(s)' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds), *Between democracy and law: the amorality of secession* (Routledge 2020), 202.
[1151] *Ibidem.*
[1152] *Ibidem.*
[1153] *Ibidem.*
[1154] *Ibidem.*
[1155] *Ibidem.*

Constitution of Jamaica and Article 188(1) of the Constitution of Cyprus have duly established the framework for the perpetuation of colonial laws until such time as they are supplanted by novel legislation enacted by the respective parliaments of the recently emancipated States[1156]. An observation can be made regarding the presence of analogous provisions in the constitutional texts of previously colonies and the European Union (Withdrawal) Act 2018[1157].

The European Union (Withdrawal) Act 2018 was duly granted royal assent on 26 June 2018[1158] and its constitutional import is of utmost significance and should not be underestimated. Section 1 effectuates the repeal of the European Communities Act 1972, a legislative enactment that has been widely recognized as falling within the purview of the esteemed category of 'constitutional statutes' within the legal framework of the United Kingdom[1159]. Significantly, the primary objective of the provision is to safeguard and perpetuate the entirety of European Union legislation within the legal framework of the United Kingdom, even after the occurrence of Brexit, as explicitly stipulated in the Act, in sections 2, 3, and 4[1160].

Later, considering the enduring symbiotic relationship between the two legal orders spanning over four decades, it is imperative to acknowledge that a multitude of EU legal provisions possess direct applicability and effectiveness, which shall cease to be operative within the United Kingdom after the occurrence of Brexit[1161]. The proposition would engender the formation of legal voids in various domains, including but not limited to environmental law, consumer protection, and labour rights[1162]. To circumvent this specific predicament, it was imperative that the United Kingdom's governing body and Westminster would endeavour to reconcile said disparities without unduly burdening the legislative calendar for an extended duration[1163].

Another aspect to mention and that reinforces a thesis that affirms the affiliation of Brexit to the broad category of secession is the potentiality for Brexit to serve as a catalyst for the secession of Scotland and Northern Ireland, both constituent nations of the United Kingdom, which expressed their preference to remain within the European Union[1164]. Regarding the

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[1156] *Ibidem.*
[1157] Sionnaidh Douglas-Scott, 'The 'Great Repeal Bill': constitutional chaos and constitutional crisis?' (2016) UK Constitutional Law Blog https://ukconstitutionallaw.org/2016/10/10/sionaidh-douglas-scott-the-great-repeal-bill-constitutional-chaos-and-constitutional-crisis/ accessed 21 September 2023.
[1158] *Ibidem.*
[1159] *Ibidem.*
[1160] *Ibidem.*
[1161] Nikos Skoutaris 'On Brexit and secession(s)' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds), *Between democracy and law: the amorality of secession* (Routledge 2020), 204.
[1162] *Ibidem.*
[1163] *Ibidem.*
[1164] *Ibidem*, 206.

former, it is important to keep in mind that without Westminster's approval, the Scottish parliament lacks the authority to arrange an independence referendum[1165]. Despite this, Scotland held a separatist referendum in 2014 that ended in a majority of Scottish citizens voting to stay in the UK. The process leading up to this referendum demonstrates that Scotland may separate from the rest of the UK in a democratic and consensual manner[1166]. The First Minister of Scotland, Nicola Sturgeon, stated after the Brexit referendum results of 2016, which saw 62% of the Scottish population vote for the 'remain' option, that she intended to 'take all possible steps and explore all options to give effect to how people in Scotland voted—that is, to secure [their] continuing place in the EU and in the single market in particular'[1167]. Indeed, according to her, Scotland 'faces the prospect of being taken out of the EU against [its] will'[1168]. Simultaneously, it was requested a referendum for the unity of Ireland and consequently for Northern Ireland to stay in the EU as Northern Ireland's 2016 referendum results revealed support for the 'remain' option (55.78% of the population)[1169]. Unsurprisingly, given the political atmosphere, the UK government has not been receptive to approving such referendums holding[1170]. The right of Northern Ireland to democratically secede from the UK is guaranteed by the constitution, but due to the region's troubled past, discussions about significant changes to its constitutional status, the status of its land border with the Republic of Ireland, and its sea boundary with the rest of the UK are bound to be contentious[1171]. This turbulent past sees as main event the Good Friday Agreement, which was signed more than twenty years ago and ended the sectarian violence that had ravaged Northern Ireland since the late 1960s[1172]. Such a conflict had its roots in centuries of religious, political, and social tensions between the mainly Protestant Unionists (who wanted Northern Ireland to remain part of the United Kingdom) and the mainly Catholic Nationalists (who sought a united Ireland independent from British rule)[1173]. Reached on Good Friday, 10 April 1998, the Agreement highlighted that Northern Ireland is an integral part of the UK but established its constitutionally recognized right to secede[1174]. Here, it is important to mention that this Agreement was put to

[1165] *Ibidem.*
[1166] *Ibidem.*
[1167] N Sturgeon's speech. Available at: https://archive.news.stv.tv/politics/1358534-nicola-sturgeon-speech-in-full-after-eu-referendum-result.html, accessed 21 September 2023.
[1168] *Ibidem.*
[1169] Nikos Skoutaris 'On Brexit and secession(s)' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds), *Between democracy and law: the amorality of secession* (Routledge 2020), 214.
[1170] *Ibidem.*
[1171] *Ibidem*, 215.
[1172] *Ibidem.*
[1173] *Ibidem.*
[1174] *Ibidem.*

a referendum in both Northern Ireland and the Republic of Ireland on 22 May 1998[1175]. In this context, an overwhelming majority of voters in both regions supported the agreement, with 71% in Northern Ireland and 94% in the Republic of Ireland voting in favour[1176]. Indeed, it is shown by past examples that secessions influence other cases of secession and there is also the example of States being the result of succeeding secessions, like Kosovo.

Focusing on the characteristics of the Brexit process and the similarities to secession, it is nowadays affirmed by most of the literature that the EU is a *sui generis* entity[1177]. It is evident that positing Brexit as a mere manifestation of Treaty withdrawal lacks logical coherence. Consequently, one may assert that Brexit, by virtue of its nature, can be construed as an occurrence falling within the ambit of secession. From the vantage point articulated, it is conceivable to elucidate the shared attributes between Brexit and the customary act of secession.

In the same way as secessions typically are, the UK's exit from the European Union contained the same themes about self-determination that are at the core of most secessionist movements[1178]. The Brexit phenomenon was also marked by the presence of nationalism and ethnicity-related arguments from the 'leave' camp, which is typical of practically every separatist attempt[1179]. Brexit is an example of a supranational constitutional challenge, and instead of being an internationally significant claim to self-determination, it was based on a political failure to address the national-level feelings of loss and unease that globalization causes[1180]. Brexit also showed that, while Article 50 TEU was used to determine and govern the withdrawal from the Union, decisional secession clauses, which need stronger counter-majoritarian protections, are preferable[1181].

On the other hand, it might also be said that secession has an exceptional character and is a process of unilaterally separating a subnational entity from its parent state according to the traditional public international law terminology[1182]. A strong and close connection between secession and self-determination is currently regarded in the doctrine as a necessary component to comprehend the distinctiveness of secession[1183]. From this perspective, it may also be

[1175] *Ibidem.*
[1176] *Ibidem.*
[1177] See Olivier Costa and Nathalie Brack, *How the EU really works* (2nd edn, Routledge 2019); Jan Klabbers, 'Sui Generis? The European Union as an International Organization' in Dennis Patterson and Anna Södersten (eds.), *A Companion to European Union Law and International Law* (1st edn, Wiley-Blackwell 2016).
[1178] Eleni Frantziou, 'Was Brexit a Form of Secession?' (2022) 13 Global Policy 69, 69.
[1179] *Ibidem.*
[1180] *Ibidem.*
[1181] *Ibidem.*
[1182] *Ibidem*, 70.
[1183] Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (online edn, Oxford Academic 2014).

difficult to affirm a characterization of Brexit as a separatist event since it is troublesome to legitimately discuss self-determination in the Brexit scenario[1184]. Self-determination, however, is not the only factor to consider when studying secession, and Brexit would not be the only instance of secession where the legitimacy of the self-determination component is absent[1185].

Also, the presence of the element of territorial integrity, which is intricately intertwined with the concept of secession, is noticeably lacking in the context of the Brexit situation[1186]. This absence contributes to the perception that these two processes, namely secession and Brexit, are inherently distinct from one another. The concept of territorial integrity, an inherent attribute of a State, is conspicuously lacking within the European Union due to its reliance on the territorial integrity of each constituent Member State, rather than being an inherent characteristic of a fluid and evolving organization[1187]. On the subject, in the legal matter of van Gend en Loos v. Netherlandse Administratie der Berlastingen[1188], the Court of Justice underscored the fundamental proposition that the European Union ought not to be regarded as a sovereign entity akin to a nation-state, but rather as an exceptional and distinct legal framework possessing its own unique attributes[1189]. Notwithstanding, it would be erroneous to perceive the Brexit circumstance as a paradigmatic illustration of secession[1190].

The phenomenon of Brexit, while not conforming strictly to the conventional model of secession, may be regarded as a constituent element of secessionist events when the parameters of the phenomena are expanded.

First, it is imperative to acknowledge that the nature of Brexit, being a decision made during a period of tranquillity and relative economic well-being, distinguishes it significantly from numerous historical occurrences of secession, namely those that ensued subsequent to the dissolution of the Soviet Union or the process of decolonization[1191]. However, while it would be implausible to classify Brexit as either a case of severe oppression of minorities or colonial subjugation, one could hypothetically consider the potential of Brexit to be classified as an international claim to secession[1192]. Specifically, the argument that could be considered is the one according to which the EU failed to adequately accommodate the right to self-

[1184] Eleni Frantziou, 'Was Brexit a Form of Secession?' (2022) 13 Global Policy 69, 70.
[1185] See, for example, the case of Quebec. Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[1186] Eleni Frantziou, 'Was Brexit a Form of Secession?' (2022) 13 Global Policy 69, 70.
[1187] *Ibidem.*
[1188] Case 26/62, *van Gend en Loos v. Netherlandse Administratie der Berlastingen* [1963] 61962CJ0026 Eur Lex 1.
[1189] *Ibidem.*
[1190] Eleni Frantziou, 'Was Brexit a Form of Secession?' (2022) 13 Global Policy 69, 70.
[1191] *Ibidem*, 71.
[1192] *Ibidem.*

determination internally[1193]. Also, undoubtedly, contemporary instances of secession do not exhibit the hallmark of emerging amidst armed conflict or within an environment of limited resources, like Brexit[1194]. The elucidating case of the Reference re Secession of Quebec serves as a valuable guidepost in this respect. In the present matter, the Supreme Court of Canada rendered a decision wherein it determined that the requisite threshold for the occurrence of a secession of this nature had not been satisfied[1195]. The court's rationale was predicated upon the premise that it would be implausible to assert that the inhabitants of Quebec were being deprived of their ability to engage with the government, given that they had frequently occupied significant positions within the federal government[1196]. Furthermore, the court determined that there was no evidence to suggest that Quebecers were being subjected to assaults on their existence or integrity, or any other infringements upon their rights[1197]. In its deliberations, the Court arrived at the determination that the persistent inability to achieve consensus regarding modifications to the Constitution, though a subject of apprehension, does not rise to the level of negating the right to self-determination[1198].

The Canadian line of reasoning can be equally extended to the European Union's association with the United Kingdom[1199]. The Union's establishment is predicated not only on the principles of conferral and subsidiarity, but also on the recognition, as emphasized in the German Constitutional Court's Lisbon judgment, that the EU Treaty framework explicitly requires the observance of national constitutional identity as stipulated in Article 4.2 thereof[1200]. Furthermore, it is important to note that while narratives emphasizing domination or the reclamation of control were prominent in the discourses surrounding Brexit, it is crucial to acknowledge that the United Kingdom, since its accession to the European Union, has actively engaged and collaborated with EU institutions[1201].

It is also worth noting that the United Kingdom's distinctive treatment within the EU surpassed the customary provisions granted to other member states[1202]. This divergence is evident in various aspects, such as the inclusion of social rights in the Maastricht Treaty, the

[1193] It is important to consider that the issue of secession based on internal non-accommodation is a subject of ongoing debate (see Carlos Closa, 'A critique of the theory of democratic secession' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds) 'Between democracy and law: The amorality of secession' (Routledge 2019), 49.
[1194] Eleni Frantziou, 'Was Brexit a Form of Secession?' (2022) 13 Global Policy 69, 71.
[1195] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[1196] *Ibidem.*
[1197] *Ibidem.*
[1198] *Ibidem.*
[1199] Eleni Frantziou, 'Was Brexit a Form of Secession?' (2022) 13 Global Policy 69, 71.
[1200] *Ibidem.*
[1201] *Ibidem.*
[1202] *Ibidem*, 72.

establishment of the euro and Schengen zones, deeper integration in matters of justice and home affairs, and the EU Charter of Fundamental Rights[1203]. Therefore, it is to be understood that although the United Kingdom expressed its dissent towards a concept of 'ever closer Union' predicated upon heightened non-economic collaboration and limited safeguards for social rights, as articulated in Margaret Thatcher's 'Bruges Speech' on the 20 September 1988, such disagreement does not possess the requisite magnitude to constitute a violation of the principle of internal accommodation of self-determination[1204]. The proposition is predicated not solely upon the inherent impracticability of secession from the European Union in accordance with established principles of international law, owing to the constitutional framework of the Union as a non-state entity[1205]. In this regard, it is interesting to keep in mind how the legislative procedure of the European Union has changed over time, going from a system that demanded unanimity among Member States to one that permits qualified majority vote in many policy areas[1206]. This progression is a result of the EU's membership expansion and increased complexity of its decision-making processes[1207]. The Single European Act of 1986, in particular, marked a crucial turning point in the development of the EU's decision-making procedure by introducing the idea of 'qualified majority voting' for several policy areas[1208]. Later, other significant developments in this area were included in the Maastricht Treaty of 1993, the Treaty of Nice of 2001, and the Lisbon Treaty of 2009[1209]. The EU's decision-making procedure has been streamlined and made more effective with a larger number of member states thanks to the progressive shift to qualified majority voting[1210]. However, there are still several sensitive subjects that call for unanimous agreement among the member nations, including taxation, foreign policy, and constitutional questions[1211]. Overall, as the EU has expanded and faced new problems, the legislative process has evolved to meet the requirement for efficiency and flexibility[1212]. It is further premised upon the UK's inability to assert, with justifiable conviction, that its integrity, continued existence, or the fundamental entitlements of its citizenry were disregarded or inadequately addressed[1213].

Upon careful examination, it becomes more evident that the rationale behind the

[1203] *Ibidem.*
[1204] *Ibidem.*
[1205] *Ibidem.*
[1206] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 125.
[1207] *Ibidem.*
[1208] *Ibidem.*
[1209] *Ibidem.*
[1210] *Ibidem*, 126.
[1211] *Ibidem.*
[1212] *Ibidem.*
[1213] Eleni Frantziou, 'Was Brexit a Form of Secession?' (2022) 13 Global Policy 69, 72.

decision to withdraw from the European Union bears resemblances to the act of secession from a sovereign state[1214]. One salient feature that appears to bring the Brexit case into closer proximity with secession is the fact that both Brexit and the prototypical manifestation of secession transpire within the realm of 'troubled membership'[1215]. Also, if we focus on cases of secession happening within member States of the EU, such reconfiguration happens in the EU, like in the case of Brexit[1216].

In the context of a State's departure from the Union, with specific emphasis on customary modes of secession within European Union Member States, it is noteworthy that the former is often a response to the Union, whereas the latter typically proceeds under the assumption of maintaining membership within the EU[1217]. These cases serve as exemplars of events aimed at accommodating the requests that come from territories and/or states part broader 'unions'[1218], employing mechanisms such as derogations within the European Union or devolution in the context of 'multiregional' states like Spain[1219]. Unfortunately, these efforts failed to produce lasting results that successfully satisfied all parties involved[1220] and, consequently, the unsatisfied constituencies find solace in the emergence of the most radical exit option, which gains credibility and even acquires inherent value[1221]. Within the context of the European Union, it is observed that mechanisms pertaining to partial exits have been employed to address and mitigate tensions that arise within the membership[1222]. These mechanisms include voluntary participation, such as enhanced cooperation, as well as derogations and policy exceptions, with as primary purpose to alleviate the tensions and foster a harmonious environment within the Union. At the jurisdictional level, it is noteworthy to observe that various manifestations of devolution, as witnessed in nations like Spain, have experienced a substantial augmentation in the realm of self-governance[1223]. However, it is imperative to acknowledge that certain entities continue to perceive these manifestations as inadequate, thereby pursuing the radical alternative of secession, commonly referred to as

[1214] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 1.
[1215] *Ibidem.*
[1216] Gary Marks and Liesbet Hooghe, 'European Integration from the 1980s: State-Centric v. Multi-level Governance' (1996) 34(3) Journal of Common Market Studies 341, 353.
[1217] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 2.
[1218] In the case of EU, such unions are mainly regional states, but in the EU there are also examples of federations. The term 'union' also refers to the European Union in the case of the UK's wish to secede.
[1219] *Ibidem.*
[1220] *Ibidem.*
[1221] *Ibidem.*
[1222] *Ibidem.*
[1223] *Ibidem.*

independence[1224]. In this context, it may be mentioned that it was widely anticipated during the 1980s and 1990s that the augmented engagement of various regions within the EU[1225] would serve as a limiting factor on the pursuit of independence aspirations[1226].

At this point, It may be recalled that those advocating for secession from the European Union or independence from a specific Member State have both voiced their displeasure with the body or organization, claiming their expectations have not been met[1227]. Consequently, they have expressed a preference for an alternative circumstance, presently undisclosed, that lies beyond the confines of the Union or the state in question, as opposed to the existing state of affairs[1228]. Notably, in both instances, these individuals endeavour to maintain certain aspects, either in part or in their whole, of the pre-existing situation, including but not limited to market accessibility and the legal standing of being a citizen. In the context of secessionist territories, proponents of independence commonly concur in positing that the pursuit of such statehood is only justifiable if accompanied by the preservation of complete European Union membership[1229]. In the matter of withdrawal, the involved parties are confronted with a considerably intricate terrain, as the spectrum of potential future circumstances[1230] is notably extensive, thereby engendering a prevailing state of uncertainty regarding the ultimate resolution[1231].Particularly, in case of a favourable outcome in balancing the incurred expenses and advantages of maintaining or severing ties with the Union, both procedures assume significance as viable substitutes for membership[1232]. Notwithstanding, it may be erroneous to construe these endeavours as solely instrumental computations[1233]. Considering the matter at hand, it can be argued that secession and withdrawal, to a certain degree, signify a deficiency in the rationalist endeavour of establishing a shared political entity based on deliberate decision-making and the will to do so[1234]. Moreover, this deficiency is further exemplified by the rational

[1224] *Ibidem*
[1225] Cristina Fasone, 'Secession and the Ambiguous Place of Regions Under EU Law' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 48.
[1226] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 3.
[1227] *Ibidem.*
[1228] *Ibidem.*
[1229] *Ibidem*, 4.
[1230] Jean Claude Piris, 'Brexit or Britain: is it really colder outside?' (2015) 369 Robert Schuman European Foundation Issue chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://static.mediapart.fr/files/2016/05/25/brexit-etuders.pdf accessed 29 august 2023.
[1231] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 4.
[1232] *Ibidem.*
[1233] *Ibidem.*
[1234] *Ibidem.*

construction of bonds of loyalty, reciprocal regard, and confidence. In the pursuit of independence in the secessionist process in Catalonia and in other cases, it is evident that the identity has assumed a significant role, superseding pragmatic utilitarian and rational considerations[1235].

Notably, the occurrence of Brexit provides validation to those individuals who had previously cautioned about the advent of the post-functionalist stage of European integration[1236]. This stage is characterized by the termination of the permissive consensus surrounding European integration, as well as its subsequent politicization within domestic electoral procedures[1237]. While decisions to withdraw or secede may be influenced by a combination of ontological and instrumental factors, this project primarily focuses on the former, examining the perceived limitations in constructing political projects that can effectively meet the demands and expectations associated with increased interdependence[1238]. The circumstance signifies a circumscribed deficiency in rational-instrumental endeavours, concomitant with the corollary observation that the insufficiency of pre-political constituents within communities appears to endanger their durability and, more recently, their attainment to objectives[1239].

In the cases of a secession within a Member State and of a withdrawal from the EU, both procedures pertain to the European Union; however, it is worth noting that the European Union predominantly assumes a passive role, acting as a bystander[1240]. This neutral stance arises from the confluence of applicable regulations and pragmatic considerations. The parties engaged in secession and withdrawal events assert that the Union should refrain from intervening. From a legal perspective, it is imperative to acknowledge that withdrawal, in its essence, represents an unequivocally unilateral event wherein the European Union assumes no participatory role in the affirmation of said entitlement[1241]. Nevertheless, it is imperative to acknowledge that the European Union maintains a robust and formidable role with regards to the negotiation of the withdrawal settlement[1242]. Regarding the matter of secession, the concept

[1235] Jordi Muñoz and Raül Tormos, 'Economic expectations and support for secession in Catalonia: between causality and rationalization' (2015) 7(2) European Political Science Review 315, 327.
[1236] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 5.
[1237] *Ibidem.*
[1238] *Ibidem.*
[1239] *Ibidem.*
[1240] John Lanchester, 'Brexit Blues' (2016) 38(15) London Review of Books 3, 3.
[1241] *Ibidem.*
[1242] *Ibidem*, 4.

of EU neutrality arises from the absence of explicit provisions within the treaties[1243]. Also, there was a tacit stance that its authorities predominantly upheld during the proceedings concerning, specifically, Catalonia[1244]. The ramifications of decisions pertaining to secession from a Member State or withdrawal from the Union extend beyond the immediate purview of the decision-makers, thereby warranting an inquiry into the appropriateness of endowing the European Union with a more overt role in such matters[1245]. In accordance with the Treaties, it is imperative that the processes adhere to certain inherent conditions, notwithstanding the absence of explicit provisions mandating such requirements. These conditions encompass the utmost regard for the Rule of Law and the fundamental tenets enshrined within the constitution[1246].

At this juncture, it can be highlighted how the process of materializing the act of withdrawal subsequent to the June 2016 referendum in the United Kingdom necessitates a contemplation of an indeterminate and uncharted circumstance, wherein the European Union finds itself inadequately equipped[1247]. In light of the procedural mechanisms outlined in Article 50, the pertinent inquiry arises as to the appropriate stance the European Union ought to adopt vis-à-vis a member state seeking withdrawal[1248]. Another question that arises is also whether this inquiry pertains solely to the realm of law, specifically the rigorous construal of Article 50[1249]. In light of the dearth of unequivocally established principles and guidelines, it is beyond dispute that the outcome shall be determined by the rationale of bargaining and negotiation, thereby indirectly influencing the principles that the European Union must espouse in this particular circumstance[1250].

This analysis has elucidated the intricate interplay between Brexit and secession, thereby illuminating the parallels that exist between Brexit and conventional instances of secession[1251]. The aforementioned resemblances serve to substantiate the proposition positing that Brexit constitutes an instance of secession, albeit not one that adheres strictly to established canonical norms. Brexit cannot of course be mentioned as a secessionist example usually used

[1243] Such provisions are expressed, among others, by Cristina Fasone, 'Secession and the Ambiguous Place of Regions Under EU Law' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017).
[1244] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 6
[1245] *Ibidem.*
[1246] *Ibidem.*
[1247] *Ibidem.*
[1248] *Ibidem.*
[1249] *Ibidem.*
[1250] *Ibidem.*
[1251] Nikos Skoutaris 'On Brexit and secession(s)' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds), *Between democracy and law: the amorality of secession* (Routledge 2020), 211.

to explain the phenomenon but can be considered as an expression of the extremely wide phenomenon of secession.

3.3 Comparing Brexit with other cases of State secession.

At this point of the research, in order to support the thesis that affirms that Brexit is an instance of secession, a comparison between Brexit and the cases previously analysed in the present work may be helpful. Indeed, a comparison between Brexit and the secessionist attempts of Quebec first and Catalonia later will be made. Later, a comparison between two cases of successful secessions, the ones of Brexit and Kosovo, will be completed. Lastly, the distinctive features of Brexit as an example of secession will be exposed.

3.3.1 Differences and similarities with the secessionist attempt of Quebec.

The secessionist attempt of Quebec is an example of secession of primary importance, as it can be seen as an influencing event for other secessionist attempts. Indeed, the Quebec secessionist history, with specifically the *Reference re secession of Quebec* decision, is a model and an element of analysis for better understanding Brexit as a secessionist attempt. These two examples can be compared.

The first difference that can be found between Brexit and the secessionist attempt of Quebec and, in general, between Brexit and any other forms of 'typical' secession, is the fact that the case of Quebec represents the 'standard' example of secessionist attempt[1252]: Quebec is a portion of a State with its own cultural identity that tried to secede from the State of which it is part, Canada. On the other side, Brexit is an unusual example of secession[1253]. However, the experiences of Canada and EU and the secessionist attempt of Quebec and Brexit have elements in common.

Firstly, the 'environments' characterizing the two experiences might be compared. Even if the majority of the literature disagrees, some authors affirm that Canada and European Union have in common the mode of government: that of a federation[1254]. Indeed, the very nature of European Union is a subject of debate: while EU was born as an international organisation with a regional identity, it developed as an entity that is more than this[1255]. It possesses features of a State, of a federation, of a confederation and of an international organisation[1256]. For this reason,

[1252] Errol P. Mendes, 'The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally' in Giacomo Delledonne and Giuseppe Martinico (eds), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan 2019), 9.
[1253] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017).
[1254] See, among others, Joseph H.H. Weiler, 'Federalism Without Constitutionalism: Europe's Sonderweg' in Kalypso Nicolaidis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (1st edn, Oxford University Press 2021).
[1255] Olivier Costa and Nathalie Brack, *How the EU really works* (2nd edn, Routledge 2019).
[1256] *Ibidem.*

nowadays it is mostly defined as an entity *sui generis,* but it should not be forgotten that some believe, especially in the past, that the experience of EU developed as having characteristics similar to those of a federation[1257]. Even though one might disagree on the idea that the EU is a federation (and it is not, at least formally) it cannot be neglected that the *sui generis* entity possesses characteristics proper of a federation, which make the case of Quebec and that of Brexit similar.

First of all, the EU possesses supranational institutions, like the European Commission, the Parliament or the European Court of Justice, which have the authority to propose and implement laws, representing the interests of the Union as a whole[1258]. Similarly, federations have central institutions that hold authority over certain matters[1259]. Moreover, in the case of Canada, it could be affirmed that the absence of local constitutions at the province level makes the power of central authorities even stronger[1260]. Also, both federations and the EU have a shared sovereignty. On these matters, it can be affirmed that both Quebec and UK developed secessionist trends because they did not want to comply to the actions of their respective central authorities and wanted to possess a greater power, reducing or eliminating the shared sovereignty. This is shown by the two secessionist referendums -with negative outcome- that were proposed in Quebec and by the always present tendency of the British governors to oppose a stronger 'politicization' of the EU.

Other characteristics that make the EU and Canada similar in their modes of government are the presence, in the EU, of a single market and customs union, an economic integration that resembles that of federations, the common policies of the EU in various areas which are similar to how federal systems might establish common policies in the federated states and the fact that there is a EU citizenship that is common to all the citizens of the member states, as similarly happens in federation[1261]. Other characteristics are shared between the two, but several elements distinguish the EU from a federal state, first and foremostly the absence, in the EU, of a central government holding significant powers and authority over smaller constituent states or regions, something possessed by federations' central powers[1262].

Focusing on the events that succeeded and the elements proper of the two experiences, differences and similarities can be found.

[1257] *Ibidem.*
[1258] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 63.
[1259] Raffaele Bifulco, 'Federalism' in Roger Mastermann and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019), 312.
[1260] Bruce Hodgins and others, *Federalism in Canada and Australia* (1st edn, Wilfrid Laurier University Press 1978).
[1261] Olivier Costa and Nathalie Brack, *How the EU really works* (2nd edn, Routledge 2019), 34.
[1262] *Ibidem.*

A first element that is present in the secessionist attempt of Quebec and that cannot be found in the British case is the linguistic aspect. Surely, the language played a primary role in the development of secessionist tendencies in Quebec[1263]. In fact, French is the official language of Quebec and, for years, the theme of developing a bilingual environment in the entire Canada and protect this linguistic identity was a subject of debate[1264]. On the other side, this was not an element characterising the Brexit case, as English is still nowadays one of the official and working languages of the EU[1265]. However, cultural reasons for seceding from the EU have been the subject of 'pro-leaving' discourses during the Brexit campaign[1266].

In both cases, secessionist tendencies have always been present, but developed strongly with the passing of time. The difference here is that, while the Quebecer pro-independence movement was most successful between the late '90s and the early 2000s, being nowadays quite weak[1267], the Brexit withdrawal campaign had serious support only recently, as before the idea of UK leaving the EU seemed impossible to believe[1268]. Also, in both cases, attempts to reduce the separatists' spirits were made by conceding elements of independence, with weak results.

Of course, the most evident difference is the fact that, while Quebec is still part of Canada and, indeed, its secessionist attempts failed, the UK succeeded in leaving the EU. However, the Quebec attempt had as a reaction a very famous decision made by the Supreme Court of Canada in 1998 that permits to also make a stronger comparison between the approaches to secession of Canada and European Union.

As already mentioned, while the European Union does not possess a real Constitution, like every State does, it possesses Treaties regulating its nature and functioning[1269]. One of the main Treaties of the EU is the Treaty on European Union that possesses an article regarding the withdrawal of a Member State from the EU[1270]. This is article 50 TEU, which affirms that 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'[1271]. This is an article that resembles the secessionist clauses that can be found in some constitutions[1272]. The Canadian constitution, instead, does not contain, neither directly

[1263] Paola Di Napoli, 'A right to secede? The Canadian Supreme Court's Reference on the Secession of Quebec in a Comparative Constitutional Perspective' (Dissertation, Luiss University 2020), 27.
[1264] *Ibidem,* 18.
[1265] Olivier Costa and Nathalie Brack, *How the EU really works* (2nd edn, Routledge 2019), 51.
[1266] Eleni Frantziou, 'Was Brexit a Form of Secession?' (2022) 13 Global Policy 69, 70.
[1267] Paola Di Napoli, 'A right to secede? The Canadian Supreme Court's Reference on the Secession of Quebec in a Comparative Constitutional Perspective' (Dissertation, Luiss University 2020), 37.
[1268] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Mamber State and withdrawal from the European Union* (Cambridge University Press 2017), 1.
[1269] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 174.
[1270] *Ibidem.*
[1271] Article 50 TEU.
[1272] Nikos Skoutaris 'On Brexit and secession(s)' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds), *Between democracy and law: the amorality of secession* (Routledge 2020), 200.

nor implicitly, any provision about secession. Indeed, the constitution does not refer to the possibility of a territorial separation and it does neither forbid nor allow secession, and this is also one of the reasons why, when Quebec tried to secede from Canada, the Governor in Council of Canada referred to the Supreme Court[1273]. However, to solve the question regarding the possibility of Quebec to legitimately secede, it was asked to the Supreme Court of Canada: 'under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?'[1274]. Here, the answer of the Court is of interest, as Canada's Supreme Court endorsed the possibility to allow a right to secede, making the Canadian order one that decided to be 'fluid' in treating secession[1275]. Indeed, the Court, while stating that there is no right, under Canadian or international law, for a province to unilaterally secede from Canada, also affirmed that the federal government and other provinces would have an obligation to engage in good faith to resolve the possible consequences of a clear majority of Quebecers voting in favour of separation[1276]. This negotiation would aim to achieve a constitutional amendment that reflects the interests of all parties involved. This is a conclusion that shares similarities but also has differences with the solution found within the European Union.

Indeed, the Canadian Supreme Court, while someway allowing secession, like happens in the EU, also emphasized the importance of permitting only a negotiated secession, not a unilateral one[1277]. This is something that is not in common with the Brexit case. Actually, article 50(1) affirms that 'A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union (…)'[1278], affirming the necessity of a negotiation between the parties of the leaving conditions. However, while the process itself involves negotiations and agreements with the EU, the decision to withdraw is unilateral and within the sovereignty of the member state initiating the withdrawal[1279]. Also, another characteristic that differentiates the two processes is that article 50 later affirms, in paragraph 3, that: 'the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement

[1273] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[1274] *Ibidem.*
[1275] *Ibidem.*
[1276] *Ibidem.*
[1277] *Ibidem.*
[1278] Article 50 TEU.
[1279] *Ibidem.*

or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period'[1280]. This means that, while an agreement on the conditions of withdrawal is expected, the Member State, if an agreement on the conditions of withdrawal is not reached within two years of the formal activation of the procedure, may withdraw unilaterally even in the absence of the same, and that unilateral withdrawal can be avoided, with the consent of both parties, through an extension of the negotiation period of two years[1281]. Contrary to the EU, the Canadian approach explicitly affirms how the unilateral secession is not permitted[1282].

Indeed, some elements of the two secessionist cases can be compared and found similar, while others differ completely. However, a comparison like this shows how Brexit does not differ much from a case, that of Quebec, considered by many as the prototypical model for asymmetric and secessionist dynamics[1283].

3.3.2 A comparison with the secessionist trends in Catalonia.

Catalonia is the second case study used in the present work to analyse Brexit as an instance of secession. Catalonia is a fraction of Spain, from which it wanted to separate. A comparison between the secessionist attempt of Catalonia and Brexit will be made in the following lines.

The first, and most evident, difference between the case of Catalonia and Brexit is that Catalonia failed in seceding from Spain[1284]. However, Catalonia is the only example in this work of a secessionist attempt that happened in a State member of the EU, and this makes the two cases even closer. Indeed, a strong difference between the two cases can be found in the fact that, while Brexit aimed at seeing the UK leave the EU to grant full independence, Catalan movements of independence always assumed that secession from Spain could only make sense if Catalonia could retain full EU membership[1285]. This subject was debated in European Union and was affirmed that a territorial portion leaving a Member State and wanting to be part of the EU had to follow the same procedure as any other State seeking for EU membership[1286].

Identity appears to have been crucial in Catalonia's fight for independence[1287]. This is

[1280] *Ibidem.*
[1281] *Ibidem.*
[1282] Case 25506, *Reference re Secession of Quebec* [1998] 2 SCR 217.
[1283] Giacomo Delledonne and Giuseppe Martinico, *The Canadian Contribution to a Comparative Law of Secession* (1st edn, Palgrave Macmillan 2019).
[1284] Francesc Pallares, 'Continuidad y cambio en los partidos politicos en Cataluña (1977- 2010)' in Joan Marcet and Xavier Casals (eds), *Partidos y elecciones en la Cataluña del siglo XXI* (ICPS 2011), 48.
[1285] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 3.
[1286] *Ibidem.*
[1287] Jordi Muñoz and Raül Tormos, 'Economic expectations and support for secession in Catalonia: between causality and rationalization' (2015) 7(2) European Political Science Review 315, 327.

something that the case of Catalonia shares with Brexit, as concerns of sizable portions of the population who felt excluded from society appear to have been a major factor in the 2016 referendum's outcome favouring the "leave" option[1288].

The two cases are also characterized by having both seen a referendum giving a result in favour of secession. However, the referendum held in the UK was legitimate and had a consultative character[1289], while the one of Catalonia was carried out with dubious legal value[1290]. Here, the main difference that can be found is the reaction to such referendums.

Both caused a stir, with results that were not expected, but, while the Brexit referendum was followed by discussions on the steps to follow to achieve the exit of UK from the EU, in the case of Catalonia there was never the intension in Spanish authorities to allow or even negotiate a secession[1291]. This is primarily because Spain's constitution contains a provision that prohibits secession: according to Article 2 of the Constitution, 'the Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible country of all the Spaniards'[1292]. By contrast, the TEU allows the withdrawal of a State from the EU in article 50[1293].

What is also apparent is that, in the case of Brexit, the EU had little influence over the choice to leave of UK, whereas, in the case of Catalonia's secessionist attempt, unilaterality was simply not permitted by law[1294].

The EU is involved in each of these processes, although it generally plays a passive, bystander role[1295]. The participants in the secession procedures for Catalonia and Brexit insist that the Union refrain from interfering[1296]. This neutral stance is the result of the rules that are in place as well as the practical issues at stake[1297]. The right to withdraw in the Brexit case is asserted in a fully unilateral manner, with no involvement from the EU[1298]. The EU does, however, still hold a significant negotiating advantage in the exit agreement[1299]. For the case of Catalonia, EU neutrality refers to the mostly passive stance that its authorities took toward the

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[1288] John Lanchester, 'Brexit Blues' (2016) 38(15) London Review of Books 3, 5.
[1289] Rudolf Adam, *Brexit: causes and consequences* (1st edn, Springer 2020), 77.
[1290] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 233.
[1291] *Ibidem.*
[1292] Spanish Constitution, art 2.
[1293] Treaty on European Union.
[1294] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 4.
[1295] *Ibidem.*
[1296] However, it should be remembered that pro-independence Catalan politicians have eagerly sought the involvement of EU institutions backing their demands vis-à-vis the Spanish central authorities.
[1297] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 4.
[1298] *Ibidem.*
[1299] *Ibidem.*

procedures[1300].

As already mentioned, the Catalan secessionist attempt caused turbulences in Spain and specifically in Catalonia but ended without successful results for the supporters of the secessionist cause[1301]. Indeed, even if the independence of Catalonia was declared (with reserve[1302]) by the leader of the pro-independence movement Puigdemont on 10 October 2016, shortly after, on 8 November, with judgment No. 124/2017, the Constitutional Tribunal declared Law 20/2017, that regarded the transition from autonomous community to State of Catalonia, unconstitutional[1303]. Indeed, no major changes were applied to the Spanish situation and there have been several attempts to obtain the imprisonment of Carles Puigdemont i Casamajó, the main actor of the last events in the Catalan secessionist process, who escaped from Spain. This is something that was not caused by Brexit, as Brexit happened in a lawful manner, even if it caused disorders in and outside the UK[1304].

As the analysis shows, while some aspects of the two separatist situations can be compared and determined to be similar, others are wholly different. The two cases have surely had completely different endings, but some similarities can strengthen the thesis that affirms the affiliation of Brexit to secessionist instances.

3.3.3 Brexit and the Kosovar secession compared.

The secession of Kosovo from Serbia is an extremely peculiar case of secession, like Brexit.

The first peculiarity of the Kosovar secession, an element that is in common with Brexit, is that the secession of Kosovo had a positive outcome[1305]. Indeed, the state of Kosovo exists since 17 February 2008[1306], even if it is not recognized globally[1307]. However, the means used to achieve independence in the two cases are very different. Indeed, Kosovo is the only example, among the cases under study, that did not resort to a popular referendum to achieve secession. Actually, Kosovar independence came after a Unilateral Declaration of

[1300] *Ibidem.*
[1301] Matteo Monti, *Federalismo disintegrativo? Secessione e asimmetria in Italia e Spagna* (1st edn, Giappichelli Editore 2021), 234.
[1302] *Ibidem,* 233.
[1303] *Ibidem,* 234.
[1304] Richard T. Ashcroft and Mark Bevir, 'Brexit and the myth of British national identity' in Mark Bevir and Matt Beech (eds), *Interpreting Brexit. Reimagining Political Traditions* (Palgrave Macmillan 2022), 3.
[1305] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 926.
[1306] *Ibidem.*
[1307] A considerable number of nations, estimated to be around 90, including but not limited to the United States, the United Kingdom, and a significant majority of European nations, have acknowledged the existence and legitimacy of Kosovo as a separate entity. See 'Kosovo Thanks You', < https://www.kosovothanksyou.com/> , accessed 31 August 2023.

Independence announced by the Assembly of Kosovo[1308], while Brexit process was activated by the results of the 2016 popular referendum[1309].

Also, the state of Kosovo can be said to be the result of a continuous secessionist process[1310], a unique historical characteristic of this case in the present work. However, Brexit has been said to possibly be the catalyst event causing a succeeding of secessionist attempts in the United Kingdom[1311].

Furthermore, a last important peculiarity of the Kosovar case, that can somehow be found also in the British secession case, is that the Kosovar independence had very strong international aspects and has also obtained the legitimation by the international community, something that was not obtained by the Quebecoise and the Catalonian instances[1312]. Indeed, even if there were, and still are, different opinions about the real possible outcomes of Brexit and its consequences, the international community has never posed any objection about its legitimacy[1313]. However, it should not be forgotten that the two cases are very different and see two different approaches to secession.

Indeed, while withdrawal from the EU is legitimated by article 50[1314], the Serbian constitution of 2006 is more cautious on the subject. This last document contains a provision about state integrity in article 8, which affirms that 'the territory of the Republic of Serbia is inseparable and indivisible. The border of the Republic of Serbia is inviolable and may be altered in a procedure to amend the Constitution'[1315]. This article seems to allow secession in certain circumstances[1316]. However, here secession is in practice much difficult to happen if the procedure affirmed by the constitution is followed, as amending the constitution is a complex procedure. Actually, it can be affirmed that, even if the Kosovar secession from Serbia happened, its secession is not recognized by Serbia as legal, as the Kosovar secession did not

[1308] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2010) 15(6) The International Journal of Human Rights 926, 927.
[1309] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 4.
[1310] Kosovo was part of Serbia, that was part of Yugoslavia.
[1311] Nikos Skoutaris 'On Brexit and secession(s)' in Carlos Closa, Costanza Margiotta and Giuseppe Martinico (eds), *Between democracy and law: the amorality of secession* (Routledge 2020), 195.
[1312] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2010) 15(6) The International Journal of Human Rights 926, 927.
[1313] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 6.
[1314] Treaty on European Union.
[1315] Constitution of Serbia of 2006.
[1316] The constitution does not mention with precision the circumstances that could allow secession but affirms that it can happen after that a procedure of amendment of the constitution is completed. See Constitution of Serbia of 2006.

happen following an amendment of the Serbian constitution[1317]. This is why it is often said that what really distinguishes the case of Kosovo is the reaction of the international community to the secession of this population. In fact, the secession of Kosovo can be defined as a secession justified by and perpetrated through international law. On the other hand, the secession of UK was regulated and legitimated by European law, considered by some as a particular form of international law, but article 50 itself affirms the role played by the internal constitutional law of the seceding State, that is not ignored[1318]. Surely, an element that the Kosovar separation from Serbia shares with Brexit is that it represents a secession, which is strongly discouraged by conventional international law, that was largely peaceful[1319].

Both cases show elements that are typical of secession, but also extremely peculiar characteristics. The fact that the creation of Kosovo belongs to the category of secessionist instances was never a subject of debate in the literature. Certainly, this absence of debate comes from the fact that Kosovo was in the past part of another State from which it separated, so it can be said to be a 'typical' secessionist case from this point of view. However, this character is only apparent, as the analysis of the case shows several elements that strongly differentiate the Kosovar secession from any other instance of secession. This shows how the category of secession is extremely broad and can contain phenomena that are show very different features.

3.3.4 The distinctive features of Brexit from other cases of secession.

At this point of the research, the distinctive features of Brexit from the other cases of secession under analysis can be stressed.

First and foremostly, Brexit is a unique case of secession because it does not represent the 'typical' instance of secession, where a territorial portion decides to become independent from a State of which it is part. Contrarily, the UK, even before Brexit, has always been an independent State[1320]. What the UK obtained by leaving the European Union is getting back its full sovereignty that it previously decided to partially develop to this *sui generis* entity that is the EU[1321].

Furthermore, Brexit is the only case of secession in this analysis that obtained a successful result following a lawful referendum and it is also the only case here, even if not in general, of a secession that is completely legitimated by the belonging entity's internal law.

[1317] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 928.
[1318] Article 50 TEU affirms: 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'.
[1319] Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 931.
[1320] Luigi Daniele, *Diritto dell'Unione Europea* (8th edn, Giuffré 2022), 32.
[1321] *Ibidem.*

Another characteristic that distinguishes Brexit from the other cases of secession, at least the ones within the Member States of the EU, is that the goal of Brexit was to leave the EU, while a common factor to all the secessionist attempts within the Member States of the EU is for the seceding territories to obtain the EU membership once become independent States[1322].

Also, a trait proper of Brexit is that Brexit did cause tensions in the country, particularly between the political parties, causing the resignation of numerous Prime Ministers in those years[1323], but the legitimacy of Brexit was never debated, neither at the internal nor at the international level[1324]. Like other cases of secession, it was conducted peacefully[1325].

These characteristics that distinguish Brexit from other cases of secession show its uniqueness. In fact, it should be remembered that the events of Brexit are unique not just in the category of secessionist events but also in the history of European Union[1326]. However, elements of similarity with other instances of secession confirm that, while Brexit cannot be considered as the 'typical' example of secession, secession is a broad category that can include several events. For this reason, Brexit can be defined as a 'peculiar' example of secession and secession itself can be outlined as a phenomenon that is developing, including different instances.

[1322] Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 3.
[1323] Rudolf Adam, *Brexit: causes and consequences* (1st edn, Springer 2020), 77.
[1324] *Ibidem.*
[1325] See Carlos Closa, 'Troubled Membership: Secession and Withdrawal' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union'* (Cambridge University Press 2017), 3 and Tamara Jaber, 'A case for Kosovo? Self-determination and secession in the 21st century' (2011) 15(6) The International Journal of Human Rights 926, 931.
[1326] David R. Troitino, Tanel Krikmae and Archil Chochia, *Brexit: History, Reasoning and Perspectives* (1st edn, Springer 2018), XI.

Conclusion.

At the end of this work, it is possible to propose below a series of concluding reflections. First, what seems convenient to highlight is the necessity for the doctrine and the society to stop treating secession as a constitutional taboo[1327], like in the past. Indeed, secession is contemporary reality, being a phenomenon characterising several States and entities around the world, and it must be treated as such. Also, history has shown how treating secession as a taboo and as something never permitted did not help stopping secessionist violence[1328]. Instead, allowing secession in particular cases and treating it as the phenomenon it is, could help normalise situations that would otherwise cause tensions. Indeed, while being aware that secession is a matter that must be treated by each State's public law, it might be desirable for the international community to develop a 'standard' approach to secession, to be introduced in domestic public law systems. This would be believed by some as being an act encouraging separation, but it could instead be a reason for a more peaceful dialogue between the parties interested by differences within a single State that could cause turbulences.

In addition, it comes to the reader's attention the fact that, while each instance of secession is unique, some features are common to most of them. This characteristic seems to endorse the thesis according to which secession is an extremely wide phenomenon, comprehending events that can also be very different but that share some elements. This approach certainly helps affirming that Brexit is a case of secession. Surely, when saying that this is an instance of secession, it is also necessary to specify that the British 'divorce' from European Union is not the 'typical' example of secession. Nevertheless, affirming that this is a peculiar case of secession can resolve a question about the nature of Brexit, a complex phenomenon that is difficult to categorize as a case of 'simple' treaty withdrawal or something else, also because of the extreme unicity of European Union, a reality that shares characteristics with many experiences but that can be defined as a *sui generis* entity.

Surely, treating Brexit as an instance of secession would help stopping the reading of secession as a taboo[1329], as the withdrawal from European Union is permitted without particular conditions to be satisfied by the Member States. The fact that European Union has always implicitly allowed separations of Member States from the Union and that the Treaty on European Union introduced an article that does it explicitly since 2009, but that in more than ten years only the UK (that has, by the way, always had a particular relationship with the EU) activated it, also responds to the perplexity of some about the introduction of a secessionist

[1327] Susanna Mancini, 'Costituzionalismo, federalismo e secessione' (2014) 4 Istituzioni del federalismo 779, 784.
[1328] *Ibidem.*
[1329] *Ibidem.*

clause in constitutions as a trigger for separations. European Union and Brexit could indeed serve as a model for other States of the world in the treatment of secession. This idea is strengthened by a data shown by the three cases under analysis: none of these States' constitutions explicitly allow a smooth secession, but this did not stop their territorial portions to try to secede.

To make a recap and conclude, the work showed that Brexit can be considered a peculiar case of secession, that shares similarities but also has differences with other instances. However, Brexit and the approach of European Union to secession can be a model for the world and the future cases of secession, that are inevitable. Indeed, treating this phenomenon as a taboo[1330] will not help stopping separatist attempts, but could even worsen the already challenging situation.

[1330] *Ibidem.*

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