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Neo-federalism: a new emerging  
paradigm for European federalizing  
processes?

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## Introduction

Individuals, communities and territories seem to be faces of the same coin, always linked by a common normative and sentimental relationship that in recent centuries has been delineated in the form of the nation-state.

The new millennium and globalization, however, thanks to the exponential increase in technological and digital evolution, have led in a short time to a series of social, political and economic changes that have influenced and unbalanced the global dynamics, especially affecting, perhaps, those Western realities that were thought to be more definitive and permanent. The European tradition in particular seems to suffer from the symptoms of a legal and identity fragmentation that is articulated on different levels that are beyond the control of the central state. The old paradigms have the appearance of changing political shape and society is rediscovering old cultural values and new loyalties that put at risk representative democracy and national sovereignty. With the emergence of specific needs, political science is looking for new models of organization that can respond to the exigences expressed by globalized communities. Alongside the usual demands, there is the urge for protection of pluralism and sub-national cultural diversity, for the enhancement of the individual and the social community, the respect for competition and the direct participation of citizens in public life, the protection of their contractual freedom<sup>1</sup>, the response to the great international questions of security and sustainability, and the translation of a political message that avoids conflict and violence of exclusion on the false lines of national borders.

Among the contemporary scholars who have identified the problem, some seek in federal doctrine the answer to the functional reorganization of institutional systems. It is clear, however, that the application of classical theory, which in itself presents a considerable range of differentiation, does not appear to be sufficient to satisfy modern demands. It is therefore necessary to develop a new federal doctrine, adaptable to a large number of different social contexts and that can live

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<sup>1</sup> Lottieri C., "Ordine policentrico e diritti individuali. Considerazioni sulla teoria neofederale di Daniel J. Elazar", in *Il Politico*, no. 66, Rubbettino Editore, 2001, pp. 319-331

with complex and historically solidified realities. This is the attempt of experts such as Daniel Elazar and Robert Schütze, who propose to introduce a neo-federalist theory capable of combining some of the aspects of the federal government with the fluidity and dynamism of the supranational legislative multiplicity, for good peace of state orders and local identity demands, all under strict constitutional control. The study and research are in a diagnostic phase and are in contrast with a growing return to nationalism, centralism and state closure that make the results unpopular. However, it seems to demonstrate that an alternative does exist, and in some respects, it is perhaps already unconsciously in place through the survival of the European Union's institutions, transnational cooperation in border regions, demands for regional decentralization and plurinational federal states.

Therefore, the study will try to understand if federalism could be readapted using some innovative features to assure a certain degree of coherence between international challenges, constitutionalism and multilayered sovereignty. This will be dealt through a first elucidation of geopolitical phenomena that express the need for a neo-federal theory to be developed, with a focus on the sources and effects of the social and political changes that led to the break-up of the classical paradigms of systemic political interpretation. The aim is then to understand federal theory in its evolution and empirical application, observing the roots of theoretical thought, with a chronological doctrinal construction, and practical developments in historical and traditional models. Bearing in mind the characteristics of classical federalism, the research will then move on to the analysis of the neo-federal theory, between the understanding of the dynamics of belonging, which seem to undergo a multi-level unpacking and a return to the locality, the original reorganization of the political structure and the link between citizens and institutions, with a view to distancing the idea of exclusive sovereignty from the national state. Finally, case studies of particular interest will be taken into consideration, which, as already mentioned, seem to resist centralizing tensions, showing in some occasions the opposite tendencies, which demonstrate the need to articulate new forms of socio-political relations between individuals, local communities, state institutions and international systems. Hence, the comparative analysis will consider a small-N inference oriented case selection

of prototypical cases<sup>2</sup> where different political entities are showing innovative and alternative features of federalism that escape from classical contexts of state sovereignty to imagine alternative and original expression of multiple identity and governance.

In conclusion, face to the theoretical and empirical deductions coming from the elaboration of geopolitical phenomena, federal doctrines and the jurisprudential construction of empirical examples, there will be an attempt to understand if the neo-federal project could prove to be a valuable theoretical starting point for a possible process of European federalization.

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<sup>2</sup> Hirschl R., in *The Question of case selection in comparative constitutional law*, University of Toronto, 2006

## 1. The shift of the sovereignty paradigm

### 1.1 The socio-political and economic changes

Centuries of imperialism, monarchy and religious despotism involuntarily collaborated to the creation of a new world order, based on the political authority of the Nation-State, whose origins can be attributed to the mythical Peace of Westphalia<sup>3</sup>. 1648 was selected as the constituent moment for a new historical pattern in international relations, laying the foundations for the main political organizations that rule our reality today. The system is essentially based on diplomatic relations held by autonomous independent authorities that can exercise the monopoly of violence on a defined group of people which are present on a determined territory and whose presence legitimates the coercive role of the central power according to the legal regulation of their public life<sup>4</sup>. Beside the role of the State in managing its territorial community, the Nation emerged as a new substantial component of the latest secularized political order. Political scientists define national communities as a body of people that shares a common identity according to characteristic features that may include spoken language and an unitarian history, culture and tradition<sup>5</sup> which represent the foundations for a unanimous and conscious will to form a political group.

The overlap between nationalism and state apparatus<sup>6</sup> gave birth to the monolithic actor of the Nation-State, whose idealism had driven and legitimated the evolution of modern history. The consolidation over the time of this kind of system, and its expansion up to a global reach, have been the results of the formula's success. Anyway, as Guibernau<sup>7</sup> highlights, the relationship between the

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<sup>3</sup> As supported by Anderson B. in *Imagined Communities*, De Agostini, 1946 (pp. 9-36), the consolidation of the Nation State is linked to the development and decline of imperialism and religious despotism

<sup>4</sup> Weber M., *Weber's Rationalism and Modern Society*, translated and edited by Tony Waters and Dagmar Waters. New York: Palgrave Books, 2015, pp. 129-198

<sup>5</sup> According to the definition of the Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/nation>

<sup>6</sup> Casale M., *La politica come esistenza autentica e la storia come narrazione: Hanna Arendt e l'esperienza totalitaria*, in *Storicamente*, vol.2, 2006, <http://dx.doi.org/10.1473/stor362>

<sup>7</sup> Guibernau M. *Nations without states: political communities in the global age*, in *Michigan Journal of International Law*, vol. 25, 2006, p.1252



three elements of the structure, ergo nationalism, which represents the ideological basis of the Nation, the Nation as the ethnic and racial group constituting the community and the State in its institutional center, is conflictual. The changing and negotiating nature of the system's components is therefore subjected to constant influences. External and internal factors have thus the capacity to alter the equilibrium of the relationship, shifting the balance of the power from one element to another. The most prominent example of this kind of alteration could be found in the Nineteenth Century's World Wars, where nationalist factor largely prevailed over the State. Indeed, the desire to prove its own military and economic power was at the basis of an important nationalistic campaign which was foreseen the war through an aggressive national rethoric in more than one European state<sup>8</sup>. The effects of the imbalance were then clear with the collapse of the European empires and their fragmentation into Nation States, strengthening the national cause that will fuel Nazi and Fascist Parties, responsible for the start of the second conflict.

In spite of the return to a practice of multilateralism in international relations after the tragedy of World War II, during the second half of the century the world had experienced a drastic increase, in terms of speed and contents, of economic, political and social changes that undermined more than ever the stability of the binomial relationship between Nation and State. A number of external and internal shifts are now challenging the paradigm that linked ultimate sovereignty to the State and its citizens, causing double-edged effects on political reality. The globalization phenomenon can be considered, in all its multifaced aspects, as the first responsible for the alteration of the Westphalian order and the primary threat to Nation States' equilibrium<sup>9</sup>.

Starting from the economical side of globalization, capitalism was seen as a problematic for the self-sufficiency and independence of states since the beginning of last century and the start of its global implosion. No coincidence that already in 1914, the soviet leader Trosckij found that the reasons for war were to be searched in the interconnected capitalist economy, whose productive

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<sup>8</sup> J. Llewellyn et al, "*Nationalism as a cause of World War I*" at Alpha History, <https://alphahistory.com/worldwar1/nationalism/>, 2019

<sup>9</sup> Mann M., "Has globalization ended the rise and rise of the nation-state?", in *Review of Internaitonal Political Economy*, Routledge, 1997, pp. 472-496

factors had started encompassing state authority<sup>10</sup>. In fact, according to socialist critique to capitalism, the dependence on consumption of this kind of economy, supported and exponentially increased by the revolution of the ways of communication, pushed national markets over the borders of the state, creating a serious deficit in the management and distributive capacities of central institutions. Along these lines, the end of the Cold War and the Soviet Union's collapse christened the global range of capitalist era which, led by globalization phenomenon, entailed a further liberalization of goods, services and financial markets. Those companies that were able to ride the wave of the new globalized economy managed then to escape from the control power of national states and extended their business domination to an international field<sup>11</sup>. In order to get access to the international market, States needed to become competitive in front of the requests of nation-free firms by failing in the promotion of one of the essential promises of democratic Europe, the Welfare State. Indeed, the Nation State formula survived the World Wars also thanks to the social guarantees that the European Welfare State managed to allow to their citizens. But capitalism and globalization destabilized state resources in terms of taxation and social regulations, disappointing the democratic expectations of redistribution promoted in the past decades<sup>12</sup>. This economic shift in the scope of markets not only damaged the power of developing countries, which are the last exploitation site of capital economy, but it is eroding the authority and democratic credibility of European and Western States that always championed the Nation State model. As Habermas suggested, it is hence beyond doubt that while a global regulation of the economic domain is still missing, globalization affects the efficiency of the administrative apparatus of states, their sovereignty over the territory and its discursive legitimacy among its citizens<sup>13</sup>.

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<sup>10</sup> Levi L., *Il pensiero federalista*, Editori Laterza, 2002, p. 73-75

<sup>11</sup> Cassese rightfully stated that if the economy used to pay attention to the state, nowadays is the state that has to pay attention to the economy, with a shift of sovereignty of the second on the first (in Cassese S., *La crisi dello Stato*, Laterza, 2002, p. 37)

<sup>12</sup> The Welfare State crisis and its incompatibility with the Nation State during globalization times is sustained by many scholars: see Habermas J., *La costellazione post-nazionale*, Feltrinelli, 1999, p. 17; Miglio G. and Barbera A., *Federalismo e secessione*, Mondadori, 1997, pp. 38-43; and others.

<sup>13</sup> Habermas J., *op. cit.*, pp. 41-54

Together with the quantitative changes of economic nature, important socio-political mutations characterized the last decades of what Hobsbawm already defined the “Short Century”<sup>14</sup> for the proportions and rapidity of the transformations that it encompasses. Indeed, the century opened on a new political era characterized by the massive participation of people to political life and propaganda. Collectivism and new ideological doctrines such as nationalism and communism encouraged the inclusion of masses to national politics by widening the democratization of the state. This quickly established the bond of trust between central government and its citizens, so the same psychological connection that kept alive the Nation State model until today, and the same that is now challenged by globalization. Nevertheless, the social structure of masses that upheld political life at the beginning of Nineteenth Century is now fragmenting under the weight of the digital revolution and the potential ubiquity of social media and social network. The individualism which lies at the basis of our communication and information system broke up with collectivism<sup>15</sup> while leaving space to networks that can overtake social, cultural and physical limits. New personal and potentially countless links can be established, and great political debates reach the global arena: political challenges found place in the international dimension, where global problems are raised, and global solutions are proposed<sup>16</sup>. One more essential change revolutionized the conception of the international relations, whose order had been unbelievably affected by the invention of the atomic bomb. World War’s age culminated with Hiroshima and Nagasaki’s disaster, demonstrating the need for a paradigm change in the equilibrium of international politics. In a global era where conflicts have the potential to provoke the extinction of humanity and the destruction of the planet, then states alone have lost their ability to preserve the life of their citizens and universal peace is

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<sup>14</sup> Pons S., *L’età degli estremi: discutendo con Hobsbawm sul “secolo breve”*, Carocci editore, 1998

<sup>15</sup> Collectivism understood as the social reality that upheld “l’ère de la masse”, so mass media, great associations of workers and national political parties whipping million of votes across the country. In Toffler A., *Les nouveaux pouvoirs*, Fayard, Paris, 1991

<sup>16</sup> Despite this tendency, it is undeniable the fact that States still benefitting from a prominent role in the adoption of international policies. In this respect, Milward suggested that the very process of European intergration, far from being the result of a defederalist ideology, represents a mere instruments of protection for European Nation States (see Milward A., *The European rescue of the nation-state*, Routledge, 2002).

imposed as last and unavoidable scope for human relations<sup>17</sup>. According to this view, state's government by itself shall no longer be regarded as the ultimate actor of world politics, and its deregulated power as a giant Hobbesian Leviathan<sup>18</sup> is threatened by its own self-destructive potential. Therefore, the external sovereignty principle that regulate state's equilibrium in the international arena has to be limited on the moral borders of the preservation of human kind and even the most powerful states should renounce to their complete sovereignty in front of this primary goal.

Social and economic changes are also leading to another slowly but drastic political revolution, where old ideological cleavages are fading, and new ones are arising. State democracy is no more divided between social classes membership or between the traditional binomial partition of right and left, but population starts to be divided depending on their support for globalization and its effects<sup>19</sup>. The protection of local sustainability or the promotion of the freedom of consumption are the modern political struggles and the research for a solution to these problems cannot be found solely in the classical representative formula of national politics. The approach to contemporary ideological splits requires original ways of citizens' association and civil society movements usually responds to these requests. Social movements are bottom up spontaneous group actions that reunite people who share the same values with the objective to achieve a common goal through activism and mobilization<sup>20</sup>. Normally these groups have a local base and defend the interests of small categories of citizens, but thanks to the power of communication networks and the transnationality character of no profit and non-governmental organizations, they can cooperate with each other and create international social networks in order to better approach global justice issues. The double and simultaneous nature of civil society's initiatives resides in the local dimension of approaching a daily life problem while the solutions must involve companies and entities that go across national legislation and power<sup>21</sup>.

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<sup>17</sup> Levi L., *Il pensiero federalista*, Editori Laterza, 2002, p.14

<sup>18</sup> Hobbes T., *Leviatano*, BUR Biblioteca Univ. Rizzoli, 2013

<sup>19</sup> Marchetti R., *La politica della globalizzazione*, Mondadori, 2014

<sup>20</sup> According to social movements theory (see <https://www.britannica.com/topic/social-movement> by Turner R., Smelser J., Killian L.)

<sup>21</sup> About the importance of the participation of new social and private actors in the giuridical global order see, amongst others, Cassese S., "La partecipazione dei privati alle decisioni

Another recent rediscovery of social spaces has been made by culture and identity, which are suffering from the decline of the Nation State under the pressures of globalization and consumption's homologation. An increasingly number of local communities, such as regions, are rediscovering their minority cultures, traditions and languages within the majoritarian group of a state. Against the centrifugal forces of globalization, social cohesion on the local scale can boost cooperation and mobilization around the public good, filling the identitarian gap of the state<sup>22</sup>. Since the political representation at the central government level fail to offer solutions to modern problematics because of its lack of authority and ideology in the bosom of a polycentric global governance<sup>23</sup>, then citizens need to organize themselves autonomously in order to preserve a certain sense of active membership to the community they live in<sup>24</sup>. This does not mean that they have to give up to central states, especially seen that they still play an essential role in managing the political life of their community. Anyway, the cultural homogeneity promoted by Nation State propaganda since the birth of the ideology, which has been constructed for the preservation of the political unity and social cohesion of countries, is now more and more threatened by migration flows (although nowadays states are, informally but completely, pluralistic). Actually, the spatial compression realized by the revolution of the means of transport and communication and the liberalizations carried out by globalization had enabled the displacement of a massive flow of people, who travels across world cleavages of wealth, risking personal security, in order to obtain a better future in a richest country. This huge human shift from the South to the North of the world can be considered as another destabilizing factor for Western States, whose glue is made up by cultural identification. A recent reaction that has been detected in some

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pubbliche. Saggio di diritto comparato" in *Rivista trimestrale di diritto pubblico*, n.1, 2007 and Ferrarese M. R., *La governance tra politica e diritto*, Il Mulino, 2010, pp. 56- 63

<sup>22</sup> Keating M., *Les défis du nationalisme moderne*, Les Presses de l'Université de Montréal, 1997, p.65

<sup>23</sup> This phenomenon is indicated by Cassese with the formula "the crisis of the State", calling into question on one side the unsatisfaction of citizens face to the public services offered by the state and, on the other side, the huge tendency to privatize many public fields that were usually placed under the control of the state (in Cassese S., *La crisi dello Stato*, Laterza, 2002, pp. 3-6)

<sup>24</sup> Rasanvallon P., *La démocratie inachevée. Histoire de la souveraineté du peuple en France*, Gallimard, 2000

countries is the attempt by state politicians to close the borders, to recall for national unity against the others and to sell citizenship as a coin for privilege. When security threats such as terrorism, climate change, diseases or criminality have reached an international level, paradoxically decision-making and executive power, along with human rights protection and social equality instruments stay in the hands of states' governments, which can boast them as a prerogative of their authority. But if it is not possible anymore to control economic and human flows, and to restore the social benefits "stolen" by globalization, then the solution to be adopted by states include isolation, nationalism and conflicts, all to pretend a degree of external and internal sovereignty which is long-standing gone. Precisely because social, cultural and political reality is experimenting a fragmentation, with masses becoming networks and cultural homogeneity a melting pot, the exact nature of the Nation State system is dissolving. Face to the fact that the *demos*, as the body of political inhabitants of a state, does not correspond precisely to a representative democratic elected decision-making power to accountably administrate their life, political scientists had often looked at the phenomenon as the conclusion of a political era<sup>25</sup>. Following the popular motto of Fukuyama<sup>26</sup>, someone spoke about the "end of territory"<sup>27</sup>, to highlight the transnational extent of network policies, or about the "end of democracy"<sup>28</sup>, denouncing the crisis of classic representative democracy. Anyway, even if there are some clear evidences of alteration from the classic model of the Nation State, the central core of public life, action and expectations still remains firmly in the hands, or at least in the promises of the states' governments. Among the scholars who detected the structural changes, Elazar tracked down a different direction, which seems to be more accommodating in respect of reality. He stressed the "paradigm shift from a world of states (...) to a world of

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<sup>25</sup> Keating M., *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era*, Oxford Scholarship Online, 2003, pp. 48-49

<sup>26</sup> In 1989 the American political scientist Francis Fukuyama in a namesake essay coined the phrase "The end of history" to praise liberal democracy and the universalization of the Western economic and political model as the maximum and last expression of historical evolution of societies. Even if the following events quickly questioned his thesis, the formula of foreseeing the collapse of a well-known reality became quite successful in social analysis.

<sup>27</sup> Ryngaert C., Zoetekouw M., *The end of territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era*, SSRN, 2014

<sup>28</sup> Buffin de Chosal C., *The end of democracy*, Tumblr House, 2017

diminished state sovereignty and increased interstate linkages of a constitutionalized federal character<sup>29</sup>. It is important to draw the attention on the double and opposite phenomena of the devolution of power that states allowed (willingly, accidentally or compulsorily) since the end of World War II to supranational and regional and sub-regional entities on one side and the recall to nationalism and cultural homogeneity. On the one side, proofs of these trends are to be found in the development and spread of international organizations that tried to converge states' will on an egalitarian and global base with the aim to prevent wars and resolve common problems created by the lack of a supranational authority. Moreover, beside the UN, the NGOs and the financial organizations born under Bretton Woods economic hegemony, other but essential organizations started to be created on a macro-regional level. This is also the case of European Union that, with its creation, provides an ideal type for supranational multilevel governance which is able to combine state sovereignty and devolution of powers. Pluri-nationality, so the inclusion of more than one nationality under the same legislative umbrella, became so acceptable under a functionalist approach that provides shared benefits in compensation for the devolution of sovereignty. The initial success of this kind of model, represented by the clear economic and social advantages of member states in joining the Union, became a boost for the creation of new regional entities in other parts of the world. Quickly, close cooperation and soft but efficient devolution of powers became attractive for those regions with a convergence of historical values or economic interests and more than one regional organization was created along the lines of the European Union. Among the most important ones there is the ASEAN (Association of South East Asian Nations) which obtained the strategical alliance between Vietnam and Cambodia to contrast Chinese hegemony on the area; the MERCOSUR (South American Common Market) which challenges the United States cultural influence thanks to the cooperation between Brazil and Argentina; also the African Union and the CARICOM (Caribbean Community) obtained good results on the cooperation about security issues and political convergence, while purely economic organizations such as the NAFTA (North America Free

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<sup>29</sup> Elazar D., *From statism to federalism: a paradigm shift*, Publius, 1995

Trade Agreement) simply focuses on the functional aspect of cooperation. Nevertheless, regionalist phenomena can be extremely representative of the paradigm shift of sovereignty, since states are cooperating not solely under the international law framework, but rather to a supranational “federal” model<sup>30</sup>. On the other side some institutional changes took place also with regard to the internal distribution of powers, with a surge of decentralization phenomena in large group of States<sup>31</sup>. The devolution of administrative or legislative powers on a subnational level is another form of regionalist trend that took hold during last century under different degrees of deepness. Federalization of new post-colonial and post-soviet States along with substantial regional devolutions in unitary countries such as Spain, Italy and the United Kingdom are some examples of this latest wave of fragmentation. However, recent transfers of power do not seem to have quieted the resurgent of local minorities, which are demonstrating a strong motivation in their autonomy’s claims. As it has already been highlighted, the struggle against modernity and the globalization’s effects produced political cleavages within the states themselves, where often the richest regions and the economic productive centers seek further autonomy in the administration of their finances. Moreover, together with these opportunistic requests, a more psychological and collective claim is made, according to the process of identitarian re-birth of local culture, history and traditions, which works as a glue for legitimate the demands for more powers. Democratic sovereignty’s disillusion and globalized consumption’s homologation are carrying out the rediscovery of cultural particularism and the reaffirmation of smaller spaces for political debate. The combination between fiscal independence and identity construction under a self-determination principle fuels the secessionist controversies in both unitary and federalist states. Indeed, demands for different degrees of autonomy and independence are hogging the political scene in Quebec, Scotland and Catalunya, followed by a large number of other regional entities in the Western world and beyond.

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<sup>30</sup> See Schütze R., “On “Federal” Ground: the European Union as an (intern)national phenomenon”, in *Common Market Law Review* vol.46, pp. 1069-1105, 2009

<sup>31</sup> Keating M., *Les défis du nationalisme moderne*, Les Presses de l’Université de Montréal, 1997, p. 54



Ultimately, if on one side there is the willingness to encompass national sovereignty with a upward devolution of powers and interstate political cooperation with the intervention of new global actors, because of the need to control globalized phenomena, on the other side civil society movements and local politics are trying to reshape the space for public life, reinventing traditions that can corresponds to new and overlapping identities which want a part of their sovereignty back.

Again, it is important to highlight the fact that the world order is organizing itself according to decentralized networks of authority, with the proliferation of multilateral and bilateral agreements on more or less regional bases, which can be understood as subregional (in the case of subnational or transnational forms of cooperation that involve civil society for the sake of a common revalued identity or common pragmatic goals), as well as supranational agreements and partnership arranged around functional or identitarian purposes. These new dimensions of collaboration are quickly gaining legitimation on the ground that they are achieving a legal regulation for their action. For the first time since the creation of the Nation State order, public life of citizens is ruled by different sets of legal norms that can finally encompasses the central state's legislation. Thanks to international law's principles and some innovative supranational entities with jurisdictional powers (among which there is the European Union with its law settled by the Treaties and interpreted by the European Court of Justice in addition to national tribunals of its member states), then individuals are administrated by shared and multilevel authorities<sup>32</sup> that can respond to their requests depending on the nature of the dispute or of the issue in question. International and supranational law, together with the fact that their principles are often recognized inside states' constitutions and constitutional systems allowed for different configurations of self-rule and shared rule that organize public life. Not surprisingly it is so the analysis of federalist scholars as Elazar and De Rougemont<sup>33</sup> that particularly insists on the simultaneity of the contradictory tendencies that animates socio-political debates and actions in the Twenty-first

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<sup>32</sup> Elazar D., *From statism to federalism: a paradigm shift*, Publius, 1995, p. 2

<sup>33</sup> De Rougemont D., *L'uno e il diverso: per una nuova definizione del federalismo*, Edizioni lavoro, 1995, pp.3-13

century. Precisely because ethnicity is breaking apart from the Nation State, with several self-determination requests that disrespect the identitarian homogenization of the state, and conversely because state democratic jurisdiction is suffering from multilevel devolution on one side and globalization's assaults to sovereignty on the other side, consequently, the necessity for a new political reorganization of power is clear in order to prevent potential turbulences and conflicts.

As it will be further explained in this thesis, some sort of federalism can answer to these problems, once that its nature is untied from the federation idea linked to the Nation State. "United in diversity", which is the European Union's motto, well represents the prospective of federalism in resolving ethnic divisions, while the characteristic multiplicity of sources of law can be the solution for the regulation of contemporary socio-economic complexities, harmonizing on different level of governance the contradictions of today's politics.

## 1.2 A critique to the Nation State

Since the birth of the State as a political organization, that, as said, can be conventionally traced back to 1648, the international arena started to be shaped by state actors, each of them with exclusive authority over its territory and equal external sovereignty. After centuries of imperial despotism and religious monarchies, the State was finally the heir of the legal protection of its inhabitants, by centralizing for the first time sovereignty and law in an increasingly secularized bureaucracy.

The 1789 French Revolution introduced into the state system a nationalist ideology, whose role was to legitimize the exclusivity of rights and protection offered by the State to its citizens in the name of the popular will. The concept was inspired by Rousseau's social contract that established the idea of the sovereign people as the last depositary of political power<sup>34</sup>. Jacobin leaned on the principle by bonding it to the Nation-State binomial and deleting every

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<sup>34</sup> Rousseau J-J., *Il contratto sociale*, Einaudi, 2006

intermediate dimension. The political notion will be exported in the rest of Europe during the Napoleonic expansion and will gain great success after the Italian and German unification during the second half of Nineteenth century. Together with the second industrial revolution, the accession of the masses to economic and political life resulted in the need for an integration strategy that could bring a social cohesion sufficient to ensure the interests of States<sup>35</sup>. Therefore, the form of political fragmentation that sets up modern world order has not to be only associated with the coercive role of centralized institutions over their citizens, but also with the necessity for these institutions to develop a sociological construction of membership to an ideal community able to gain the legitimation for its action. From this demand, the State (the political community) is associated to a Nation (the cultural and ethnical community)<sup>36</sup> within closed borders and historical common grounds. As it is reflected by the very first political agenda of the Jacobin party, the construction and preservation of national identity, which entails a long and institutionalized process, is based on a set of symbols, rituals and myths to produce a collective memory which is continually renewed. Nationalism as a sociological creation represents therefore the link between the citizens and the State, legitimating its administrative apparatus and institutions. But according to its definition, nationalism is also an ideological connection between the political boundaries of a State and a determinate cultural heritage made up by language, traditions and values<sup>37</sup>. The artificiality of the concept is not only proven by its short historical roots (which represent the first and important paradox of the idea itself), but also by the fact that, as Anderson highlights, it is founded on imagined social connections<sup>38</sup>. This means that, even if there is a group of people who live in the same territory, speak the same language and follow the same rules of behavior under the same political centralized administration, the community would never be as physically united as to share social relations one with the others. Since there is a complete lack of direct socialization between the members of a nation, the sense of community on which

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<sup>35</sup> <http://www.treccani.it/enciclopedia/nazionalismo/>

<sup>36</sup> Haller M., Ressler R., "National and European identity", in *Revue française de sociologie*, vol.47, 2006, pp.817-850

<sup>37</sup> Levi L., "Il nazionalismo", in *The Federalist*, vol.3, 1981, p.134

<sup>38</sup> Anderson B., *L'imaginaire national*, La Découverte, 1996, pp. 18-21

the nation relies must be the result of an external actor that operates to create an ideological connection between them. This role is opportunistically covered by the State through a set of instruments applied to the identity-building process to create the feeling of membership. This process rests on the exploitation of symbols, collective rituals, ceremonies and myths based on a historical memory which is central to the continuity and preservation of the so-called national community. The members are therefore part of a unique society that was present before their birth, with the necessity to be present after their death, since it is a representation of its component individuals. The memory of this ancient society is constantly drip-fed into the memory of the present society, playing a finalistic role that gives a sense of life to its bearer, thanks also to the competitive connotations that exist in relation to the other communities. This set of historical and cultural heritage is channeled and spread by “invented traditions”<sup>39</sup>, namely a mix of repeated rituals, actions or ceremonies which are thought to have historical roots, and which must represent a symbolic behavior or relate back to an old and fundamental achievement.

Another essential tool to connect national society is what Habermas would define as the public sphere<sup>40</sup>: the rational share of information and dialogue around the events, the politics and the polity of the State. This theory is developable in those democracies that are to be considered as consolidated, which is potentially the case for the European tradition. Democratic procedures such as elections and media (news-papers, television and, more recently, internet) encourage the participation of citizens to the public debate, highlight the importance of each individual for the national cause, they create a virtual link between the members of the community whose information and occurrences are shared and, finally, they penetrate the intimacy of their identity having access to their private life and habits<sup>41</sup>. Therefore, the instrumentalization of identity as a social construct by Nation States has brought about the development of nationalism with political aims. Albertini sums up the relationship by stressing the fact that the more a State is centralized, the stronger the cultural integration of its citizens is needed in order

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<sup>39</sup> Hobsbawm E., *The invention of tradition*, Cambridge University Press, 1992, p.1

<sup>40</sup> Habermas J., *Teoria dell'agire comunicativo 1*, Il Mulino, 1997

<sup>41</sup> Morley D., “Broadcasting and the construction of the national family”, in *The television studies reader*, Routledge, 2004, pp. 418-442

to directly control the country's ideal and material resources<sup>42</sup>. National consciousness is so a consequence, not a precondition for the establishment of a State and its implementation corresponds to the forced expansion of the communitarian identity within the borders of the central government in an exclusivist vision.

The paradoxical contrast inherent to the Nation State is well displayed also by the opposition between its two structural elements: the State as an inclusive construction of law finalized to the protection of individual rights and the Nation as an exclusive and homogeneous community that claims to be the holder of these rights<sup>43</sup>. Then, if to be part of the Nation it is necessary to own specific and natural prerequisites, and if the State allows its protection only to the members of its Nation, accordingly, the rights are privileges and the defense of these privileges can legitimate aggressive and competitive behavior.

Even if Western societies have developed a peaceful democratic political culture, the seed of violence is therefore inherent to the specific nature of nationalism as an ideological construct instrumentalized by Nation State politics, and its simple emotional language could supply a strong alternative to globalization's disillusion and complexities. Although a nationalistic ideology, which has been created, constructed and fueled by State's institutions works as a glue for cultural and ethnic community, nonetheless it can quickly become dangerous when it is designed to turn not only in a way to maintain social cohesion, but in the last and definitive purpose of the society, that looks for nationalism as a competitive and aggressive goal. Moreover, the exclusive idea promoted by nationalism acts as a centripetal force within closed borders, which entails the marked and opposing separation of members both internally and externally thus leading to vast exclusions. This means that phenomena of political violence in the name of nationalism are likely to emerge, since the idea is based on the desire for domination justified by the patriotic defense of the nation<sup>44</sup>.

According to the Oxford Dictionary, nationalism can be considered as the "identification with one's own nation and support for its interests, especially to

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<sup>42</sup> Albertini M., *Lo Stato nazionale*, Il Mulino, 1992

<sup>43</sup> Arendt H., *Le origini del totalitarismo*, Editori Laterza, 2001, p. 322

<sup>44</sup> Crettiez X., *Violence et nationalisme*, Odile Jacob, 2006, pp.9-23

the exclusion or detriment of the interests of other nations”, or as the “advocacy of or support for the political independence of a particular nation or people”<sup>45</sup>. The distinction between the two forms of nationalism is to be found in their final purpose, since while the second definition is fulfilled when it has achieved some kind of political autonomy or independence, the other would be nourished only by an unresolved competition for the supremacy and internal purity. But given that modern societies are made up by heterogeneous communities and national ethnicities are more a sociological construction fed by, as it has been highlighted yet, a set of promoted symbolism than a sociological truth, then already institutionalized nationalism (that corresponds to the first definition mentioned), would constantly lead to aggressive behavior. Furthermore, there are clear possibilities for nationalism to degenerate in violent escalations where, according to some theories of international relations, nationalism starts to channel aggressive reactions to power transition cycles<sup>46</sup>, economic decline<sup>47</sup> or hegemonic ascent or descent<sup>48</sup>. This condition evidently reflects the emergence of nationalist politics in Western societies and the potential threat that it can represent for international security, even if, and maybe precisely because, the grounds for its action are modern, stable and democratic Nation States. Further to socio-political and economic changes already discussed, which are causing a general perception of impotence of traditional politics face to the globalized challenges of modern world, a sense of decline among old Western powers is acting as a disturbing factor for the democratic political routine of industrialized countries. Also in the international arena there are proofs of this transition since while the “Global South” is aiming to gain Western privileges, the balance of power is shifting towards the new industrialized poles of Eastern countries, with China in the first position<sup>49</sup>. Consequently, immigration flows, economic instability and internal social transformations (the ascent of traditionally marginal roles such as women and minorities) are additional elements of instability.

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<sup>45</sup> <https://en.oxforddictionaries.com/definition/nationalism>

<sup>46</sup> Modelski G., *Long cycles in world politics*, Palgrave Macmillan, 2014

<sup>47</sup> Kindleberger C., *The world in depression*, University of California Press, 2013

<sup>48</sup> Keohane R., *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton University Press, 1984

<sup>49</sup> Nye J., “Soft Power”, in *Foreign Policy* vol. 80, Slate Group, pp. 153-171

The return of nationalism on the political scene is therefore a natural consequence of the need for people to find in the State a hero against uncertainty. In fact, it seems a rational solution to common citizens' worries because it creates an ideal membership where citizenship represents an exclusive and elitist access and a quick response to every-day problems. Protectionist policies shift economic interdependence from cooperation to competition, the closure of borders excludes the outsiders while rewarding the members on the basis of an idea of some kind of cultural hierarchy. A paradox then appears, since the resurgence of nationalism in a globalized era could therefore become a factor of fragmentation inside the State itself.

Thereafter, it is essential to make a distinction between old and new nationalisms (which led to World Wars before and to the election of Trump, to Brexit and to the more general gain of consensus by extreme right in Europe), and minority's nationalism carried out by peripheral social movements in Western societies.

Actually, it would be a mistake to look at regionalist nationalisms as a simple reaction and rejection to modernity, to States and to the global market. As Keating<sup>50</sup> emphasizes, they are instead witnesses of an effort of adaptation to global changes, they are aware of the sovereignty shift and they are trying to find a new place in a world where power is no longer centralized in the hands of the State that is still administering them.

Even if sub-national minorities with pro-independence claims worked to the construction of a collective identity by relying on the same set of instruments promoted by the Nation State (such as myths, traditions, language, memory, etc.), trying to legitimize their demands through a common history, they aspire to a free confrontation with political and economic realities that could go beyond the mere desire to create a new and independent Nation State.

Political tradition of the last couple of centuries monopolized sociological knowledge and pushed for a total standardization of collective identity on a state level. Regional nationalisms are now challenging the perspective, proving that there is the possibility for the coexistence of multiple identities. And more importantly, this new level of collective identity is associated to a sub-national

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<sup>50</sup> Keating M., *Les défis du nationalisme moderne*, Les Presses de l'Université de Montréal, 1997, p.69

political organization with potential competencies in the distribution of rights and duties and a large civic component able to take on the partisan vision of national citizenship. National minorities are not only cultural communities<sup>51</sup> but they constitute an Habermasian public sphere based on shared political values and consciousness. Consequently, their claims for devolution of sovereignty from the State representing the will of the majority can easily gain democratic legitimation by breaking up with the constitutional exclusivity of the Nation State. As a matter of fact, it is only because Westphalian tradition is taken as an axiom that regional nationalisms are considered to be struggling for secession aiming for an independent statehood on their own. In practice, such a request would result as expensive in terms of uncertainty<sup>52</sup>: the ambivalent identity of regional movements, but mainly their usually conflictual relationship with the dominant State and with international community, would leave them out of the global economy and governance. This is why national mobilization at regional level must transcend the classic categories of international relations and has to be considered as beyond self-determination principle that enables the creation of new sovereign states. On the contrary, even if self-determination is still a goal, it is researched under different and alternative way of expressions that do not lead to traditional statehood<sup>53</sup>.

The construction of the nation-state mythology operated over the last centuries has trapped political science inside an ontological truth that however does not correspond to historical reality<sup>54</sup>. If the understanding of international relations and constitutionalism is limited by the perpetuality of the myth, global political order is though constantly changing. While theory remains fixed to its idealisms, reality takes advantage from unrestrained socio-political and economic changes. It is so true that a demystification and deconstruction of the Nation-State's borders has already begun and new avenues for regional and supra-regional accommodation are opening up.

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<sup>51</sup> Seymour M., *The fate of the Nation State*, McGill-Queen's University Press, 2004, p. 70-73

<sup>52</sup> Keating M., *Plurinational Democracy: Stateless Nations un a Post-Sovereignty Era*, Oxford Scholarship Online, 2001, p.8

<sup>53</sup> Keating M., *op. cit.*, p.11

<sup>54</sup> Elazar D., "Political science, geography, and the spatial dimension of politics", in *Political Geography*, vol.18, Jerusalem Center for Public Affairs, Jerusalem, 1999, p.880



Without denying the existence of Nations and States, it could be conceived a possibility for the two concepts to co-exist along-side each other rather than to stand as a unified and homogeneous principle of classification. Not all nations will become states, not all states will become nations and plurinational states are not only a reality but more and more an undeniable habit.

The success of the multiple ethnicity idea is related to the analysis around the needs for democracy to be hold: if it is true that democratic regimes requires a *demos*, than does the *demos* require an homogeneous ethnicity?

The principal definition of people comes indeed from the notion of the Greek *demos*, whose translation is associated to the social dimension of politics. It differs in its meaning from *plethos*, which represents the people as a distinct social class devoted to a common cause, and from *ethnos*, which pursuits the natural merging of individuals that share innate elements traditionally associated to the same community (physicality, language, historiography and cultural homogeneity). The second definition could correspond to a socialist state whose constitution includes a rigid interpretation of the fatality of its politics, while the third one is referring to a nationally homogeneous state whose people respects the standards of nationality transferred by institutional propaganda and cultural traditions.

Therefore, if considering the relationship between democracy and people, or citizenship, the identity link with the political community is continually recalled by the reciprocity of rights and duties towards institutions and the legal system and by the involvement of individuals in laws formation procedures through the mechanisms of political representation and direct democracy (political elections and instruments such as referendums). The key factor for the political continuity of the democratic regime lies in the commitment of people to belonging together. This is the idea of Habermas' "constitutional patriotism"<sup>55</sup>, where individual identification is not a static and circumscribed concept but is articulated on multiple levels of self-recognition that start from the daily experience of family belonging, to the cultural experience of belonging to social groups, to arrive at identification within a political community. In this regard his thesis supports the artificiality of national identity, which it would not be a spontaneous product of

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<sup>55</sup> Habermas J., *L'inclusione dell'altro. Studi di teoria politica*, Feltrinelli, 2013

social aggregation, but that would derive precisely from the political action of the same States, which, thanks to the nineteenth-century cultural context, would have set up an effective program of construction of the feeling of national belonging. The example given is, not surprisingly, that of Italy and Germany, whose political unification was the basis for the construction of the national cultural bond: local and regional collective identities were transformed only later into national identities, and the propaganda was so successful as to create a patriotism as convinced as to become harmful to its citizens<sup>56</sup>.

Cultural homogeneity entailed by national identity is likely to lead to minorities' oppression since even in more authentic cases of national states, such as France and the United States, there is the no denying presence of multiple identities that transversely coexist with the institutionalized majority.

To conclude, a people understood as *ethnos*, or nationality, is not a central pivot of democratic regimes and by extension, not even the Nation State is an essential element of it. As Keating pointed out, democracy needs a political community sharing a basic set of common values and symbols able to sustain reciprocal trust between its members, in order to allow minorities to accept potential defeats without having the possibility or the desire to opt out from the public debate<sup>57</sup>. Moreover, globalization and transnational interdependence forces are driven international arena to a paradox that lies on the problematic relationship between nationality and sovereignty. If national identity is linked to the State and it represents the final recipient for political decision-making processes, drawing virtue from its homogeneity, then international arena remains a void space of anarchy where public debate and powerful economic trades are nonetheless performed. Under the pressures of the new millennium challenges, the binomial and exclusive relation between sovereignty and the Nation-State is no more a solution and new formulas that can accommodate multiple identity claims should be developed in order to be able to manage both transnational governance and regional issues.

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<sup>56</sup> Scoditti E., *La costituzione senza popolo*, Dedalo edizioni, 2001, p.74

<sup>57</sup> Keating M., *Plurinational Democracy: Stateless Nations un a Post-Sovereignty Era*, Oxford Scholarship Online, 2001, p.12

No wonder sociologist Bauman<sup>58</sup> described modern society as liquid, in marked contrast with last centuries' communities, where identity were fixed, sole and undivided. Therefore, this undeniable fluidity can be used as a weapon for nationalist parties to revive the fire of former conflicts, or it can become a turning point for cross-cultural dialogue and the preservation of cultural autonomies under a peaceful regime of reciprocal acceptance.

### 1.3 Beyond classical sovereignty

Each individual lives in a particular time and in a definite space. This axiomatic reality assumes sociological and anthropological meanings that have a great impact over the production of knowledge and the interpretation of social sciences such as political and international studies. The association of both these self-evident elements of temporality and geography, together with the Habermasian theory of multiple identifications, will necessarily lead to the creation of a plurality of cultural communities, social classes and groups. The organization of people around different sociological categories is not only a causative effect of the correlation between time and space and cultural influences they receive during their life, but it represents an essential element of stabilization and fulfillment for individuals. Since time is a concept beyond the control of human being (although modern technology is now trying to overcome this same postulate) , then territory remains the sociological dependent variable to determine one's destiny and sense of membership to a certain community. Everybody needs a place to be in the world and this place will be internalized and defended from the outsiders, according to the spatial limits of the group. Geographical boundaries offer a perception of security and fellowship to their members and hence they gain an emotional importance in controlling conflicts and competition between peoples. During time, *limes* are shaped by the relation between political actions and behavior, social transformations and the production of knowledge.

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<sup>58</sup> Bauman Z., *Modernità liquida*, Editori Laterza, 2011

As already noted, last two centuries have seen the complete monopolization of the research fields by a State approach or mindset: once world order assumed the Nation State paradigm, then most of disciplines such as history, geography and political science started to close their point of view according to state boundaries<sup>59</sup>. Even if politics, theory and sociological changes are tightly related, the anchoring of the second to the first is showing a clear slip of socio-economic reality compared to political organization, behavior and research.

On top of this problem it lies ultimately the concept of sovereignty and its implication in the constitutional and legal remit, which is directly correlated with the management of state borders and the members enclosed within them.

A simple definition of sovereignty entails the supreme power or authority of a State or government to rule over a population with complete independence with regard to other states. As outlined by Ferrajoli<sup>60</sup>, sovereignty is a double notion that corresponds to both juridical and political fields, but its origins in the modern interpretation are to be found in the *suprema potestas superiorem non recognoscens* sentence, and therefore in the idea that the power of a state has to be considered as original (because it does not derive from any other authority than its own), absolute (because it does not respond to any other higher authority), exclusive (because indivisible) and unalienable<sup>61</sup>. This definition has been formulated with the birth of the great European States and thanks to the work of well-known political theorists such as Bodin, Hobbes and Rousseau. Affected by the confusing political reality of their time and by the contractual nature of their theories (which is particularly true for Hobbes and Rousseau), the sovereignty elaborated by these scholars entails an exclusive monopoly of power in a political organization where the legislator is considered as *legibus solutus* (without any responsibility for its actions and in a position of superiority in respect of the law) in front of its subjects and in front of the other states. In this sense, sovereignty surely guaranteed an ordered centralization of power in the hands of a juridically personalized super partes state. This interpretation of sovereignty represented and followed a real revolution for world order, encouraging the passage from the

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<sup>59</sup> Elazar D., "Political science, geography, and the spatial dimension of politics", in *Political Geography*, vol.18, Jerusalem Center for Public Affairs, Jerusalem, 1999, p.881

<sup>60</sup> Ferrajoli L., *La sovranità nel mondo moderno*, Universale Laterza, 2004, p.7

<sup>61</sup> [http://www.treccani.it/enciclopedia/sovranita\\_%28Dizionario-di-filosofia%29/](http://www.treccani.it/enciclopedia/sovranita_%28Dizionario-di-filosofia%29/)

fragmentated and overlapping power of a feudal and religious society to a well-defined bureaucratic and temporal state.

Nevertheless, this reorganization brought the demand for a further distinction within the term, with the necessity to separate sovereignty into its external and internal understanding.

External sovereignty, intended as the representation of world order as a “*communitas orbis*<sup>62</sup>”, refers to the creation of equally free and independent states each with the absolute and exclusive authority over their territory and whose relations are not subject to any other law on top of their own. The justification for what Hobbes would have call an international state of war is given by the definition of external sovereignty also in order to legitimize some kind of right to war which is attributed to the state.

Internal sovereignty, developed as the circumvention of the political power from any responsibility face to the law, soon run into the severe critique of liberals. In fact, the absolute sovereignty principle that allowed the legislator to be unbound to the law was challenged by Locke and constitutionalist theorists, founding an end with the 1789's Declaration of the Rights of Man and the Citizen. The document and the following constitutional papers inaugurated the limitation of absolute power and promoted a radical change in the structure of the state. The introduction of the principle of rule of law, the division of powers and the fundamental rights, contained and guaranteed by the constitution, leded the concept of sovereignty to a new and paradoxical application. The people become the holder of sovereignty, which is delegated to the government and the constitution became its keeper.

In parallel with the limitation of the internal sovereignty of states, thanks to the development of liberal democracies and the rule of law, external sovereignty followed an inverse trajectory, which brought internal popular legitimation to release absolutistic powers of states in the international arena. The constitutionalization of European states, and their final arrangement into Nation-States at the turn of the Nineteenth century, consolidated the self-sustaining and independent nature of these actors and overthrow any possibility for

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<sup>62</sup> Francisco de Vitoria quoted by Ferrajoli L. in *La sovranità nel mondo moderno*, Universale Laterza, 2004, p.13

supranational law. The more the state gains internal legitimation, the more its external sovereignty obtains unaccountability for its actions. Not without reason these achievements could be considered as the juridical basis for colonial and world wars of last century<sup>63</sup>.

Another outcome of the absolutistic criterion of external sovereignty has to be found in the circumscription of fundamental rights to the state scope. If the 1789 Declaration unleashed the allocation of personal rights to every human being, with the development of the modern liberal state these rights found their fulfilment in state jurisdiction as their ultimate guarantor. This triggered the overlapping of citizenship rights with universal rights, paradoxically recognizing to the last ones a vitiated character of privilege<sup>64</sup>.

Although this paradigm has defined the idea of modern sovereignty that still represents accepted knowledge and reality, in truth there could be detected a number of transnational changes that are challenging again not only the Nation-State as socio-political and economic entities and actors, but also their sovereignty as intended by theorists and used in public debates. Again, international revolutions such as the birth of a new conception of international law, mainly due to the creation of the United Nations and the 1948's signature of the Universal Declaration of Human Rights, opened up to a different idea of supranational relations. World wars' tragedy and the emergence of new international actors, alongside with de-colonization before and globalization after, totally changed world order, showing the need for some kind of international jurisdiction. It became clear that a perpetual state of war could not be accepted anymore: *ius ad bellum* (the right to war typical of absolute external sovereignty) is therefore immediately limited by UN's documents and universal rights gain a real supranational protection<sup>65</sup>. Moreover, the creation of regionalist structures such as the European Union has contributed even further to the disruption of modern state sovereignty, by imposing an effective jurisdictional regime upon its members and their citizens.

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<sup>63</sup> Ferrajoli L., *La sovranità nel mondo moderno*, Universale Laterza, 2004, pp. 34-38

<sup>64</sup> Ferrajoli L., *op. cit.*, p. 36

<sup>65</sup> Ferrajoli L., *op. cit.*, p. 39-45

Beside international organizations and agreements, states are nowadays losing part of their sovereignty also as a consequence of the liberalization policies enhanced by globalization in the last decades. Many economic activities and flows take place on a transnational level which cannot be controlled anymore by governments alone. Another symptom of the crisis of state sovereignty is then represented by the disruptive pushes of identity claims of regional movements which, face to world instant communications, are demanding more and more sovereignty to their state in order to accommodate the need for socio-economic fulfilment of what they consider as their people.

Anyway, even though these are clear examples of a serious decline in the sovereignty system of Nation-States, it would certainly be a mistake to consider it as over. States' governments still control the majority of institutional prerogatives, included the monopoly of force and taxes and still paly an ultimate part in their citizens' public life and communitarian identity, while international organizations still lack of effective judicial apparatus and their balance does not respect the principle of equality and fairness between states since they are the result of the balances of power which created them.

An important analysis that takes into consideration these paradigm changes without going too far in its assumptions is the "late sovereignty" theory elaborated by Cormac Mac Amhlaigh<sup>66</sup>. The term "late" could be in fact considered as appropriated to define actual circumstances since it refers to a global governance game whose rules are changing but the playing field remains the same: states are struggling to find a way to cope with the international nature of their challenges while new actors are claiming part of their power but the scope and focus of the action is still around state sovereignty. In fact, even if it has lost its central core (seen that states have allowed the delegation of part of their powers to supranational institutions, losing both part of their internal and external exclusivity), sovereignty stays fixed in the hands of governments, at least for what it concerns the political debate and under the legal doctrine of state's jurisdiction. This is possible because the qualitative approach of sovereignty is attributed to the

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<sup>66</sup> Mac Amhlaigh C., "Late sovereignty in post-integration Europe: continuity and change in a constitutive concept", in *Micropolities in the margins of Europe* by Adler-Nissen R. and Pram-Grad U., Routledge, 2012

subsidiary principle of ultimate authority, which is detached from the territory, but it resides finally in state's governments. The example of the European Union is again a good illustration of the paradox: European law is applied through and above national laws directly on the citizens of the Union although it has jurisdiction only in the fields which are explicitly or implicitly delegated to it and only in the case in which national law cannot be applied in a more effective way. This is the best expression of a late sovereignty distribution of powers, and the principle of subsidiarity is fundamental to distinguish exclusive territorial authority from other forms of autonomy that can be allowed under a diffuse sovereignty's umbrella. The heart of the matter refers here to the functions and not to the territory or the organ that emanates the law. Once sovereignty is distributed according to the purpose of its action, then it is possible to identify the institution which is more able to enhance its application, without any limitation towards its spatial location. "Autonomy does not imply territorial exclusivity"<sup>67</sup> and European Union and many other international organizations and initiatives already showed that states are not the only entitled to participate to the sovereignty game. Recent models of global governance are indeed stressing the importance of multiple actors, such as multinational corporations, non-governmental and international organizations, international standard setting bodies, medias and social medias regional associations and, more in general, civil society's intermediate bodies. More specifically, civil society could play a great role in the mediation between the Nation State and its identity, since it may channel nationalism through not institutionalized routes in order to produce positive outcomes for the common good. When national identity takes roots in civil society's movements, then there is no corruption of political actions by the decline of the state and it can otherwise represent the device for public mobilization of more than one national identities<sup>68</sup>. The pursuit of new patterns of collective action with a civic and not state nature is already challenging the state by escaping from its control<sup>69</sup> and it represents a local pivot for resolving political issues, from the biggest problematics related to globalization and pollution, to more localised matters linked to territorial everyday

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<sup>67</sup> Mac Amhlaigh C., *op. cit.*, p. 8

<sup>68</sup> Keating M., *Les défis du nationalisme moderne*, Les Presses de l'Université de Montréal, 1997, p. 41

<sup>69</sup> Keating M., *op. cit.*, p. 58



problems. Unfortunately, even if civil society is calling into question the dominant approach of Nation-States and global markets, it is still acting in an undefined agora which will need to find a proper and recognized space within democratic policies of states before to be considered as a transparent and functional alternative to state representative decision-making procedures.

As it is defined by Mac Amhlaigh, sovereignty is a “normative discourse”<sup>70</sup>, explained under a legal and political approach that guarantees its status within the state system. However, the sole fact of having a normative source reverses its original definition, for its authority is no more to be considered as *legibus solutus* but it is dependent from the law. Assuming that state sovereignty could be submitted to international law, agreements and supranational (in the case of European Union) legislation, its autonomy is limited foremost by constitutional papers. Constitutionalism is the doctrine that replaces exclusive and absolute autonomy of the sovereign power by representing the ultimately constraint to its action. Indeed, through the constitutionalization of modern states the reach for their same sovereignty has been enclosed in a normative document that is the guardian of a higher jurisdiction. As it has been noted by Walker<sup>71</sup>, constitutional law could be interpreted as the product of a new and modern sovereignty, which is no more exclusive and either popular, but limited in its scope and action by a legitimate and authorized legislation with reductive claims over state power. The importance of constitutional documents in the smooth rearrangement of international and domestic law has been highlighted also by McCormick, the “cosmopolitan local”<sup>72</sup> who suggested that constitutional pluralism could allow the coexistence of more than one ultimate authority. New legislative sources are emerging on different levels giving birth to unusual forms of “local” constitutional orders, each of which with its own juridical integrity<sup>73</sup>. Thereby, some sort of legitimation should be arisen in order to reconceptualize multiple but

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<sup>70</sup> Mac Amhlaigh C., “Late sovereignty in post-integration Europe: continuity and change in a constitutive concept”, in *Micropolities in the margins of Europe* by Adler-Nissen R. and Pram-Grad U., Routledge, 2012, p. 5

<sup>71</sup> Walker N., *Sovereignty and beyond: the double edge of external constitutionalism*, Virginia Journal of international law, vol.57, 2009, p. 806

<sup>72</sup> As defined by Walker N., “The Cosmopolitan Local: Neil McCormick’s Postsovereign World, in Law and democracy” in *Neil McCormick’s legal and political theory. The post-sovereign constellation*, Dordrecht, 2011, pp. 3-14

<sup>73</sup> McCormick N., “Beyond the sovereign state”, in *Modern Law Review* vol. 56, 1993, pp. 1-18

intact sovereignties. Kumm suggests the “trinitarian commitment of constitution to human rights, democracy, and the rule of law”<sup>74</sup> through an active participation and civic responsibility of all citizens<sup>75</sup>. The idea is close to the habermasian constitutional patriotism<sup>76</sup>, where the holder of constitutional law is the subject concurring to the discursive creation of it through democratic participation. Where the constitution contains and protect sovereignty from wherever it comes from, and it ensures the exercise of powers in a democratic way and according to the rule of law, then it could be guarantor as well of multiple models of shared sovereignty. This is already true for those constitutions that include specific provisions for the compliance of national law to international agreements and legislations<sup>77</sup>, while some kind of homogenization between the content of constitutions can be already observed, because the same binding international legal instruments has been sign by the contracting parties. The internationalization of constitutional law is therefore acting as an implicit and involuntary device for the limitation of national sovereignty. In addition, being guardian of society’s fundamental values, constitutional documents could become the key mechanism to overcome the thresholds of the Nation State, given that its relationship with sovereignty is historical but problematic, due to its changeable and limited structure of authority<sup>78</sup>. On the other hand, current international regimes have obtained direct and incisive effects over citizens as subjects of the law thanks also to the development of the human rights’ doctrine and the process of constitutionalization of the international law’s system and its principles. As remarked by Walker<sup>79</sup>, these innovations could have been the responsible for an

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<sup>74</sup> Kumm M., “The cosmopolitan turn in constitutionalism: an integrated conception of public law”, in *Indiana Journal of Global Legal Studies*, vol. 20, 2013, p.607

<sup>75</sup> Kumm M., *op. cit.*, p. 625

<sup>76</sup> Habermas J., *Questa Europa è in crisi*, Laterza, 2001

<sup>77</sup> E.g. Italian Constitution, Art. 10: “L’ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente riconosciute.” And Art. 11: “L’Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali; consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo.

<sup>78</sup> Keating M., *Plurinational Democracy: stateless nations in a post-sovereignty era*, Oxford Scholarship Online, 2001, p. 21

<sup>79</sup> Walker N., *Sovereignty and beyond: the double edge of external constitutionalism*, Virginia Journal of international law, vol.57, 2009, p.815

unexpected change in the nature of states face to their external affairs, by filling the role of guardians more than actors of international order.

Contrary to these tendencies, some defensive mechanisms may be detected in constitutional jurisprudence's processes. On the one side there are the attempts to bound international organizations' actions to perform in a way that cannot undermine state identity; this could be done by the integration of precise constitutional provisions, or through the intervention of national domestic or supreme courts<sup>80</sup>. On the other side, a trend was found to include constitutional provisions dealing with the protection of purely sovereign prerogatives, such as the use of powers relating to the rights of political participation or membership or more generally about the rights of foreigners and refugees<sup>81</sup>.

Albeit these inclinations could be interpreted as a clear sign of where sovereignty resides in the final analysis, even in a globalized era, in truth these attempts are mostly showing a fair denunciation of the removal of exclusive sovereignty, as theorized in past centuries, from the Nation State. Indeed this last one, as already revealed, seems to be undermined as much as in its constitutional core by international law and, more in general, by a legislative environment that is now multileveled and densely populated and which is openly challenging national borders.

Furthermore and relatively speaking, given that sovereign states are often different in their independence face to the others, and it is not uncommon to find states suffering from external intervention in their internal affairs, then it could be better for them to be imagined within a broader federation<sup>82</sup> where sovereignty is not unilaterally claimed but could be the result of a discursive procedure of bilateral accommodation, which is ultimately protected by constitutional papers.

Certainly, all the mentioned changes, and in particularly the crisis of the Nation State model, represent an epoch-making shift with unforeseeable consequences.

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<sup>80</sup> This is the case of BVerfGE 123, 267 – Lisbon Decision (Lissabon-Urteil), where German Federal Constitutional Court had to decide on the case of the compliance of the Treaty of Lisbon with the Basic Law. The Court ruled in favor of the Act approving the Treaty, thus imposing some limitations to future amendments, which could not be done in a number of matters that define the constitutional identity of the Country.

<sup>81</sup> Walker N., *Sovereignty and beyond: the double edge of external constitutionalism*, Virginia Journal of international law, vol.57, 2009, pp. 816-819

<sup>82</sup> Keating M., *Plurinational Democracy: stateless nations in a post-sovereignty era*, Oxford Scholarship Online, 2001, p. 22

Anyway, as Ferrajoli again suggests, it is clear that an important role in this scenario would be played by law as interpreted by cultural jurisprudence according to its “artificial reason”<sup>83</sup>. The complete separation between law, sovereignty and state could be the only opportunity to release peoples’ autonomies from the strict state paradigm which is standardizing their identity in the national one. Through an intelligent use of jurisdiction and the transnational constitutionalization of fundamental values and rights, identitarian self-determination of peoples could be achieved with peaceful, democratic and inclusive meanings<sup>84</sup>.

According to this point of view, the duty of political scientists is to find out new forms of political organization that could keep up with socio-political and economic transformations of society by focusing on the mitigation of conflicts, allowing for multiple identifications and shared sources of sovereignty.

Nations without States may therefore be the actors of the future international community, and it may be possible to conceive innovative and multinational federations able to manage their identitarian impulses under a constitutionalized umbrella of largescale jurisprudence.

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<sup>83</sup> Ferrajoli L., *La sovranità nel mondo moderno*, Universale Laterza, 2004, p. 50

<sup>84</sup> Ferrajoli L., *op. cit.*, p.50

## 2. What is federalism?

### 2.1 An ideological definition

#### 2.1.1 Pre-modern federalism

Prior to initiating the path through the development of the federal ideology, it is essential to investigate the ancestral sources of the language that give birth to the long history of what it will be considered as a specific object of political studies<sup>85</sup>, in order to clarify and circumscribe the field of its interpretation.

The best way to start the analysis of any concept is to look for the semantic origins of it. The etymology of the term federalism in fact tells a substantial reality about the nature of the idea and envisages the future of its application. The word comes from the Latin *fides*, meaning “trust”, that will later become *foedus*, meaning “treaty” or “contract”. The term has been used by the Roman Empire to forge alliances with other populations, italics or barbarians, with a clear perspective of ensuring peace at its borders. During Middle Ages the idea kept its contractual nature, by largely identifying peace and alliance treaties and then by referring to the specific construction of Medieval society through the adjective “feudal”, with reference again to the relationship of trust and loyalty coming from the *foedus* between the parts. Even if the word will gain different transfigurations in its political understanding, especially with the expression *confederatio* (that replaced *foedus* in the statement of leagues and more or less tight alliances), it will maintain its original reference to the Latin definition<sup>86</sup>.

Another elucidation has to be made about the distinction between “federation” and “federalism”. While the first term has an empirical extent, being applied to the analysis of political systems and institutions, “federalism” refers to a more

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<sup>85</sup> Lépine F., “A Journey through the history of federalism, Is multilevel governance a form of federalism?”, in *L'Europe en Formation*, n.363, 2012, p. 24

<sup>86</sup> Lépine F., *op. cit.*, pp. 31-33

abstract definition of a specific political ideology<sup>87</sup>. Whereas in a following moment it will be examined the application of the first concept in all its forms and existent declinations, it is imperative to first inspect the development of the doctrine which lays behind it. To be more accurate, this analysis will lead, in the end, to the constitutionalist, liberal democratic, way of thinking, leaving out all those federative organizations which do not answer to the principles of constitutionalism of modern States. From this perspective, big and important federal experiences such as the former URSS or contemporary Brazil will be left aside, while the focus will be placed on those countries that followed the Western tradition, with a specific look on the European Union and its member states. A first essential interpretation sees federalism as “an arrangement in which two or more self-governing communities share the same political space”<sup>88</sup>. Above all, it seems therefore easy to find out two cornerstones defining federalism as the limitation of power and the self-government<sup>89</sup>. In addition to these generic concepts, Schmitt reminds the dual nature of the system, which constantly relates the political unity of the federal cohesion with the multiplicity of its members, each of them with its own integrity. The emphasis is placed on the balance between unity and pluralism, where conflict is not only allowed but necessary, up to the point where the political agreement is maintained<sup>90</sup>. According to some scholars, the federalist character is concentrated in the diffusion of power’s idea, while others prefer to point out the centripetal unitary force that lays at the basis of its establishment<sup>91</sup>. In any case, the federal dialectic is often absorbed by the antinomy between antagonist concepts that fight for the ultimate equilibrium: as quoted before the main contradiction is among unity and diversity (or

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<sup>87</sup> The distinction draws origins from the 1982’s Preston King *Federalism and Federation*, where “federation” were defined as an institutional fact, while “federalism” referred to the doctrine based on the claim for a decentralized government and political decisions.

<sup>88</sup> Karmis and Norman, *The Revival of federalism in normative political theory*, quoted in Lépine F., “A Journey through the history of federalism, Is multilevel governance a form of federalism?”, in *L’Europe en Formation*, n.363, 2012, p. 25

<sup>89</sup> Barbera A., Miglio G., *Federalismo e secessione, un dialogo*, Mondadori, 1997, pp. 3-4

<sup>90</sup> Schmitt C., *Dottrina della Costituzione*, Giuffrè, 1984, p.485

<sup>91</sup> Even if the federal tradition relies on the diffusion of power, Miglio reminds that the ideology is still part of the state dogma, where unitary power is unavoidable. In fact, history shows that the large majority of federations were created by the merging of multiple political entities rather than as a result of centrifugal movements (in Barbera A., Miglio G., *Federalismo e secessione, un dialogo*, Mondadori, 1997, pp. 4-5)

centralization against decentralization), while also Proudhon's distinction between liberty and authority<sup>92</sup> can explain well the reality of federalism. Moving on more complex definitions, Elazar gives a comprehensive idea of the subject saying that "federal principles are concerned with the combination of self-rule and shared rule. In the broadest sense, federalism involves the linking of individuals, groups, and polities in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties"<sup>93</sup>. In this sense, according to the author, federalism would be applied in order to comply with some final objectives, such as the institution of an efficient political system and the creation of an effective and equal community, under a fair moral order<sup>94</sup>. By the use of this broad definition, Elazar paves the way for more than the classical format of federation, foreseeing the inclusion of different federal political organizations in the international landscape. According to this point of view, "any kind of cooperation between political units that does not lead to the constitution of a new single centralized state can be considered as a federal arrangement"<sup>95</sup>.

On the other hand, Watts will refer to the same interpretation, though adding a "common government [...] for the constituent units"<sup>96</sup>, with the clear intent of closing the field of study to a state-centric perspective.

Anyway, these few definitions are only insufficient attempts of giving a clear explanation of what is federalism, since it is not possible to find an univocal understanding of this political phenomenon. Many schools of thought gave origins to as many traditions, and history shows the application and the development of very different forms of federalism. Consequently, it looks promising to retrace the tracks of the idea during the centuries of its elaboration, in order to obtain, again, a more specific understanding of its shapes.

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<sup>92</sup> Proudhon P.-J., quoted in Lépine F., "A Journey through the history of federalism, Is multilevel governance a form of federalism?", in *L'Europe en Formation*, n.363, 2012, p. 26

<sup>93</sup> Elazar D., *Exploring Federalism*, University of Alabama Press, 1987, p. 5

<sup>94</sup> Elazar D., *op. cit.*, p. 87

<sup>95</sup> Lépine F., "A Journey through the history of federalism, Is multilevel governance a form of federalism?", in *L'Europe en Formation*, n.363, 2012, p. 29

<sup>96</sup> Watts R., *Comparing Federal Systems*, quoted in Lépine F., "A Journey through the history of federalism, Is multilevel governance a form of federalism?", in *L'Europe en Formation*, n.363, 2012, p. 26

Before that, it is still important to quickly justify the relation between federalism and the political approach, by using Albertini<sup>97</sup>'s analysis. According to the Italian scholar, three criteria would suffice in order to detect a political ideology, and federalism would respect them all: it has an “aspect of value” (the final objective), which is peace, an “aspect of structure”, defined by the Federal state, and an “aspect of history”, represented by the historical context that could allow its development.

Once it has been confirmed the ideological character of federalism, it is time to recover its genesis. The first allusions to the idea, even if still unconscious, could be traced back to Althusius' work in its *Politica Methodice Digesta*, which contains something that can be already defined as “proto-federalism”<sup>98</sup>, starting with: “politics is the art of associating men for the purpose of establishing, cultivating, and conserving social life among them. Whence it is called ‘symbiotics’.”<sup>99</sup>.

Althusius (1563-1638 approximately) was an important figure for the political thought of the Calvinist Germany, giving a convincing alternative to the state centralization tendencies of the time and in open contrast with Bodin's absolute sovereignty<sup>100</sup>. According to many scholars, he was the first to propose a comprehensive theory of social and political consociation by promoting an organization of society based on bottom up consensus to the contract that delegates powers to a monarch through a bilateral revocable conferment dependent on the prosecution of the common good. At the grounds of this last popular sovereignty act there are a number of corporative deals following an order of complexity, each of them representing a self-governing connected to the others by a mutual trust relationship. He identifies five main forms of association, from the family to the State, going from the private to the public sphere, where the members of the communities finally become citizens, so participants to the shared services and laws of the association. Although the notion of the common covenant could approach Althusius to the classical contractualist thought, in

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<sup>97</sup> Albertini M., *Qu'est-ce que le fédéralisme? Recueil des textes choisis et annotés*, Société Européenne d'Etudes et d'Informations, 1963, p. 32

<sup>98</sup> Moroni E., *L'idea federalista*, Uniurb, 2014, p. 255

<sup>99</sup> Althusius J., quoted by Carney F., introduction of *Politica by Johannes Althusius*, Liberty Fund, 1995, p. 17

<sup>100</sup> Elazar D., *Althusius and federalism as Grand Design*, Jerusalem Center for Public Affairs, 2003



reality he recalls the concept of representation in a very different sense, highlighting the importance of the continuous process of symbiotic communication which is at the origins of the contract and which control the entire progression of the powers' administration<sup>101</sup>.

Elazar, together with other modern federalists<sup>102</sup>, brings back to light Althusius' long forgotten work, as a "grand design"<sup>103</sup> right because of its extensive potential reach to political and social fields of the future, post-sovereign world.

While Althusius' reflections were omitted, Montesquieu's "L'Esprit des Lois" (1748) experienced much more fortune, gaining a special place in the history of federalist political thought. In this well-known work Montesquieu argues about a "federative republic", that he raises from the international agreement's dimension to an institutional elaboration of the forms of states<sup>104</sup>. The subject revolves around the enquiry of the most efficient systems of political organization: while the monarchic regime and the despotic ones are rejected in favor of republicanism, this last form presents nevertheless some criticism. A republican government must have limited territorial extension in order to prevent its internal corruption by losing efficiency but having restricted dimensions would involve the risk of being overrun by bigger enemies. The solution proposed by Montesquieu is the federation of republics, hence the political association between more than one republican government, capable of yielding a "society of societies"<sup>105</sup>.

According to this point of view, republics could carry out a reciprocal control of the nature of their regimes whereas they would be represented as a strong and cohesive group face to external threats. Albeit the work was inspired by British parliamentarism, and it makes federative suggestions only in few chapters, nevertheless it will have a great impact on upcoming events, by representing a

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<sup>101</sup> J Althusius, *La Politica. Elaborata organicamente con metodo e illustrata con esempi sacri e profani*, vol. 2, Claudiana, 2009

<sup>102</sup> Lépine attributes the rediscovery of *Politica* to von Gierke, also quoting its influences on the theories of Friedrich and, later, on Lijphart analysis of the consociational pluralistic democracy (in Lépine F., "A Journey through the history of federalism, Is multilevel governance a form of federalism?", in *L'Europe en Formation*, n.363, 2012, p. 34)

<sup>103</sup> Elazar D., *Althusius and federalism as Grand Design*, Jerusalem Center for Public Affairs, 2003

<sup>104</sup> Malandrino C., *Federalismo. Storia, idee, modelli*, Carocci, 1998

<sup>105</sup> Montesquieu quoted by Ventura S., in *Il Federalismo: il potere diviso tra centro e periferia*, Il Mulino, 2002, p. 20

source of inspiration for American theorists and fathers of the 1787 Constitution. With regard to this historical moment, in truth, “L’Esprit de Lois” did not receive a univocal and agreed interpretation. The republican format of the division of powers was crucial for the elaboration of the document, but some argued that the subjects of Montesquieu’s society are ultimately the republics, intended as States, and not as peoples. In this sense the French thinker was exploited to support the Confederative cause, being even labeled by certain critics as “antifederalist”<sup>106</sup>. Anyway, it is fair to attribute to Montesquieu the credit for having finally introduced a political and systematic meaning to the federalist semantic. Following the path of the federal thinking across history it is also undeniable that its evolution was possible thanks to the creation of the first federal state, with the union of the former British colonies in North America, but also to the concomitant work of the German philosopher Kant (1724- 1804), who gave a general but essential purpose to this ideology. In the most famous of his writings, the *Perpetual Peace*, he celebrates the role of some sort of international federalism for the achievement of a peaceful world order<sup>107</sup>. From his perspective, the creation of a universal *foedus pacificum* of republics is the only possible solution to ensure world’s security. This means that Kantian federalism moves in a supranational dimension by foreseeing an external federative movement with global reach through the application of republican laws, in constitutional form, and respecting freedom and equality between all citizens<sup>108</sup>. Thereby, Kant suggests that the peaceful federation should be composed of free republics with civil constitutions able to guarantee the stability and permanence of the regime. The goal of this project does not refer to the more or less temporary absence of war but, more precisely, to the construction of an unbreakable international law which is able to make war an impossible occurrence. This would require a complete conversion of the geopolitical world order up to a final stage of its development, since the organization of international arena that we know, based on the dominance of state sovereignties in a permanent condition of potential conflict, would allow them to obtain only a period of truce in their ongoing

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<sup>106</sup> Amiel A., “La figure de Montesquieu dans le débat constitutionnel américain”, in *Revue de métaphysique et de morale*, n. 77, 2013, pp. 47-63

<sup>107</sup> Kant I., *Perpetual Peace*, Cosimo, 2005

<sup>108</sup> Riley P., *Federalism in Kant’s Political Philosophy*, in *Publius*, v. 9, 1979, pp. 43-64

struggles<sup>109</sup>. The role of the federation would therefore be to eliminate violence from human relations, by imposing the use of a common universal law (that must be made by the citizens of the republics according to the above-mentioned principles of freedom, equality and justice) to resolve controversies<sup>110</sup>. The rule of law is then at the core of the ideology and acquires a threefold nature: next to the internal *ius civitatis* and the international *ius gentium*, a cosmopolitan law is attributed to each inhabitant of the planet as free to avoid hostile treatments during his passage across the world<sup>111</sup>. This innovative introduction needs to modify political spaces and to alter national borders in favor of rationalism, republicanism and federalism as bearer of universal peace.

If on one hand the Perpetual Peace could be considered as a theoretical development of the federalist doctrine with a finalistic scope, linking eternal peace with a global federation and human emancipation, on the other hand it is difficult not to highlight the shortage of its empirical application and the complete absence of any indication concerning the institutional arrangements able to put the Kantian political project<sup>112</sup>. Certainly, the dreams of the German philosopher will rapidly collide with newly formed nationalisms, showing the intrinsic limits of its federalist thought.

### 2.1.2 Modern federalism

As long as Kant and other philosophers were trying to give shape to the federal idea, in the New World there were politicians negotiating for the implementation of a concrete federal experience. Madison, Jay and above all Hamilton were the protagonists of the attempt of giving an empirical form to federalism, on the basis of the political compromise emerged from the Constitutional Convention of Philadelphia. Hamilton in particular had the merit of having understood, explained and finally supported the functioning of the first constitutional federalism of history, even before its accomplishment<sup>113</sup>. It is important to stress

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<sup>109</sup> Albertini M., *Il Federalismo*, Il Mulino, 1993, pp. 19-26

<sup>110</sup> Albertini M., *op. cit.*

<sup>111</sup> Kant I., *Perpetual Peace*, Cosimo, 2005

<sup>112</sup> Levi L., *Il pensiero federalista*, Laterza, 2002, pp. 20-22

<sup>113</sup> Albertini M., *Il federalismo*, 1993, pp.48-49

the geopolitical situation of North America after the War of Independence and before the Civil War, and the limits to political thinking and conception at the time. Having gain their independence from Great Britain, former colonies were found divided and autonomous, with similar interests to unity. Political tradition so far did not allow federal conception of the state, considering state sovereignty as absolute and indivisible through the government's independence from external powers. The casual necessity of newborn American states to find a political unification of their pluralism led to the drafting of the constitutional document, which was at the end the mere result of a practical compromise between empirical needs and democratic principles. Hamilton's task was to give a theoretical meaning to the institutional structure of the federation and, on the other side, to elucidate the pragmatic application of written unknown rules. In *The Federalist* (1787) he describes the essence and consequences of the enlargement of the representative system to a multiple number of states, promoting the division of powers to maintain the balance in the democratic regime and the primary role of the constitutional document to preserve the integrity of the pluralistic nature of the federation. But mainly he supports the benefits of a unitarian federal government rather than a simple confederation of autonomous states in the resolution of conflicts and in the development of the economy<sup>114</sup>.

His analysis fails to properly define the link between the three institutional spheres, without improving democratic harmonization and the rule of law. These inaccuracies, together with the fact that he left out the social context and its relationship with, and reaction to, the original form of political organization newly implanted, exclude the classification of Hamilton as a theorist of federalism<sup>115</sup>.

Anyway, he is nevertheless a conscious and voluntary accomplice of the empirical application of the idea, giving essential suggestions to the realization of what will become an archetype model for the federal state. Therefore, if *The Federalist* and other works by Hamilton were not accomplished with the support of a theoretical analysis, nevertheless they certainly represented a solid basis for the future elaboration of the federal doctrine.

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<sup>114</sup> Hamilton A., *Lo Stato Federale*, Il Mulino, 1987

<sup>115</sup> Albertini M., *Il federalismo*, 1993, pp. 47-55

Indeed, the success of American federal system does not prevent the development of the federalist ideology in Europe to stagnate in the incompleteness, and the French revolution perfectly exemplifies its failure. The process that will bring to the liberation of France from monarchical regime saw the emergence of very new political claims, among which the Girondist current that were expressing some sort of federalist principle in its attempt to undermine the current political order. The aim of this movement was to overcome European conflicts among States through a new international order, with the proposition to start from the decentralization of French powers in order to protect local and regional autonomies under the same community of free peoples<sup>116</sup>. Unfortunately, the Jacobin model that shaped the new regime under a nationalistic state-centric perspective took over the Girondist current and got control of the revolutionary process. From this moment on federalism was considered a forbidden argument and its supporters were threatened by guillotine. As a matter of fact, with the designation of a world of sovereign states legitimated by popular will and unified under nationalistic glue, federalist principles were to be regarded as unlawful, and its precursors as traitors of the nation<sup>117</sup>.

Despite the events in France, another political thinker of the epoch was going against the mainstream, supporting an innovative approach to federalism. Proudhon (1809-1865) took advantage of the Jacobin concept of fraternity<sup>118</sup>, which was used during the revolution to propagandize the unity of French people in the fight against the monarch, applying its meaning to the federative principle. In his writing *Du principe Fédératif*, he argues that European political governments are only parts of the real and unique social constitution which is the same for all peoples: the Federative Republic, namely the only “solution to the political problem”<sup>119</sup>. But his research of a solution is made under an original point of view, since it seeks to respond not only to the traditional problematic linked to international instability and war, but it tries to use federalism in order to address

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<sup>116</sup> Levi L., *op. cit.*, pp. 33-35

<sup>117</sup> Levi L., *op. cit.*, p.37

<sup>118</sup> Proudhon quoted by Lépine F., in “A Journey through the history of federalism, Is multilevel governance a form of federalism?”, in *L’Europe en Formation*, n.363, 2012, p.38

<sup>119</sup> Proudhon quoted by Rainone A., in *Proudhon e il federalismo*, in <http://www.doppiomondo.net/materiali/Proudhon%20e%20il%20federalismo.pdf>

social and economic problems that the central state cannot face because of its self-interested functional reason<sup>120</sup>. This is an integral version of federalism where territorial communities based on the local self-management and the redistribution of resources between workers are administrated through the social and economic decentralization, in order to avoid the control of means of production and dominant classes<sup>121</sup>.

Notwithstanding its utopic perspective, with his late works Proudhon was among the few that dared to condemn nationalism and the centralization of the State during nineteenth century. Alongside him, political thinkers such as Frantz (1817-1891) and Cattaneo (1801-1869) were fighting for the federalist cause and foreseeing the threats of the European system of Nation-States to international peace. While the first one was complaining about a nationalistic drift of the rich German federal tradition, Cattaneo was instead envisaging a brand-new federal structure for Italy and Europe in the footsteps of those federative models that with the United States of America and Switzerland were demonstrating their success. Throughout the entire century many pacifist movements in Europe will lean on the federal idea to propose alternative forms of government able to pursue an enduring peace for the continent, constantly devastated by wars and conflicts. Dreaming for a world federation predicated on the new theories on socialism and liberalism, European political thinkers and men of action often engaged in meetings and confrontations about these themes. Along this line in 1856 during a peace conference in Paris the French poet Hugo gave a famous speech, foreseeing the future of the “United States of Europe”<sup>122</sup>.

Different perspectives on federalism has been pointed out, and each of them has had an impact on the development of a modern doctrine on the subject, despite the fact that their authors did not have the time to perceive the historical evolution of the concept, since they were all sons of their time. From Montesquieu to Kant, passing through Hamilton and the American tradition, the elaboration of the federal idea was an ongoing project with unknown results and undefined experiences united by some common principles grounded on the liberal

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<sup>120</sup> Pugliese E., in [http://www.ildomenicale.it/articolo.asp?id\\_articolo=1089](http://www.ildomenicale.it/articolo.asp?id_articolo=1089)

<sup>121</sup> Levi L., *Il pensiero federalista*, Laterza, 2002, pp. 50-53

<sup>122</sup> Hugo V., quoted by Metzidakis A., in “Victor Hugo and the Idea of the United States of Europe”, in *Nineteenth Century French Studies*, vol. 23, pp. 72-84

democratic vision, which is a more or less accidental product of the revolutions and of the progress in the international relations' field. Consequently, pre-modern forms of federalism are linked to the idea of a bottom-up construction of society among its political multiple components based on a cooperative contract for the protection of justice and freedom of citizens<sup>123</sup>.

### 2.1.3 Post-modern federalism

Coming back to European affairs, the twentieth century revealed all the misbehaviors of a system where the nationalist drift fanned the flames of war for so long that the explosion of the conflict was intended to be unavoidable. On the other hand, however, the violence of World Wars revived the federalist approach, and a large number of the exiled and silenced political élite focused its efforts in imagining the re-construction of a brand-new institutional order able to face nationalism's damages while preventing their repetition. Some concrete plans of action were elaborated under a federalist outlook, disposing maybe the seeds of the future European Union. One of the first program was the Pan Europa movement founded by the Austrian-Japanese aristocratic Kalergi in 1926, a pacifist proposal for the unification of the continent starting with political and economic cooperation between France and Germany. His commitment was flanked by the political figure of Aristide Briand who, as a French foreign minister, tried to bring the ideal project to political action, presenting the general lines to the Assembly of the League of Nations meeting in Geneva on 7 September 1929. The pan-European Manifesto which he proposed to the Congress did not have the desired results, however, and the immature federalist ideal was indeed rejected ignored by national leaders, who failed to grasp the prophetic threat of the impossibility of maintaining a lasting peace in a context of international anarchy.

Suffocated by national regimes and antagonisms, many young intellectuals nevertheless retained the hopes of seeing a Europe no longer exacerbated by ideological and national divisions but united in the ethical and cultural values

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<sup>123</sup> Lépine F., "A Journey through the history of federalism, Is multilevel governance a form of federalism?", in *L'Europe en Formation*, n.363, 2012, p. 39

inherited from the past. One of the figures who engaged on this front during the war was Altiero Spinelli, who during his exile on the island of Ventotene, decided by the fascist courts, wrote a work that will be fundamental for the future of post-war Europe, work that will be remembered as the Ventotene Manifesto. Spinelli and his fellow prisoners Ernesto Rossi and Eugenio Colorni devoted themselves to the drafting of the document in the early 1940s, the full title of which was For a Free and Unified Europe. Project of a Manifesto, containing suggestions for the construction of a lasting peace: in the first place it was necessary to abolish the national states, to later obtain the unity and freedom necessary to achieve a real progress of western civilization<sup>124</sup> The text of the Manifesto was inspired by the ideal of European federalism propagated in the same hot period by other anti-fascists such as Luigi Einaudi, Carlo Rosselli and many others; but Spinelli's intervention was driven by strong and decisive passions that were able to look beyond the conflict, sensing future prospects and the needs of a world yet to come. The supranational vision of Spinelli, Rossi and Colorni, despite being in antithesis with the common paradigm, and ahead of historical times, will still be a guide and reference for the European integration path that will start in the second half of the twentieth century<sup>125</sup>. Together with Spinelli, Einaudi was the other great guide of European antifascist and post-war federal movement, by founding in 1943 the European Federalist Movement. A more integralist current were instead represented by De Rougemont, who sustained an even more deep European federalism, that integrates not only political institutions but entire aspects of the social life of European citizens, in order to make the cultural traits of the federated peoples homogeneous and distinctive<sup>126</sup>.

The European unification movements that had matured during the Resistance are faced with a new system of world equilibrium in which Europe is no longer dominant but dependent and indeed dominated by the two emerging powers that were competing for global leadership in the international chessboard. The elite approaches that saw the unification as the only way of continental restoration, however, tended towards different paths, which were distinguished by intensity

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<sup>124</sup> Foresi A., Sensini M., *L'Abc dell'Europa*, Città Nuova, 2002

<sup>125</sup> Brunelli F., *Manifesto di Ventotene e Progetto di Trattato che istituisce l'Unione europea: per rilanciare l'Europa federale*, Istituto di studi federalisti Altiero Spinelli, 2014

<sup>126</sup> Pistone S., *L'integrazione europea, uno schizzo storico*, Utet, 2006



and modus operandi, and the federal current was soon combined with a functional and a confederal attitude. These conceptions, thanks to the intervention of important leaders such as Jean Monnet and Robert Shuman, will then lead to the creation in 1951 of the European Coal and Steel Community, hence the embryonic institutional format of the future European Union. With the constitutionalization of second half of the century, which consolidate the democratic liberal nature of States, political scientists' approach to federalism started to change. The normative analysis of the system was replaced by a more analytical one<sup>127</sup>, aimed at comparing different empirical models in order to find a criterion of classification. On one side, for many scholars this undertaking proved to be tricky, given that political reality presented innumerable examples of singular forms of federalism, some of which showing unsolved problems or undetermined characteristics. The failure of the federalist finality of European Union, and the limitation of the classical comparative approach (that take into consideration only the State as the subject of the study), undermined the evolution of the federalist field of research, by exposing it to structural criticism. But while some scholars were struggling to find a common standard for federalism, by questioning the existence of a general funding idea<sup>128</sup>, on the other side theorists such as Friedrich and Elazar were instead using comparative methodology to opening new frontiers for the application of the federalist ideology. The innovation introduced by Friedrich (1901-1984) was the conceptualization of federalism as a process and its separation from the lucky link between state and sovereignty. He tried to give a more "dynamic"<sup>129</sup> sense to federal organizations, including the federal character to both federal states and confederations and to whatever kind of organization that represent the association of different groups,

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<sup>127</sup> Lépine F., "A Journey through the history of federalism, Is multilevel governance a form of federalism?", in *L'Europe en Formation*, n.363, 2012, p. 42

<sup>128</sup> Criticism on the federalist model were raised particularly by Riker in 1969 and by Davis in 1979 (Lépine F., *op. cit.*, 2012, p. 46)

<sup>129</sup> As it is featured by Burgess M., "Carl J. Friedrich and Federalism as Process", in *In search of the federal spirit: new comparative empirical and theoretical perspectives*, Oxford Scholarship Online, 2013, <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199606238.001.0001/acprof-9780199606238-chapter-6>

by moving away from the classical combination of state and single people<sup>130</sup>. In his definition, federalism is “the form of political organization suited to communities where [...] territorially diversified pattern of objectives, interests and traditions can be effectively implemented by joint efforts in the pursuit of common objectives and interests and the cultivation of common traditions. The federal structure [...] may sometimes be difficult to determine. The distinction should be drawn in accordance with the balance of these patterns of objectives”<sup>131</sup>. Allowing the process of federalization to a group of communities, and distinguishing sovereignty from autonomy, Friedrich elaborated a modern theory that goes beyond the domestic field of political studies, including international jurisdiction in the process of federalization.

In the effort to extend the field of analysis of federalism there is the integral vision of Marc (1904-2000), that resumes the aggregate perspective of Proudhon for the purpose of bringing justice to the philosophical comprehensiveness of federalism not only with regard to political science and law, but including also anthropological and sociological field of study. Marc’s ideology envisaged an utopic federal society based on four behavioral cornerstones: autonomy, cooperation, participation and subsidiarity<sup>132</sup>.

An even more in-depth contribution to the modern approach was then given by Elazar (1934-1999), who, as it has been already observed, is a point of reference for the new conceptualization of contemporary federalism. Through his definition of self and shared rule, the field of its application is again extended to the international level and the federalist idea is imagined in a post-modern era of political entities which go beyond sovereignty and state. According to his ideology, there are three different ways to look at political and juridical orders: the pyramidal model, which represent a hierarchical society deriving from a previous conquest (this conception presents some analogies with the Jacobin interpretation of the nation state), the center-periphery model based on an organic theory of concentric circles (which is near to Marxist criticism of world order), and finally a matrix model that can be useful for defining the image of federalism. This last

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<sup>130</sup> Friedrich C., *Constitutional Government and Democracy: Theory and Practice in Europe and America*, Ginn and Company, 1950, p. 191

<sup>131</sup> Friedrich C., *op. cit.*, p. 190

<sup>132</sup> Marc A., quoted by Levi L., in *Il pensiero federalista*, Laterza, 2002, pp. 120-121

model is essentially polycentric, based on networks and links that together define the whole<sup>133</sup>. Decisional centers are connected by lines of formal authorities and of formal and informal communication, with the constitutional document as skeleton and institutional agreements as structural contents. In this way the distribution of power is effective, considering that different competences are attributed to different degrees and with different aims but according to an ordered method<sup>134</sup>. Elazar's federalism has to be intended as a value more than an absolute term which is subject to rigid definitions, therefore it can be applied to different contexts, it embody a particular vision of the world and a specific approach to the study of political phenomena, while its malleability is in this sense an indicator of potentiality, not of vulnerability<sup>135</sup>. Through its sociological support to the cooperative conflict it aims to create dialectical creative interactions which are compatible with the human nature of differences, by resolving cultural discrepancies through a positive redundancy focused on the political relationship between all levels of government<sup>136</sup>. Elazar's vision is therefore focused on a multi-level governance model on federal grounds that could be a solution for the emerging desire of populations to preserve the local community by combining, at the same time, the needs to be part of bigger and more complex systems of governance which are able to cope with international challenges of the globalized world<sup>137</sup>. The notion of multi-level governance that has been firstly formulated by Elazar will be resumed by many other scholars which are more or less close to the federalist school, and it will be used to analyze pioneering but composite political systems and realities of nowadays world order. Political scientists such as Marks, Kelemen and Nikoladis<sup>138</sup>, followed by many others, thanks to Elazar's thoughts, started taking into account a federalist approach which could able to go beyond the state in order to understand and classify unintelligible actualities such as the European Union or global governance. In so doing, federalism has gained a new and interesting perspective which is based on an exhaustive interpretation that

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<sup>133</sup> Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, p. 23-24

<sup>134</sup> Elazar D., *op. cit.*, p. 31

<sup>135</sup> Elazar D., *op. cit.*, p. 25

<sup>136</sup> Elazar D., *op. cit.*, p. 27

<sup>137</sup> Elazar D., *op. cit.*, p. 7

<sup>138</sup> Quoted by Lépine F. in "A Journey through the history of federalism, Is multilevel governance a form of federalism?", in *L'Europe en Formation*, n.363, 2012, p. 49-52

follow the history of its ideology to find innovative applications for the theory in resolution of tomorrow's geo-political struggles.

## 2.2 History and development of the model

### 2.2.1 Pre-modern federal history

Once having assessed the history of the political thought and the ideology behind federalism, it becomes crucial to detect the empirical pattern that this form of political organization took during centuries. As a matter of fact, only a careful examination of the development of the different federal models could enable the understanding of its paths and, more important, the shape that it has taken in the present time, the shape that it will eventually take in the future.

There is no doubt that the history of federalism has deep roots, since several times in history nations have wanted to expand the borders of their governments, and often this has been done with the help of leagues, alliances or other agreements between local units<sup>139</sup>.

It is precisely Elazar to provide the first historical example of federalism, by tracing back its empirical application to a theological inspiration from the Bible<sup>140</sup>. According to the Jewish holy book, the relationship between God and the mankind was based on deal with mutual contractual nature. This supernatural covenant gave than birth to a more pragmatic and egalitarian agreement that determined the tribal association of Israeli people, which survived for more than six centuries (XIII – II century B.C)<sup>141</sup>. Clearly, this first type of communitarian

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<sup>139</sup> Riker W., quoted by Ventura S. in *Il federalismo: il potere diviso tra centro e periferia*, Il Mulino, 2002, p. 16

<sup>140</sup> Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, p. 95

<sup>141</sup> No coincidence that Arendt suggested to recover to federalism in Middle East in order to restore peace between Israel and Palestine territories. A form of secularized broader federation, giving equal autonomy and membership to both groups, could mitigate nationalist

aggregation was founded upon an equal group of peoples in front of a duty of divine submission that restricted the grasp of federalist potential in its political claim. A similar limit was later suffered by Greek leagues (VI – II century B.C), but this time the veil of ignorance was to be attributed to the ideological domination of the polis, whose self-sufficiency was promoted in a permanent conflict at each other<sup>142</sup>. The edge of the confederation was also dictated by the limits of direct democracy, which could not be extended over the boundaries of the city. It is important to recall how this kind of limitation will be tabled again by representative democracy, that even if it has the credit for having unified cities in a peaceful environment, it will find its exclusivist fulfillment in the Nation State, by re-creating the virtuous circle of external belligerence<sup>143</sup>. Nonetheless, even Hamilton recognized in the Greek confederation some analogies with the modern federation (that he will contribute to create). In particular, he highlights the fact that the members benefitted from an equal right to vote in the bosom of the council, which operated in compliance with the common good of all the confederation. It is also surprising that the set of delegated powers were, at least on paper, enough for the administration of a nation (including the power to declare war, to defend the boundaries, to judge internal disputes and to legislate on religious matters)<sup>144</sup>. Albeit it is well known that in practice the confederation did not respect its own theoretical dispositions, and Greece was permanently submitted to the Athenian and later Spartan's domination, the attempt to create a tight political collaboration set an important example for federal models coming afterwards, as it is demonstrated by Hamilton himself.

Other significative experiences in the proto-federalist history are also present all along the Middle Age period. As has already been mentioned, the etymological roots of “feudalism” reside in the same *foedus* which lays at the basis of federalism. In this sense, it is possible to draw a parallelism with the corporative form of the internal organization of the Holy Roman Empire, which was founded on medieval municipal corporations whose statutes were anyway subject to the

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conflicts and establish a peaceful cohabitation (Arendt H. quoted by Moyn S. in “Fantasies of Federalism”, in *Dissent*, vol. 62, University of Pennsylvania Press, 2015)

<sup>142</sup> Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, p. 99

<sup>143</sup> Albertini M., *Il federalismo*, Il Mulino, 1993, p. 101

<sup>144</sup> Hamilton A., *Lo stato federale*, Il Mulino, 1987, p. 77-83

ruler<sup>145</sup>. As it is highlighted again by Elazar, the most prominent case of semi-federal institution during Middle Age was given by the Helvetic Confederation established in 1291, which represents a first attempt of associating different republics under a set of institutional multilateral agreements originating a common popular government. However, Hamilton<sup>146</sup> preferred to rely on other examples to build his federal argument, since he judged that the relationship between Swiss cantons was based on a geopolitical need rather than on a real will of federal unification. In fact, at the time of his analysis the Helvetic Confederation presented only some light characters of political association: it did not involve a common fiscal system, or judicial apparatus, or military device. On the other side, he quoted the German Empire, this time not referring to the feudal reality of local societies but focusing on the transition period (from the twelfth to the fifteenth centuries), where important federal elements were introduced in the administration of the empire. In fact, after Carlo Magno's death, the conflicts between the heirs to the throne allowed the slow but steady interference of the representatives of cities and principalities to the political public life. So it was that already with the Peace of Westphalia, and until the 1871 – 1918 period, the German Empire were organized into a confederation, where a Diet composed of the representative members concentrated the legislative power, in concurrence with the emperor as the supreme magistrate. Following this argument, and emphasizing the complexity of the imperial system, at the expense of the simplistic needs of the Helvetic Confederation, Hamilton took a cue from some institutional solutions that kept the Empire alive during centuries in order to elaborate a functional federal theory able to create the American model. While Elazar makes a complete comparative analysis between numerous premodern federal manifestations<sup>147</sup>, the very beginning of the history of federalism has to be attributed to the foundation of the United States of America, and more precisely,

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<sup>145</sup> Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, p. 101-104

<sup>146</sup> Hamilton A., *Lo stato federale*, Il Mulino, 1987, p. 85-91

<sup>147</sup> Elazar made a comparative analysis of various forms of ancient federal systems, from the Israeli Federation and Greek Leagues to European medieval examples of dualistic empires and leagues up to tribal confederations in North America (Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, p. 96-101)

with the Philadelphia Convention of 1787 as the founding moment of the first historical example of federal State.

### 2.2.2 Modern federal history

Concomitantly with the consolidation of the unitary state in Europe as a dominant form for political organization, the territory of the former British colonies of North America was trying to experience a new and alternative way of administrating the power. After the Declaration of Independence of 1776, occurred subsequent to the protests for the imposition by Westminster of a taxation whose application was not voted by any representative of the colonies, a confederative chart established a first kind of union between the neo-emancipated states. The need for political stability and for more defensive and economic guarantees quickly led to the abovementioned Convention, whose work gave life to the written Constitution including the presidential system for the federal government. The focus on the specificity of the historical moment that delivered the federation is essential, since it tells a lot about the nature of the federation and its relationship with the European case. Effectively, one should not underestimate the weight of European political failures on the successful elaboration of the federal theory: the former colonies not only had free rein on the drafting of their form of government, but they had centuries of wars and conflicts between European states as an example for their political building. Therefore, it is possible to consider that in order to understand the future necessity of the American political history, the role of European experience was fundamental. Hence, face to the demands for ensuring stability in the continent through some sort of unification on one side, and for providing a certain degree of independence to each colony on the other, the founding fathers decided to take an alternative road and tried to follow a different ideological path following the federal cause<sup>148</sup>. The main political features enclosed within the Constitution represents the core of the archetype of the federal model, which reached with the United States its primary empirical manifestation. Having abandoned the sovereignty of the British

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<sup>148</sup> Albertini M., *Il federalismo*, Il Mulino, 1993, p. 7

monarchy, they decided to give up the inheritance of the title by instituting the figure of an elective president whose role was at the head of the executive power of the federation. He embodies the powers of the Head of state and Head of government, he names his ministers and answer directly to the people, which can judge his work with quadrennial elections. The legislative power of the central state was then assumed by the Congress, where representatives of the member states were divided in two chambers following the pattern of many European parliaments while nevertheless guaranteeing the expression of both central and states' interests. By consequence, the legislation, in order to be approved, has to gain the consent of the majority of the representative of the people of the federation and, at the same time, the majority of the representative of states<sup>149</sup>. Both powers were defined as to be independent one from the other, given that the president cannot dissolve the Congress and does not have to be concerned by a legislative initiative against him. Thirdly, to an impartial judicial organ it is attributed the power of controlling the compliance of administrative and legislative acts with the constitution and its duty is protected by the system of checks and balances between the parts. To the central government as reflected in the constitutional document are attributed only limited competencies such as foreign policy and defense or monetary and fiscal exclusivity. All the remaining competencies are attributed to the governments of the member states, in accordance with a complete self-ruled capacity. This kind of organization was made possible also by the fact that, for the first time, the federation was representing a modern state that was the result of voluntary union of former political entities rather than the effect of an aggressive expansive policy of conquest of a former central state<sup>150</sup>.

On the European side it is necessary to wait at least one or two centuries before finding another sufficiently convincing expression of the federal model. It is though possible to take into consideration the case of Switzerland from 1848 and Germany from the end of World War II as main examples of historical models for federal states. These references coincide not surprisingly with some of the pre-modern paradigms of proto-federal forms. Even if Switzerland could not be

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<sup>149</sup> Levi L., in Hamilton A., *Lo stato federale*, Il Mulino, 1987, p. 7-21

<sup>150</sup> Ventura S., *Il federalismo: il potere diviso tra centro e periferia*, Il Mulino, 2002, p, 11



properly placed in the European fil rouge, because it is commonly known that its political history followed an autonomous path, it is anyway important to analyze the modern evolution of this state, for the purpose of better identify the characteristic of a successful federalism. As already mentioned, the Helvetic example has revealed during centuries a persistent exception to European politics, by keeping a peaceful behavior in both its external and internal affairs and maybe for this same reason its political tools have to be considered as important to analyze rather than to be dismissed as too specific to serve as standardized canon for federal research. This is the first authentically federated country which was founded on the desire to protect and preserve peoples with different ethnicities, cultures and languages<sup>151</sup>. Not without reason Tocqueville gave a curious but interesting interpretation of Swiss achievements, by praising more generally federalism and stating that federate peoples enjoyed a specific socio-political culture where “ambition for power gives place to love of well-being, a more vulgar but less dangerous passion”<sup>152</sup>. Thanks to this eulogy, Tocqueville exposed the pacifist scope of federalism, which is placed in direct contradiction with European aggressive nationalism despite demonstrating another fascinating reality of effective historical aggregation of different political entities. On the other hand Germany, the other great federal example, this time completely in line with the developments of the Old World (to such an extent that its federalism was a consequence of its political events), paved the way for the construction of a functional example of federal state born from an international imposition rather than following spontaneous internal actions. The fate of World War II left the victorious powers with the necessity to avoid another nationalist regurgitation by the defeated Germany, and in order to protect the future of European peace they decided to divide the former unitary state in a number of *länder* linked by a central *bund*. They were creating a federation by recalling the ancient federal spirit of medieval German confederations and leagues and then the one of the German Empire<sup>153</sup>. While the small dimension of Switzerland territory allowed for a balanced representation of the federate entities in the bosom of the Federal

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<sup>151</sup> Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, p. 35

<sup>152</sup> Tocqueville A. de, quoted by Kinclaid J. in “Federal Democracy and Liberty”, in *Political Science and Politics*, vol. 32, 1999, p. 213

<sup>153</sup> Papa E. R., *Discorso sul Federalismo*, Giuffrè Editore, 1995, pp. 3-20

government, Germany's executive power at the central level is administered by the chancellor and its cabinet, although the legislative branch is managed by a bicameral federal parliament. The last example of modern federal system that became a standardized model is Canada, which is the application of the parliamentary form of government (in British style) under the federal perspective of a multinational state<sup>154</sup>.

Taking into consideration the proposed models of federalism as a form of State, it is thereby possible to map out some common structural features of these political arrangements<sup>155</sup>. Firstly, a written constitution is always present in a rigid form (the agreement of both parts of the federation, the central level and the members is required in order to modify it), as the originating deal, with ultimate authority of control and as a guarantee for the division of powers. In addition to the constitutional document a specific judiciary organ must be put in place, with the aim to watch over the application of its rules and, more important, to regulate the eventual disputes between the different levels of government. Furthermore, federate entities must participate in the decision-making process through the presence of a second chamber within the federal parliament. Usually, one chamber represents the nation in its whole, while the other is a proportion of each member of the state. The second chamber could be a Council, if the members are appointed by the governments of the states (as it is for Germany), or a Senate, if citizens of the states directly elect their representatives (as it is for the United States and Switzerland). This division is made up to preserve the rights and prerogatives of the units in front of the national political line. Finally, a distribution of competences must be in place following the constitutional directives<sup>156</sup>, that normally attribute fields like foreign and commercial affairs or monetary and fiscal policies to the central level while domains such as education, cultural affairs etc. to the members. The allocation of competences is made on the

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<sup>154</sup> Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, p. 35

<sup>155</sup> Ventura S., *Il federalismo: il potere diviso tra centro e periferia*, Il Mulino, 2002, pp. 13-16

<sup>156</sup> Watts remembers that it is precisely the presence of a constitutional document containing the guarantees of autonomy of all the levels of government which distinguishes the federal state form any other decentralized unitary system (Watts R., in *Federalism, federal political systems, and federations*, Annual Reviews Inc., 1998, p. 124). Following this logic, Elazar highlights that in a federation, the constitutional recognition of the diffusion of powers acknowledges them as rights and not as grants, which is instead the case for decentralized unitary states (Elazar D., in *Idee e forme del federalismo*, Mondadori, 1995, p. 29)

basis of the principle of subsidiarity, which defines the range of action of all the levels of government and it configures the fields of potential conflict by proposing pre-emptive solutions<sup>157</sup>. More precisely, the principle states that the administration of public functions must be made at the territorial level which is the closest to citizens as possible and on, the other side, that these functions must be attributed to the upper institutional level only when this last is able to better perform them than the lowest one<sup>158</sup>. This juridical tool not only prevent reciprocal interferences between the degrees of government, but it could be considered as an instrument able to protect and enhance freedom and social determination of local communities, since it safeguards the political action of sub-national entities while resolving at an highest stage the administrative problematics that require more complex solutions<sup>159</sup>.

According to this analysis and following Watts definition, a federation is thereby a “compound polity combining constituent units and a general government, each possessing powers delegated to it by the people through a constitution, each empowered to deal directly with the citizens in the exercise of a significant portion of its legislative, administrative and taxing powers, and each directly elected by its citizens”<sup>160</sup>. The federal state is the shape that federalism assumed during its modern evolution in order to cope with the cultural hegemony of the nation state. By taking inspiration from the typified examples of the abovementioned countries, many other states tried then to approach federalism: sometimes they replicated the American institutional standard *in totum*, while in other occasions they imported only some federal features, practices or principles without being fully engaged in the federal format. Some data could show the successful expansion of the model in the world, especially during the second half of last century, thanks to the post-Wars waves of constitutionalism and decentralization<sup>161</sup>. However, given that federal theory did not provide a univocal

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<sup>157</sup> Papa E. R., *Discorso sul Federalismo*, Giuffrè Editore, 1995, pp. 45-58

<sup>158</sup> <http://www.treccani.it/enciclopedia/principio-di-sussidiarieta-diritto-costituzionale/>

<sup>159</sup> Monaco F. A., *Federalismo e sussidiarietà*, <http://www.sussidiarieta.net/files/Pdf/012005/Roversi%20Monaco.pdf>

<sup>160</sup> Watts R., *Federalism, federal political systems, and federations*, Annual Reviews Inc., 1998, p. 123

<sup>161</sup> The federal model found successful replications in many areas of the world, especially during the period between the end of World War II and the early '90s: the most prominent

expression of its empirical applicability, each State had developed a specific form of federalism. Some scholars have tried to classify the phenomena by distinguishing them on the basis of standardized criterion. It is maybe again Elazar<sup>162</sup> who offered the main clarification on the subject, by setting up a theoretical scale of intensity for federal agreements. On the first step he placed of course the federation as developed with the modern prototype of the United States. As already stated, this is the representation of a political attempt to preserve sub-national diversities in the bosom of a single political unity, while the centralization tendency acts in the defense of the unity of the State. The very last word on this format is given by the national character expressed as a common will in the Constitution: the cultural supremacy has to be found within the central State, which claims for the national unity despite the recognition and the respect of the federate entities. According to this device, the controversy of international law is solved, since the ultimate subject of international relation is undoubtedly the central state, as it is perfectly shown by the United State archetype. The distribution of internal sovereignty to the constituent entities (legitimated by the popular expression of political rights), together with the maintenance of its last residence within the central level (legitimated by the national cause perpetuated by the constitution), arranges federalism to suit the form of modern states, and silences the doubt in international relations' terms. Beside this classical form it exists a wide range of federal agreements that prove a more or less strong will to federate. One case could be the union, where normally former integrated countries expressed the desire to keep the political and cultural bond at the bottom of the constitutional document through the establishment of common institutions. The United Kingdom, for example, could be defined as a legislative union on the basis of the degree of autonomy that it grants to its constituent entities, even if it had always denied the federal nature of its order. This is the demonstration of the model that award the sub-national entities to an autonomous self-administration system upon what it considers as "local" policies, while maintaining a complete sovereign exclusivity upon every other field.

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examples of this tendency could be Brazil, Russia, Argentina, Belgium and the less lucky Bosnia-Herzegovina.

<sup>162</sup> Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, pp. 33-66

Another option is the consociation, where multiple realities of communities differentiated according to ethnical, religious, linguistic or cultural features decided to constitute a common society around constitutional, non-territorial basis. Lijphart<sup>163</sup> defines these political associations as consociate and takes Belgium, with its cultural linguistic specificities as an example. The characteristic that distinguishes consociate regimes from federal ones is the hierarchization of sub-national entities, which are generally organized and controlled by separated élites. It is precisely the institutional link between the different elitist governments that composes the central administration of the consociation, which corresponds to the result of the continuous negotiations between the parts.

The confederation then represents another model of political order with federal features, but despite its great success in making the history of federalism (with many examples that has already been exposed – from the Holy Empire to the Helvetic Confederation -) it has suffered from a tragic end during the modern time. In fact, the apogee of the Nation State consolidated a view of international relations which was not in compliance with the confederative point of view.

During the last two centuries, all the pre-existent confederations followed a different pattern, by converging their political core according to centripetal or centrifugal forces (transforming them-selves into federations or unitary states).

Some suggest that the innovations provided by the European Union are pressing for a new re-birth of the confederative idea, but the case is far too complex to be quickly classified.

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<sup>163</sup> Lijphart A., quoted by Elazar D., in *Idee e forme del federalismo*, Mondadori, 1995, p. 41

### 2.2.3 Post- modern patterns of federal evolution

Last decades have then seen the insurgence of some particular form bilateral or multilateral relationships with federal aptitudes. The asymmetrical political agreements<sup>164</sup> that gives life to this phenomenon happens to be between a stronger self-sufficient State and another, often a former colony, which takes advantage of the best developed administrative capacities of the first to compensate its vulnerabilities. The unbalanced nature of the relationship can wear the clothes of an associated state, when the agreement can be unilaterally dismissed according to prearranged protocols, or it can become a federacy, if the mutual consensus is required before dissolving the contract. Despite the ongoing emancipation of the former colonies, in the current situation the presence of some asymmetrical federal order is still persistent: it is no secret that institutional ties between countries such as San Marino and Italy, Liechtenstein and Switzerland or the Principality of Monaco and France are enduring and nevertheless successful<sup>165</sup>. Finally, the leagues are a last way to tie with federal elements two or more communities that share a same objective. This is the less convincing form of federalism, because the political agreement creating the association is often confined to a single but clear aim, albeit it lastingly connects very distinct political realities. If the historical past of leagues was centered on defensive agreements, nowadays is more and more common to find custom associations with the scope of enlarging the single economies face to the globalized world market.

Few transformations are to be found also in the classical model of the federal state, the same idealized by the American Constitution and replicated world-wide.

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<sup>164</sup> The discourse does not concern those cases of federal states with structural asymmetries in the demographic or economic reach of their components and it does not even refer to constitutional asymmetries within federations. In both situations the imbalance does not respond to a domination rule of one state over the other, but it is the mere translation into legal and political terms of the unique social reality of the federal state (Watts R., *Federalism, federal political systems, and federations*, Annual Reviews Inc., 1998, pp. 122-123)

<sup>165</sup> Elazar added to this category the institution of condominiums, when a political community is managed by the combined responsibility of two or more external entities. Anyway, it is difficult to recognize a federal aptitude to these cases, since the concerned community does not retain any kind of political autonomy or competence of self-government (in Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, p. 47)

The biggest changes involve the balance of the distribution of powers between the central government and the federate entities, which is a quite delicate institutional framework. The history of United States' federalism begun with a dual structure, that means that the reciprocal spheres of competence were distinctly separated the ones from the others. Usually and as already mentioned, the activities related to defense, foreign policy and international trade (monetary and custom policies) were allocated exclusively to the central stage, while all the residual matters, which are not enumerated in the constitution, are attributed to the member states<sup>166</sup>. Indeed, the constitutional document had an essential role in the clarification of the distribution of powers, and no grey area were therefore left for any dispute on the argument. In dual federalism, each level of government is autonomous in the expression of its sovereignty, and the exercise of public competences were made without any interference. This is a fixed and vertical structure that promotes competitive democracy between the states, where the fight for the allocation of national resources is to the detriment of the less powerful political entity<sup>167</sup>. On the other side, starting from the thirties of last century and throughout the Nine-hundred, an important shift happened to the structure of classical federal state systems, that went from a dual to a cooperative mechanism of assignment of competences. With the complicity of a complexified society, and consequently the augmentation of public powers' effectivity, the need arose to ensure the balance between the central government and the participation of the member states to the administration of the federation<sup>168</sup>. Those are the origins of the cooperative federalism, where all the competences become concurrent and national or regional interests are formulated with the negotiation between the different parts of the government, the centralized institutions and the federate entities. The cooperation introduces a reciprocal interdependence between the degrees of authority: there is no supreme sovereignty, but decisions are adopted, and policies are applied depending on the influence and the capacities of persuasion of each link of the government chain. An example of

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<sup>166</sup> The tenth amendment of the United States Constitution states this concept: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

<sup>167</sup> <http://www.differencebetween.net>

<sup>168</sup> Levi L., *Il pensiero federalista*, Laterza, 2002, p. 108

cooperative federalism can be found in the legislative system. If in the dual form the legislation is led by the center, the cooperation in this field occurs with the concurrent legislation or through the framework laws. In both cases the intervention of the local (regional or state) entity is allowed in order to preserve a particular interest or to gain some margin of manoeuvre in the application of a provision<sup>169</sup>. The tendency is thereby towards the identification of the procedures of coordination between the center-periphery axis, through the introduction of representative mechanisms such as the creation of confrontation organisms or assemblies, more than on the distribution of competences<sup>170</sup>.

Another possible distinction on the nature of classical federal state can be made upon the basis of its origins: the federalization of a political order could be the effect of an aggregation movement or the result of a process of disaggregation. The first situation was typical of ancient federative waves, when the defensive needs of the single states represented a sufficiently strong motivation to renounce to its own sovereignty in order to create a larger and less vulnerable institutional area. According to the balance of power's principles, states with a set of cultural and political commonalities were led to participate to the federal process in order to increase their offensive power<sup>171</sup>. With the exhaustion of conflictual inclinations in the European continent after the end of World Wars, the aggregative drives started to decline and eventually disappear, leaving space to an opposite phenomenon. Actually, disaggregation federalism is a more recent experience, that responds to local culturalism tendencies emerging after the globalization process. This entails a decentralizing pressure in the bosom of a unitary state that presents multiple social assets, often legitimized by economic and cultural claims face to the other groups or to the national community. The central government is then pushed to split some of its sovereignty in order to accommodate separatist demands. In doing so the state remains, nevertheless, the ultimate authority and the original power: any kind of concession included in the constitution will never call into question the existence of the central sovereignty (given the unoriginal essence of newly federated bodies) even if it would probably entail similar claims

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<sup>169</sup> Ventura S., *Il federalismo: il potere diviso tra centro e periferia*, Il Mulino, 2002, p. 28

<sup>170</sup> Ventura S., *op. cit.*, p. 29

<sup>171</sup> Mastromarino A., *Il federalismo disaggregativo: un percorso costituzionale negli stati multinazionali*, Giuffrè Editore, 2010, p. 106



from other peripheral entities. An important lack of constituent powers with regards to the members states, provinces or regions has then to be recognize. It goes with it that while the traditional federal states born through the aggregative process represent a white paper for its political parties, being the result of the spontaneous encounter of autonomous willingness, on the contrary the disaggregative federal states have to cope with already consolidated relationships of force that influence the political reality of the social bodies since generations, by altering the feedback of public policies before and even after the federalization of the already existing central state<sup>172</sup>. The degree of independence reached by disjointed entities within a federate State is far from any idea of secession, and it represents instead a valid alternative to this drastic process, being an institutionalized tool to preserve native cultural communities without jeopardizing the pluralistic society and state unity<sup>173</sup>.

From this analysis of federalism in its ideological and empirical features it is now possible to figure out three different legal traditions that have guided the path and understanding of this political phenomenon. For a start, the classical tradition foresees the federal principle as an “international” format, where the contractual agreement is stipulated between self-sustaining states, each of them holder of an exclusive sovereignty<sup>174</sup>. With the already mentioned birth of modern State and its biunivocal relationship with sovereignty, theorists decided to attribute to the unions and leagues of states a clear international character, getting around the problem arisen in the encounter of state sovereignty and federalism. According to this point of view, every federal pact was considered as some kind of prototype of modern international organizations<sup>175</sup>.

In the second place, the establishment of the first federal state in North America undermined the classical understanding of federalism, by placing it in a legal

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<sup>172</sup> Mastromarino A., *op. cit.*, pp. 112-113

<sup>173</sup> Sabatino A., quoted by Mastromarino A., in *Il federalismo disaggregativo: un percorso costituzionale negli stati multinazionali*, Giuffrè Editore, 2010, p. 54

<sup>174</sup> Schütze R., *From Dual to Cooperative Federalism*, Oxford University Press, 2009, pp. 15-22

<sup>175</sup> Effectively, the well-known theorist of sovereignty Bodin considered successful examples of pre-modern federal associations such as the Swiss League or the German Empire on the international plan where all the entities at stake were preserving their complete sovereignty (Bodin J., quoted by Schütze R., in *From Dual to Cooperative Federalism*, Oxford University Press, 2009, p. 17)

limbo, filling the space of a “mixed”<sup>176</sup> format. Despite the unclear and hybrid nature of the American tradition, alongside the development of the nationalist thought during the European nineteenth century the United State fortunate format will be associated with the idea that federalism was definitively a form of state. Therefore, according to the third and European tradition, the federal principle was to be classified under the national perspective: the borders of the federal agreements must correspond to the modern state legal frontiers, with absolute and exclusive sovereignty fulfilled within the central government. It follows that federal pacts could be categorized as confederations (when in the field of international law) or as federation (when corresponding to the domestic legal system), and any kind of composed or multi-tiered reality ceased to be considered<sup>177</sup>.

However, during last decades, the evolution of brand-new forms of (con)federal agreements between modern and self-sufficient national states started challenging the traditional understanding of the federal idea, by showing a complex and articulate system of shared sovereignty and devolution of powers that seems to be impossible to classify. The creation of the European Union, the identitarian claims for autonomy of many local realities, and the attempts of accommodation of pluri-national societies are taking on the binomial division of legal orders and are opening up the political scenario to new possibilities. That is how many federal options could offer effective alternatives to a nation-state legal monopoly that struggles to meet post-modern socio-political changes. In the aftermath, some original approaches to federalism will be then investigated, with the aim of detecting the possible application of neo-federal tools and theories to the re-conceptualization of democratic societies in the world to come.

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<sup>176</sup> Schütze R., *op. cit.*, pp. 22-30

<sup>177</sup> Schütze R., *op. cit.*, pp. 30-31

### 3 A neo federalist idea

#### 3.1 The identitarian struggle

Last decades have seen the rebirth of the nationalist phenomenon, this time in the shape of local and regional identities that are struggling to find a place in the globalized world. In a reality where economic and cultural goods are traded all over the planet without any real control by states, the access to mass culture is opened to everyone. Simultaneously, the secularization of Western society and the decline of the disenchanted political ideologies of the twentieth century have left peoples with a dangerous void of consciousness. Thereby, it seems that even the most cohesive Nation States have to cope with sub-national identitarian claims when, at the same time, they are already suffering from loss of sovereignty under the supra-national perspective, face to international organizations, such as the European Union, which present their own identitarian affirmations. It is therefore important to recognize the existence of multiple identities that move away from the single sense of belonging to the institutionalized nation of reference for the state. And once that this plurality has been acknowledged, it has to be included in the political system through the constitutional mechanism, in order to protect cultural minorities, to allow a positive reciprocal conflict and to preserve a negotiated but peaceful coexistence between the different parts of the society. The institutional identification of cultural differences in the bosom of a same Nation State will tolerate alternate identities and it maybe be the beginning of a re-organization of sovereignty on multiple and supra-national terms, that no longer clashes with the exclusive idea of the national state.

If it is undeniable that ethnic and cultural claims are filling the gap of the sense of being and the need to be identified, spaces that were before saturated by some God, by any Marx or by the *Patrie*<sup>178</sup>, it is nonetheless essential to understand the

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<sup>178</sup> Sub-national claims for identity and supra-national attempts to build a community of identitarian sense are to be read as the continuation of the role of state's nationalism, as it was defined by Sturmer as "the only legitimate power able to satisfy the hunger for identity, a task that had once been fulfilled by religion" (Sturmer M. quoted by Schmitz H. in *On their*

meaning and the reach of these wishes and to compare them with the national sentiments that were at the basis of World Wars and of the current world order. The issue of cultural identity and ethnic roots is now part of the political and social horizon and of the public debate, sometimes by highlighting the importance of the respect for specificity and authenticity of different civilizations, sometimes by arguing about the rejection for external contaminations or influences with a clear racist mark<sup>179</sup>. According to this second point of view, many scholars have emphasized the effects of this macro-closure on cultural grounds by prophesying a large-scale “clash of civilizations”<sup>180</sup> between Muslim countries and Western ideology. As a matter of fact, this interpretation of reality seems to respond to a rather belittling line of thinking, that tends to simplify the cultural and sentimental bonds of individuals to a mere exclusive ideological reality<sup>181</sup>. This is the thesis of Sen, who bitterly criticizes the illusion of the single identity and its instrumentalization for violent purposes. The conflicts between ethnic groups are often consequences of a univocal interpretation of identitarian reality, and political struggles about identity are resolving in a contraposition that can easily degenerate in violence, and which is primarily caused by the need to classify and order the rational knowledge of social phenomenon. On one side, the human desire of classify and divide is putting up barriers between ethnic and cultural groups, by ignoring the richness of the historical process of evolution of different cultures. On the other side, as already repeated several times, the standardization of culture operated by the aggressive side of globalization, that exports and imposes the culture of the strongest, is raising defensive reactions of resorting to ancient traditions or religious fanaticism<sup>182</sup>. The aggressive nature of smallest cultures is justified by the fact that their importance, but even the same existence of those cultures, has suffered from the colonization of the main ones, which, on the contrary, has never been called into question. In fact, when strong and long-living

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own terms, *The legacy of National Socialism in Post 1990 German Fiction*, University of Birmingham Press, 2004, p. 219)

<sup>179</sup> Proserpi A., *Identità, L'altra faccia della storia*, Editori Laterza, 2016, p. 89

<sup>180</sup> Recovering the expression of Huntington S. in “The Clash of Civilizations?” In *Foreign Affairs*, 1993 which have then been developed in *The Clash of Civilizations and the Remaking of World Order*, 1996

<sup>181</sup> Sen A., *Identity and violence: the illusion of destiny*, Norton & Co., 2006

<sup>182</sup> Proserpi A., *Identità, L'altra faccia della storia*, Editori Laterza, 2016, p. 9

national and religious cultures are self-sufficient in their promotion during generations, being given for granted, the sub-national cultures are in need of continuous cares, since the construction of valuable common rituals, traditions and memory is not made once and for all, but it requires further elaborations able to perform identitarian results against the dominant model<sup>183</sup>.

An analysis of the concept of minority is then required in order to understand the difficulties and problems that could arise in their claim to identity. The focus is therefore on the relationship between minority and majority, and the application of this duality on the democratic path<sup>184</sup>. In a close state system where decisions are adopted within a collective process through the majority principle, the deliberation will be undertaken according to the majority of votes of the given collegial organ. In this sense, the protection of minorities is ensured by the possibility of the occasional minority to be translated into a majority during a later deliberation, since the democratic decision-making process guarantees, more or less but always, the participation of minorities to the political debate. In this sense, the minority covers the role of the opposition, and it does not permanently correspond to a specific social group of reality that represents the outsider in the main national society<sup>185</sup>. This is instead the case of a minority in its sociological meaning and definition, which embodies a specific social reality that is detached from the dominant majority group according to an enduring attitude. The permanent minorities assume a legal status or a juridical tutelage only when the constitutional legislator assigns them particular collective rights with a view to preserve a potential degree of political autonomy. However, this situation has a fortuitous character, given that the principle of majority normally followed in the state system is aimed at the preserving of the majority's rights, without recognizing the need for protection of cultural and social diversities, which are rather relegated into an homogeneous minority or rarely incorporated into a superficial general majority<sup>186</sup>. The subject of the identitarian struggle has then to

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<sup>183</sup> Louvin R., *Legami federativi e declino della Sovranità: quattro percorsi istituzionali emblematici*, G. Giappichelli Editore, 2001, p. 5

<sup>184</sup> Pizzorusso A., *Minoranze e maggioranze*, Einaudi, 1993

<sup>185</sup> Pizzorusso A., *op. cit.*

<sup>186</sup> Piccioli I., *Nazionalismo ed autodeterminazione: il caso Basco nel contesto Europeo*, Centro Studi per la Pace, 2003, pp. 55-58

be identified with the permanent minority, which will feature some distinctive social traits of cultural, ethnic, linguistic or religious nature. Moreover, the self-perception of the group as a different but united community of destiny must be present in the collective consciousness of the permanent minority. This last characteristic could be then the effect of a discrimination, when its participation to the social and political life of the state does not follow egalitarian rules for both the dominant and the minoritarian groups, or it could be on a voluntary basis, when the cultural differences are cultivated and presented in clear opposition with the main national tradition<sup>187</sup>. In any case, the perception of one's identity and the identification of a minority as an independent people is far more important than to really be a nation in their own right according to the sociological meaning of the term. The minority must perceive itself as such and consequently assume an "even implicit" attitude aimed at preserving its own differences. This self-recognition could articulate around different degrees, from a weak intensity to a strong one, from a feeble sub-national sentiment until a dangerous resentment representing a threat for the maintenance of the central institutions<sup>188</sup>; from a vague self-assertion and claim to the right to proclaim oneself different, to a more elaborate phase of self-definition, in which the minority imagines itself, tracing its borders, to a third level which presupposes the choice of a transference, so the detachment from the territory of the state of origin, both to reunite with an already existing state or to found a new one, and finally the self-organization, or the right to give oneself statutes and autonomous laws, and self-management, that is, self-administration within the framework of the statute that the community has given itself following the negotiation with the central power<sup>189</sup>. It follows that the presence of voluntary minorities expressing the desire to maintain their diversity represents a threat for the state and to its territorial integrity, even if only under a hypothetical point of view. Protecting minorities, in order to make their identity effective and guaranteed, does not mean merely responding to an abstract ethical appeal or fulfilling the obligations contracted at the international level; it also

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<sup>187</sup> Pizzorusso A., *Minoranze e maggioranze*, Einaudi, 1993

<sup>188</sup> According to a classification made by Salvi S. in *Lingue Tagliate*, Rizzoli, 1975, quoted by Piccioli I., in *Nazionalismo ed autodeterminazione: il caso Basco nel contesto Europeo*, Centro Studi per la Pace, 2003, p. 58

<sup>189</sup> Piccioli I., *op. cit.*

means preventing a social and institutional conflict in power and considerably reducing the danger of orientation of minorities themselves towards independence or separatist positions. Some scholars argue that minority is a purely voluntary association whose main trait is subjectivity, the desire to distinguish itself. If the legitimacy of minoritarian claims is judged by referring to objective criteria, in particular the democratic nature of the latter and the respect for the rights and freedoms of individuals of the community that formulates those claims, therefore the minority is defined with reference to a purely subjective criterion. A group that does not want to identify itself as a minority does not need protection or special measures. The right of minorities is therefore without object. The minority is wanted by its members because of their subjective desire and must be recognized as such by the members of the majority<sup>190</sup>. The political recognition of these minorities is hence essential to affirm the right to obtain rights. Then there are those who go beyond and describe the minority as a simple invention of the majority<sup>191</sup>, which establishes it in order to give itself a counterpoint of conscience, to create a mirror on which it can better identify itself through its counterpart. According to this line of thought there is therefore someone who proposes to abandon the very idea of minority, as a reductive and useless perseverance of an unequal relationship of domination, in favor of the notion of people as the bearer of future global reorders<sup>192</sup>. Nevertheless, the presence and construction of an otherness, of a social opposition, it is not only to the benefit of the majority, but it is an integral component of the process that fuels the construction of the collective identity, even in the case of a minoritarian group. As Cattaneo points out, in fact, "the national conscience is like the ego of the ideologues who notices the self in the collision with the not I"<sup>193</sup>, and this is valuable both for the national and sub-national, minoritarian consciousness, which is sustained by the same presence and influence of the dominant culture. Another interesting definition that sums up the importance of the alterity in the

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<sup>190</sup> The main supporter of this thesis is Packer J., quoted by Foucher P. in *Minorités et organization de l'état*, Bruylant Bruxelles, 1998

<sup>191</sup> This is the opinion of Simard J., quoted by Foucher P., *op. cit.*

<sup>192</sup> Finally, it is Argemi A. to propose this alternative, quoted again by Foucher P., *op. cit.*

<sup>193</sup> Self-translation of Cattaneo C., quoted by Chabod F. in *Storia dell'idea d'Europa*, Editori Laterza, 1962, p. 102

creation of collective identities is given by Ricoeur with the formula “the self is always affected by the other self”<sup>194</sup>.

It is so undeniable that the construction of identity has a prominent place in the political aims of the representatives of every community, and their efforts in the scope of developing an identitarian sense of membership is not merely linked to the strengthening of nationalistic purposes. In fact, the political potential of an autonomous and convincing collective identity could be useful even beyond state borders, in particular when this identity is recalled through soft power’s techniques that refers to imperialistic claims or independentist movements. It is again a reference to the European and Western identities, which often took advantage of their cultural domination to legitimize their attempt to colonize the rest of the world. On the other side, the single identity principle is used as a political instrument by sub-national minorities to pursue international campaigns for the support of their claims for autonomy, and to guarantee the fueling of nationalist sentiments within their same territories. A recent but clear example of the importance of single identity in the political field is given by the fathers and legislators of the European Treaties, who tried to define a set of common values and cultural roots that could provide the Union with a strong identitarian European basis<sup>195</sup>, in order to follow the same successful path of national states which compose it. Their attempt failed when the project of constitutionalization of the Treaties was blocked by the direct approval of the member states, but the political obstructions and difficulties that the supranational entity is facing up to the present are showing the weight of a common identity in the survival of the

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<sup>194</sup> Self-translation of Ricoeur P., *Soi-meme comme un autre*, Editions du Seuil, 1990, p.78

<sup>195</sup> It is enough to look at the preamble of the 2003 Treaty Establishing a Constitution for Europe to detect the struggles of the constitutional legislator for the construction of a collective identity: “Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, believing that Europe, reunited after bitter experiences, intends to continue along the path of civilization, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world, convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny [...]”.



institutions. The multidimensionality of identity is often diminished and ignored, and this seems to be the main cause of the problems related to the exploitation and domination of some peoples over others, both as regards to the cultural oppression of intrastate minorities and to the needs of legitimizing colonial or imperialist campaigns. The evidence of the violence suffered on the cultural and identity wealth of the peoples is easily identifiable with the description that has been given for centuries, of the wild man, which represents the fatal error of being arbitrarily empty of conscience. In fact, the history of European colonization demonstrates how indigenous man is assimilated to a stateless being, in his trivialized sense of cultureless, without tradition or civic education, in clear opposition to the reality of the dominating white man. The Enlightenment thinkers themselves, although eager to compare the European with the exotic in order to highlight the defects of their time and to promote a common culture of tolerance and civilization, clash however with an empty and fallacious imaginary of cultural approximation of base, which lacks the complex perception of human identity<sup>196</sup>. The same belief that a person in the state of nature would be devoid of consciousness is misguided. Unfortunately, it is precisely this simplistic reading of the nature of the feelings of conscience that form individuals that have been inherited over time, and it is now partly the cause of unresolved and incubated conflicts that will not soon cease to violate world peace.

Anyway, identity does not respond to a single master, but it is composed, under a sociological point of view, by many degrees of membership and self-identification. A first articulation can be made starting from the individual level of consciousness as a single person, then another level following the already mentioned alterity, which represents the definition of identity in opposition to someone else or another culture, and finally, the collective consciousness of the group, as something that can be imposed, inherited and preserved during generations, but it can also be lost, rejected or recalled, and this one is subjected to political instrumentalizations<sup>197</sup>. If identity is made up by a variety of incentives, that can come from different spheres of the experience, from hereditary to environmental

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<sup>196</sup> Great philosophers of the Enlightenment era such as Rousseau and Montesquieu leaned more than once to this simplification in their efforts to evaluate their society (examples can be found in the 1762 *Du Contrat social* or in the 1721 *Lettres persanes*)

<sup>197</sup> Proserpi A., *Identità, L'altra faccia della storia*, Editori Laterza, 2016, pp. 22-54

factors as much as life-long cultural and social relations, then a single individual can respond to multiple collective identities, and nationalistic exclusive sentiments are the results of a good work of political propaganda<sup>198</sup>. As it has already been pointed out, although the risks arising from the political recognition of a determinate nation, under the juridical point of view the legal awareness of the existence of a specific people is important for the capacity of minorities to become rightholders. This is precisely because identity is not an existential surplus but an innate imperative and it is an inevitable characteristic of the human being, since there is an inborn exigency of individuals of understanding themselves and their own borders, in order to give a sense to their life<sup>199</sup>. Identity is also ideal, because it needs to be imagined and believed beyond the material direct social relationships<sup>200</sup> and, most important for the purposes of this analysis, it is dynamic<sup>201</sup>, because it is subjected to continuous transformations and adjustments. Therefore, taking into account that identity is spontaneous, inborn, and constantly fluid, it became essential to find out all the possible legal instruments that allow the protection of its different expressions, in order to avoid the political and social exploitation or oppression of some peoples over the others. Considering all these factors as unavoidable, a national state would always be composed by multiple identities, and so multiple minorities. Consequently, the state should not be satisfied through making efforts in the homogenization of the nation, but it should follow an accommodating logic that preserves the cultural and traditional features of its minorities, for the double purpose of safeguarding the rights of each of its components and by avoiding centrifugal forces that could break its institutional unity. Under this perspective, the Italian federalist Chanoux suggested that, instead of speaking about privileges, the focus of this legal cooperation between the central state and its local autonomies should be placed on the concept of tolerance, that would preserve cultural, ethnic and linguistic

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<sup>198</sup> Prosperi A., *op. cit.*, p. 38

<sup>199</sup> Mastromarino A., in *Il federalismo disaggregativo: un percorso costituzionale negli stati multinazionali*, Giuffrè Editore, 2010, pp. 27-28

<sup>200</sup> This point, besides being already treated previously, is perfectly clarified by the work of Anderson B., in *L'imaginaire national*, La Découverte, 1996

<sup>201</sup> Mastromarino A., in *Il federalismo disaggregativo: un percorso costituzionale negli stati multinazionali*, Giuffrè Editore, 2010, pp. 29-31

specificities in return for the loyal participation of all the citizens to the public life, to a harmonized public sphere<sup>202</sup>.

In fact, the peculiarity of Chanoux's thought manifests itself in the attribution to the non-institutionalized social groups of a sort of legal personality from which burdens and rights would derive, just as in the case of the individual personality whose protection is recognized by human rights on the international level : "All peoples have the right to life. The little ones like the adults. All peoples have the right to preserve their characters, their ethnic and historical personality, to whatever political complex they belong. As the human person has the right to see his own personality safeguarded, so human communities must be able to exist while preserving the characteristics of their personality. It is a law of justice. The only guarantee for peace [...] "<sup>203</sup>.

The recent evolution of international law seems to follow this reasoning, thanks to the introduction of the principle of self-determination of peoples, which has been developed according to the need to protect national minorities during the decolonization process. The principle states that all peoples have the right to "freely determine their political status and freely pursue their economic, social and cultural development"<sup>204</sup>. The importance of the concept also emerges from its particular dominant position within the 1945 United Nation Charter (it is mentioned in article 1 as a principle and purpose of the organization), and in the twin International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966 ICCPR and ICESCR), that made it part of the *jus cogens* of international law. The fact that the international community allows for secession those homogenous peoples that have been oppressed, subjugated or colonized by another state, certainly represent an instrument to discourage the exploitation of minorities, but in actual fact its practical application was principally intended for African de-colonized countries, which did not present any kind of constitutional guarantee for the unity of the state . Anyway, the principle seems to call the international community as an arbiter for the legitimation of separatist

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<sup>202</sup> Chanoux E., quoted by Pasqui G. A. in *L'attualità di Emile Chanoux nella prospettiva federalista*, Le Chateau, 2004, p. 38

<sup>203</sup> Self-translation of Chanoux E., quoted by Pasqui G. A. in *op. cit.*, p. 49

<sup>204</sup> According to the definition given in Article 1.1 by the 1966 UN International Covenant on Civil and Political Rights

movements, and the nationality claims are bearer of this special status, which is inversely part of the normative content of national identity<sup>205</sup>. It goes without saying that, even if a nation boasts a self-evident specific cultural community, it needs to present a convincing political message that it is sustained by the people in order to gain the attention and recognition within the state and face to the international community. This entails an enormous work by the supporter of the claim, and the attempts to reach the scope of the principle would require a socio-economic mobilization of resources that would not always be worthwhile for the benefit of the population. Besides, in some cases the successful expenditure of energies for the construction of a national collective identity could bring to a secession with bittersweet results, since the new born state could face important problems of economic isolation due to the globalized world order. The difficulties of state systems in the international arena, together with the large number of sub-national independentist movements, which are often present in troubled geopolitical areas, have inspired new, less radical, interpretations of the principle of self-determination. It could refer to the external right of a state to be respected in its integrity, or to the internal right of social groups to be fairly represented in the bosom of the central institutions, or to obtain a sufficient degree of autonomy necessary for the preservation of their cultural and ethnic prerogatives<sup>206</sup>. As it has been already pointed out, autonomist groups rarely seek for complete independence and statehood, while their struggles are principally directed to the acquisition of some sovereignty devolutions that could grant them the survival of their identity that risks being gobble up by the major culture.

Understood that collective identity is a layered and dynamic concept, which can serve multiple masters, and that the concept of nation is not univocally associable to the concept of state (even if the first one responds to a normative nature of claiming to self-determination), then it should be important to find different ways to accommodate the identitarian struggles for autonomy under an alternative perspective of political organization that overcomes the axiomatic interpretation of state sovereignty. Therefore, political autonomy of sub-national realities within

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<sup>205</sup> Keating M., *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era*, Oxford Scholarship Online, 2003

<sup>206</sup> Keating M., *op. cit.*

states should not be intended as decomposition of the holy temple of global order such as the nation state, but it should be regarded with a view to introduce new and free bottom up associations of citizens able to enhance the cooperation between diverse levels of civil society. Multiple senses of membership to the political community, under a voluntary, aware, collaborative and responsible basis, could shape a positive competitive spirit encouraging the participation to the public life by avoiding the conflict that could result from the single identity construction of alternate nationalities.

### 3.2 The Neo-federalist theory

Combining the socio-economic and geopolitical changes of last decades with a critical interpretation of nationalism in its monolithic historical evolution in the representation of world order, it finally emerges the need for a new way for arranging political communities. The rise of supranational organizations, the crisis of the sovereign state paradigm and the revival of local identities are factors of challenge for the twenty-first-century's societies. On the other side, maybe an alternative understanding of legal and philosophical theories could offer an answer to the instability, and constitutional doctrines could accommodate the claims coming from this general sense of disorder. Taking into consideration the great variety of sources of legislation that are emerging in recent times, together with the multiplicity of cultural expressions resulting from social and political reactions to globalization, the theory that seems to provide a solution for these turbulences is certainly the federalist one. Effectively, federalism appears to be in line with modern phenomena, since it has been previously used to combine the strength of broad central governments while granting a large degree of autonomy, which is constitutionally safeguarded, to the different parts of the society<sup>207</sup>.

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<sup>207</sup> Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, p. 216

Moreover, the exercise of self-government features had often protected the cultural specificities of local realities, by discouraging the disruptive secessionist forces. Federalism promotes a democratic and accountable division of powers whose core derives from a contractual agreement between the citizens and is retained in the constitutional document, which gives an ultimate and certain nature to the legal system. The ambivalence of the human being, that fills the social reality with a double meaning of distinct and unique individual, who is alone and free to act, and of citizen committed to its communitarian role, express the importance of the conjugation between the levels of consciousness that layering the society. The two, or more (seen the multiplicity of identities) poles that constitute the political community need to be related in order to solve the tension generated by the oxymoron “the one and the different”<sup>208</sup>. This certainly reminds the famous federalist motto of “unity in diversity”<sup>209</sup>, and De Rougemont gives to this logical link a triple interpretation: to a “federalist problem”<sup>210</sup>, hence a situation where two or more alternative realities, each of them with a valid basis, the answer could not be the merger and not even the subordination of one into the other. The “federalist solution”<sup>211</sup> is therefore the satisfaction of the demands of both, such as every response that respects the conflictual terms of the game by associating them through a line of positive tension. Accordingly, the “federalist politics”<sup>212</sup> should be the leitmotif of the whole, problems and solutions, of social reality.

Elazar goes further and suggests that the exploitation of the federal principle in order to organize socio-political communities does not mean that there is the obligation of constituting a federal system in the measure of the contemporary understanding of the federal state. In fact, federalism could be employed to “institutionalize a particular set of relations between the participants to the public life” and not to the building of a “particular set of insitutions”<sup>213</sup>. From here

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<sup>208</sup> De Rougemont D., *L'uno e il diverso*, Edizioni Lavoro, 1995

<sup>209</sup> Such as the motto of the European Union in *varietate concordia* or in *varietate unitas*, adopted in 2000 and then included in the failed 2004 *Treaty establishing a Constitution for Europe*

<sup>210</sup> Self-translation of De Rougemont D., *L'uno e il diverso*, Edizioni Lavoro, 1995, p. 13

<sup>211</sup> Self-translation of De Rougemont D., *op. cit.*

<sup>212</sup> Self-translation of De Rougemont D., *op. cit.*, p. 14

<sup>213</sup> Self-translation of Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, p. 11

maybe the drafting of a Neo-federalist theory, as an alternative federal option to administrate political authority and public powers that takes into account the definition of “self-government and participation to the government”<sup>214</sup> able to widen the borders of classical state theories. Thereby Elazar opens up to ways of permanent contractual connections establishing a participation to the central government that overcomes the sovereignty limits which complements the former organic links (intended as the cultural communities of sub-national roots), by avoiding their homogenization or diminution face to the dominant identity<sup>215</sup>. Following this direction, an interesting and very recent analysis headed by professor Schütze was developed around the elaboration of a new federal theory aimed at the discovering of new forms of division of the political power among peoples<sup>216</sup>. Firstly, it resorts to the classical interpretation of federalism in its triple partitioning of the legal traditions that have already been mentioned in this context. The international tradition considers the federal principle as an international dogma, so as a functional agreement between autonomous and independent states which will keep their full sovereignty. The example is taken from the British Empire of the Eighteen century, when the legal debate about federalism as an instrument to create the Empire led to an understanding of the principle in its international format, as a way to regulate relations between sovereign states. The American tradition, or the “mixed” one, will allow the creation of a federal state composed in its turn by other member states, by establishing a federal constitution that guarantees the allocation of powers and sovereignty between the central institutions and the federate entities. Finally, the European tradition relegates federalism to a nation-state dimension, by respecting the state-centric perspective of world order. Under this last point of view, the national constitution manages the devolution of powers by guaranteeing the unitary nature of the central state, which is the only and ultimate holder of sovereignty. German legal tradition offered the main reference for the federal state that regulates the relationship between the single central sovereign

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<sup>214</sup> Which is the definition of Elazar’s federalism, in Elazar D., *op. cit.*, p. 12

<sup>215</sup> Elazar D., *op. cit.*

<sup>216</sup> <https://www.federalism.eu/projects/overview/>

institutions preserved by constitutional norms and the more or less autonomous entities, or in this case, Länder.

Keeping in mind the three traditions, a Neo-federalist theory should adapt classical federal characteristics to the Twenty-first century's society, by overcoming the contemporary tendency of using federal structure for the scopes of the Nation-state ideology. New and different exigences are ruling today's world and the modern state formula is no more in compliance with the need of globalized citizens. Political borders seem to be more and more obsolete and forced in comparison with the fluidity of cultural identities and the rapidity of the digital era, that enables the organized communities to elaborate various and divergent expressions of their historical cultural grounds. As Miglio<sup>217</sup> points out in his interpretation of neo-federalism, this kind of institutions derive from the philosophical and ideological roots of a never ending evolution of the federal principle, that invokes the spontaneous formation of communities as an alternative to absolutist and centralized regimes of authority such as monarchies or empires, intended in their role of founders and incubators of the modern state-system. The compelling part of Miglio's theory resides in the inventory of essential features that the forthcoming federal community must set up so to reform itself under neo-federalist terms. The first point is that the federal structure should not be an accessory feature of the central power, but it should have a straight line that connects the role of federate entities to the decision-making process of the institutions. The United States, as many other forms of federal state, are used as an example to criticize the limits of the classical federal theory, since the application of the federal principle is concentrated in the role of the second chamber of the Parliament. Citizens elect directly or indirectly the representatives of the chamber according to the local entities' logic, but then the executive, and in large part also the legislative power, is administrated elsewhere, by excluding the organization of territorial units in favor of the national parties' subdivision. Consequently, despite the usual participation of the lowest chamber to the approval of ordinary and constitutional legislation, the federal principle should gain a primary character in directing the political action<sup>218</sup>.

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<sup>217</sup> Miglio G., Barbera A., *Federalismo e secessione, un dialogo*, Mondadori, 1997, pp. 91- 94

<sup>218</sup> Miglio G., Barbera A., *op. cit.*, pp. 94-100



Another reform of the classical model should entail the enhancement of territorial units, to the detriment of the organized representative of interests. The consolidation of the variety of territorial entities could also reinforce the constitutional document when the political system is destabilized by the corporative levels of society that seek for protection in the constitution. The overlap of economic interests with their own territorial unities would promote a clearer understanding of the federal mechanism, by avoiding the blend of contradictory positions in the bosom of political authority<sup>219</sup>.

Additionally, the different levels of sovereignty, the decentralized and the central ones, should always be preserved by the federal constitution. This means that, before undertaking any kind of modification to the administrative role of regional unities, the approval of both authorities must be required. In fact, public opinion is not a sufficient deterrent for the authoritarian exceedance of the central power. A set of constitutional mechanisms should be put in place to protect the levels of government from the abuses of the other part. A double vote including the regional layer as a political unit or the requirement for an absolute majority vote in the second chamber of the parliament should always be included in the constitutional text for what it concerns the modification of the allocation of competences. A negative example is given by the German Basic Law, that allows the second chamber to intervene in the fields reserved to the Länder “if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest”<sup>220</sup>, and only few of the sectors concerned by the intervention of the Bundestag require the consent of the Bundesrat<sup>221</sup>. Moreover, after the 2006 constitutional reform, although there has been a reorganization and redistribution of competences that under certain aspects is favorable to the Länder, there was an important reduction of the

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<sup>219</sup> Miglio G., Barbera A., *op. cit.*, pp. 100-106

<sup>220</sup> Art. 72 of the Basic Law

<sup>221</sup> Miglio G., Barbera A., *Federalismo e secessione, un dialogo*, Mondadori, 1997, pp. 106-107

legislative fields requiring the approval of the Bundesrat, that now retain the veto power only on few subjects referring to the regional perspective<sup>222</sup>.

A fourth advise refers to the communities of interest and their bond with identitarian claims at the regional level. A neo-federalist reform should therefore strengthen the existent local communities, which should help the cultural and historical identity of the sub-national reality to a single political unity able to represent the interests of the community to the upper level of government. This is an essential point for the arrangement of the new millennium's demands, since it could accommodate already mentioned identitarian struggles to a certain degree of political autonomy necessary for the survival of the unitary doctrine. Here Barbera suggests that the determination of the cultural and traditional entities would not correspond to a fixed and perpetual definition of political sub-national borders, considering that instruments such as the ones used in the international arena, see agreements or arrangements, could expand and dynamize the new multilayers frontiers<sup>223</sup>.

Another advise is focused on the fact that all the possible competences should be maintained at the lowest level of the regional federated entities. In accordance with the principle of subsidiarity, the administrative power should be retained close to the citizens by safeguarding the efficiency criterion (the great part of public functions should be allocated within the regional sphere of action, except for those which are expressly reserved to the central government). Anyway, the constitution must firstly enumerate the list of competences assigned to the sub-national units, and only after the principle of subsidiarity. Those competences then should require a mechanism of protection provided of a set of aggravated procedures for the changing of the constitutional text in this area. But again, those principles could be undermined, as in the case of the implicit powers' doctrine, which was elaborated by Hamilton and then exploited during the American history in order to increase the influence of the federal government<sup>224</sup>. Following

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<sup>222</sup>Burkhart S., Manow P., Ziblatt D., "A more Efficient and Accountable Federalism? An Analysis of the Consequences of Germany's 2006 Constitutional Reform", in *German Politics*, no. 17, 2008, pp. 522-540

<sup>223</sup> Miglio G., Barbera A., *Federalismo e secessione, un dialogo*, Mondadori, 1997, pp. 107-110

<sup>224</sup> Relying on the Hamiltonian interpretation, the famous ruling of the Supreme Court of the United States in 1819, *McCulloch versus Maryland*, established an important precedent for the implicit powers' doctrine. At the center of the case was the State of Maryland that had

this logic, every power conferred to a government is sovereign and it includes the right of deploying every necessary means and resource which are not prohibited by the constitutional paper or contrary to the scopes of the community in order to fulfil its purposes<sup>225</sup>. Furthermore, the same principle of subsidiarity could present some problematics, insomuch as it involves that the basis on which the functions are executed is the adequacy of the institutional level that is supposed to carry them out. But bearing in mind that the subjects that are called to evaluate the appropriateness of an institutional body are the same who holds the rein of the federal power, then the principle could become a double-edged sword for the autonomy of sub-national communities. Rightfully, in fact, Barbera points out that the exploitation of this principle in the construction and direction of the European Union was stressed by the founding fathers, and especially by its inventor Delors, and by pro-European political forces, not in the spirit of recognizing some competences to the Members states, but in order to justify the absorption of competences by the Union<sup>226</sup>. This example recalls the ultimate importance of the constitution in the attribution of functions to the levels of government, which should always start from the lowest federate bodies before deciding how many and what kind of competences to allocate to the federation. Successively, an authentic (and “neo”) federal constitution should not leave room for the production of sovereignty acts, see that negotiation has to be intended as the best way to perform a decision-making process. Absolute, sovereign powers are no more the rule of the juridical order, and in the necessity of having a clear and efficient solution, the legislative system at the federal level should rely on the ultimate democratic instrument, namely the vote. If citizens are entrusted with the capacity of determine the results of an unsolved legislative debate, then

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attempted to tax Second Bank of the United States transactions that occurred outside its borders. The Supreme Court rejected the ruling of the Court of Appeal on the following grounds: since federal laws have supremacy over state laws, the state of Maryland does not have the power to interfere in banking operations. Indeed, this is the pronouncement with which the supreme judges have established that the United States Congress can approve norms not expressly foreseen among the federal powers but that nevertheless implement the constitutional principles. The ruling also states that a State cannot issue rules that prevent the implementation of those established in Washington (<http://america24.com/news/le-principali-sentenze-della-corte-suprema> )

<sup>225</sup> Miglio G., Barbera A., *Federalismo e secessione, un dialogo*, Mondadori, 1997, pp. 110-116

<sup>226</sup> Miglio G., Barbera A., *op. cit.*, p. 115

democracy and efficiency are safe together with the principle of negotiation between the layers of sovereignty. In addition to the constitutional provision granting direct democracy instruments, the strict separation between the legislative and the executive spheres must be respected in each level of government, as it is shown by the American system of “check and balance”. Otherwise, Barbera suggests the control over the division between majority and minority in the bosom of the political representatives. According to the Westminster model, when the opposition play its part in balancing the power in the parliament, then the democratic essence of the federation is anyway preserved<sup>227</sup>.

Finally, the last point proposed by Miglio is around the diversity’s “cult”. Society is used to prefer the homogeneous and unitarian ideas, while a federation requires a pluralistic perspective of the social reality and an appreciation for cultural and social diversity, which has to be respected and preserved by the political community. A criticism should be made about the organicistic interpretation of the social body that from Platonian political metaphors to Rousseau’s eulogy of the unitarian nature of the single people had persecuted not only pluralism but also the invaluable merit of the concurrence<sup>228</sup>. A federalist approach is in this sense revolutionary in the conception of society, since it is aimed at valorizing the differences and preserving the cultural and psychological richness that could come from the cooperative and negotiating spirit that derives from a positive concurrence between the social groups of a pluralistic, multilayered community. The overcoming of the systemic thought, which minimize human freedom and personal initiative on behalf of a unitary impersonal society, is required in order to conquer a pluralistic point of view. The neo-federal asset would therefore demand a cultural basis of aggregation, and a real choice of common civilization, understood as an aware participation, with a particular focus on the active and voluntary nature of the cultural character that is needed for the success of the future federal society. It will no longer be enough to develop the identity in its meaning of membership, or in its *arché*, but it will be essential to find another interpretation of cultural association, an approach centered around the purposes

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<sup>227</sup> Miglio G., Barbera A., *op. cit.*, pp. 130-134

<sup>228</sup> Miglio G., Barbera A., *op. cit.*, pp. 134-136

of culture, the improvement of a *telos* as a responsible construction and reciprocal convergence<sup>229</sup>.

Returning to the political discourse about neo-federalism, once that it has been pointed out the necessity for a cultural reform of society, it is essential to explore the possible forms that the division of powers could assume within and among national peoples. Schütze's research gives again some food for thought, by offering three neo-federalist contemporary challenge to constitutional law. The first one concerns the idea of "international federalism", expressed as the "transition from a law of coexistence to a law of cooperation"<sup>230</sup>. This concept could refer to the creative role of international organizations such as the United Nations, but also to transnational phenomena of cooperation between different sub-national regions or macro-regions that exploited forms of international law and agreements to enhance projects of collaborations around common matters. The second benchmark for alternative patterns is indeed taken from the European Union, and it is called supranational federalism. Starting from the fact that European constitutionalism has included some features of shared sovereignty, and by following the simplistic exclusionary logic stating that if the Union is not an international organization it must be a federal state, Schütze suggests that this supranational peculiar example could be refined until it reaches the scheme of a neo-federal system that could be repeated and applicable to other social realities with successful results<sup>231</sup>. The third idea takes into account the identitarian sub-national struggles emerged during last decades particularly in Europe, and it is so referred to regional federalism. Here the analysis observes the situation in Italy, Spain and in the United Kingdom, where regional claims to different levels of autonomy or independence are undermining the stability of the corresponding states<sup>232</sup>. The belief is that the development of neo-federalist

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<sup>229</sup> The philosophical opposition between the ancient Greek terms of ἀρχή and τέλος was proposed by Husserl for indicating the distinction between principle, origin and finality, scope. It is appropriated in this analysis because it can highlight the key role of the civic culture's approach for the implementation of an alternative federal society (Husserl E., quoted by Goisis G. in *L'uno e il diverso*, Edizioni Lavoro, 1995)

<sup>230</sup> <https://www.federalism.eu/projects/overview/>

<sup>231</sup> <https://www.federalism.eu/projects/overview/>

<sup>232</sup> <https://www.federalism.eu/projects/overview/>

political designs could accommodate those claims and reform the conception of state sovereignty according to a regional devolution of powers.

Even if Schütze's project stops here, in the creative act of imagining a neo-federal society there should be place for a last case study, the pluri-national federalism. Naturally, this time the main inspiration comes from the case of Canada, and its efforts trying to hold its stability face to the regionalist claims deriving from Quebec's cultural specificities. However, this example seems to be interesting seen that the pluri-nationality is proving to be a common characteristic of modern states, which therefore continue to avoid multicultural realities and persist to make reference to a homogeneous people. The Canadian context becomes indeed important since its constitutional system recognize its pluralism and seeks to organize its different identities under the same political community according to federal principle of coexistence and collaboration.

A last journey through the possibilities offered by new conceptions of political organization will be carried out, followed by a more in deep analysis of the four case studies proposed by neo-federalist and already existing realities.

### 3.3 Re-organizing political communities

Before reinventing the political order, it is certainly necessary to define its spaces. The definition of territory therefore assumes a strategic importance in the framing of empirical reality: it is not determined only by its geographical nature and does not refer to a mere physical space but assumes social connotations from the moment it is articulated as a "place"<sup>233</sup> constituted by three elements. First of all, it is a place in which social relations are developed; secondly, it needs a geographical framework, a localization, in which the socio-economic processes can take place within the limits of a global society. Finally, a sense of place must come from the

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<sup>233</sup> According to the term used by Agnew J.A., quoted by Keating M. in *Les défis du nationalisme moderne*, Les Presses de l'Université de Montréal, 1997, p. 68

collective experience of the people who live there and who perceive it as their own. A fundamental characteristic of the modern "place" is the domination of the public, in which the legislature allows the market to express itself freely within those defined geographical barriers and for people to obtain a collective mobilization, through a potential that is given precisely by the bureaucratization of the place in question<sup>234</sup>. The stratification of this definition given by Agnew has then been complemented by the idea that those "places" are nothing less than the components of the modern territorial states<sup>235</sup>. This means that from a simple historical unit such as the *polis* (an ever-green model for socio-political interactions), the political communities have grown up to the dimensions of today's sovereign state. In the face of the enormous success of the aforementioned model, which has come to dictate the canons of the world political order, the historical value and the capacity for self-sufficiency of minor local autonomies has therefore been lost sight of. The value of the *polis* as a force for economic, political and relational propulsions has been lost in favor of the state and the sovereign bureaucratic machine to the detriment of the immediate participation of citizens in public life, which took place first through an efficient system of institutions close to the daily reality of the community<sup>236</sup>. The basic cell has thus been cancelled, together with the conception of society as concentric circles of mutual interdependencies, and there is no longer an intermediary between the individual and the state. Unfortunately, globalization and digitalization are affecting this perception and the straight line that runs from the citizen to the central authority is quickly dismembering.

But then how could it be possible to change course and modify the laws that govern the relationship between the political community and citizens? Habermas comes to this question and is concerned with finding a solution to the dilemma by maintaining the democratic aspect as the basis for change. He argues that in order to transform modern society it is necessary for the "state people" to become a "nation of citizens"<sup>237</sup> capable of autonomously determining their political future.

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<sup>234</sup> Keating M., *op. cit.*, p. 69

<sup>235</sup> Agnew J.A., *Place and politics: the geographical mediation of state and society*, Allen and Unwin, 1987, p.1

<sup>236</sup> Papa E. R., *Discorso sul Federalismo*, Giuffrè Editore, 1995, p. 35

<sup>237</sup> Self-translation of Habermas J. in *La costellazione post-nazionale*, Feltrinelli, 1999, p. 36

He also supports the importance of the role of culture which, although on various levels, must ultimately be integrated to allow the formation of a civic solidarity that enables individuals to feel responsible for the abstract community. It follows that any self-modification of the political structure by a people must be centered on the perception of the common self. If understood in a democratic sense, the transformation can be carried out with a view to a free and voluntary association between a defined quantity of persons in order to distribute among them a set of rights sufficient to guarantee the peaceful coexistence of the members as they are equal to each other<sup>238</sup>. In support of this thesis, Habermas recalls that democracy is disconnected from the state's sphere of the nation and that indeed it is a useful tool to bridge the gaps of social integration and cultural pluralism through the civic participation of citizens in the public life of the community. The pivot on which the reform in the federal sense of a complex society could be based could indeed be what the German philosopher calls "the formation of the opinion and the civic will"<sup>239</sup>, which is supported by the constitutional guarantees of popular sovereignty and human rights. The access to public debate and political participation in a hypothetical multi-level *agorà* would thus provide the adequate glue for the formation of a solidarity that is therefore abstract, but juridical and self-healing. Since democracy is the focal point around which the existence of a liberal and modern political system revolves, and participatory political negotiation is the *conditio sine qua non* that allows the model to function, it is possible that it forms around mechanisms that are alternative to those of state representative democracy? With the complexification of the concept of sovereignty, which now finds itself to be widespread and disputed between a multiplicity of different actors, the field of political action of the citizens expands and a new series of negotiation tools come to the fore. The new millennium thus opens the doors to a reshaped democracy, which allows individuals to express preferences and wills that are dissociated from the duality of the classic representative form. The vote is joined by other models of participation in public life that allow citizens to express opinions, exercise control, judge an agreement or

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<sup>238</sup> Habermas J., *La costellazione post-nazionale*, Feltrinelli, 1999, p. 37

<sup>239</sup> Self-translation of Habermas J. in *op. cit.*, p. 53



simply to speak in front of the community<sup>240</sup>. Moreover, it seems that the governance that regulates global socio-economic relations of power is making the domestic political order to tend towards decentralization. If before the legal system referred to the majority expressed by the government and the parliament of a state, now it is influenced by different extra-state actors such as individuals, groups, communities, minorities and civil society movements or supranational organizations<sup>241</sup>.

The federal idea starts from the assumption that sovereignty does not belong to a single government or state, but it resides in the people who are administered by it. Citizens delegate their powers through constitutional mechanisms, which regulate and control the distribution of sovereignty. There is therefore a huge difference between what Elazar would call “peoples” and “publics”<sup>242</sup>. While the term “people” refers to the ethnicity of a specific social group, so it is the heir of a set of common characteristics that could be physical, cultural or linguistical, the concept of “public” refers to a community based on a common civic attitude and common political expression. In order to survive, a political community should have a public, but it could be composed by more than one people or it may not even have one. Federalism takes into consideration the distinction and is able to defuse ethnic conflict by creating a transversal public, or by equipping each people with the instruments of political expression that could make a public out of it<sup>243</sup>. But this distinction becomes vital for the democratic paradigm to be enforced in a multilayered system of law. Democracy in fact need a public, not a people, since it has an including sense deriving from a self-legislative practice that does not need the cultural homogenization of its citizens to be enforced. The Habermasian basis for democracy recalls the role of the public to develop a discursive and participative procedure of establishment of a collective opinion and will, which is constantly re-negotiated by the parts, and the legitimation of the system comes directly from the constitutional guarantees of this inclusive procedures<sup>244</sup>.

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<sup>240</sup> Ferrarese M. R., *La governance tra politica e diritto*, Il Mulino, 2010, p. 109

<sup>241</sup> Ferrarese M. R., *op. cit.*, pp. 112-113

<sup>242</sup> Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, pp. 190-191

<sup>243</sup> Elazar D., *op. cit.*, p. 192

<sup>244</sup> Habermas J., *La costellazione post-nazionale*, Feltrinelli, 1999, pp. 49-51

With the development of a common and preponderant political culture, the identity of each citizen is balanced and positively compared with the collective identities that are reciprocally recognized. This political culture, or “constitutional patriotism” is finally detached from the ethno-national dominant culture and it would allow citizens' free access to the public sphere even in cases of multicultural societies, since a collective solidarity is generated by the community under a civic spirit of fellowship<sup>245</sup>.

An essential tool for restoring juridical nature to the concept of civic solidarity could lie in the expression of citizenship and in the rights that this brings with it, which fully reflect the idea expressed by the "constitutional patriotism". However, it is clear that the latter is considered a historical product of the nation and is often associated with it in a unique and indisputable manner. But if citizenship turns out to be the only criterion for the attribution of civil and political rights, it should be guaranteed on an inclusive and non-ethnic basis, as it represents the only laissez-passer for the public sphere and civic engagement. Only through a process of de-legalization of nationality, depriving it of the citizenship award, could the integration be created in a sufficient way as to support today's multicultural societies<sup>246</sup>. The Habermasian ideal in fact refers to the desire to give mobility to the relations between state, citizens and community, in order to untie once and for all the fidelity to political institutions from the sense of belonging to the nation.

The shaping of a civic solidarity would project an emancipatory pressure for society to organize it-self around new dimensions of self-consciousness and self-determination that are already present in the dynamics of the modern era and that now need some kind normative regulation. Under this perspective, federalism could be adapted to supply a dynamic model of reference for a creative and fluid constitutional system. Federal mechanisms should be employed in order to keep up with the ever-changing socio-economic and political contexts of today's world. Indeed, the federal juridical form leaves room for manoeuvre for the relationship between authority and pluralism, between sovereignty and democracy, and

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<sup>245</sup> Habermas J., *op. cit.*

<sup>246</sup> Louvin R., *Legami federativi e declino della Sovranità: quattro percorsi istituzionali emblematici*, G. Giappichelli Editore, 2001, pp. 159-160

constitutional law seems to be ready for an evolution in this sense, setting aside its classical rigidity in favor of new and alternative ways to protect the connection between citizens and political institutions<sup>247</sup>. Federalism recognizes the complex nature of every majority, which is always composed by a plurality of minoritarian subgroups, each of which with specific needs of protection. Those exigences are added to the principle of consensuality and freedom as the pillars of federal constitutions<sup>248</sup>, and together they represent an important answer for the challenges of the modern times.

The first step in thinking about a multilevel reorganization of sovereignty is perhaps to identify what are the models of territorial autonomy that can be applied to redistribute state power starting from the first step, the identity claims. Autonomy as a form of self-government responds to a logic of decentralization designed to protect the interests of minorities or composite cultures based on the concepts of popular democratic sovereignty of citizens with the right to free association and political expression, which stays subjected to constitutional law<sup>249</sup>. A constitutional reform in the sense of the distribution of autonomy is thus the bearer of the acceptance by the community of social groups carrying specific interests, which, feeling recognized as such, will more easily adhere to the conditions set by the central authority regarding common matters.

A soft autonomist policy could be granted by the central state through the cultural recognition of the minority in the quality of region or province of the unitary state. This could happen when a national propaganda for cultural integration has been carried out successfully, when the minority at hand has suffered from oppression and prosecution or because of an “historical accident” where unforeseeable circumstances such as the end of a dynasty or a natural phenomenon had interrupted the cultural transfer from a generation to another<sup>250</sup>.

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<sup>247</sup> Louvin R., *op. cit.*, pp. 9-10

<sup>248</sup> Elazar D., *Idee e forme del federalismo*, Mondadori, 1995, pp. 3-4

<sup>249</sup> According to the definition given by Sabatino A. in “Autodeterminazione o autogoverno?”, in *Il Federalista*, vol. 2, p. 97

<sup>250</sup> Guibernau M., “Nations without States: political communities in the global age”, in *Michigan Journal of International Law*, vol. 25, 2006, p.1258

Anyway, the identitarian claims put forward in last decades do not respond to those features, but they present strong elements in support of their political requests, which represent a real challenge for the cohesion of their host state. Although the autonomist choice seems at times to be obligatory for the legislator due to permanent tensions within the fragmented and conflicting social body, it is however possible to recognize criteria that can determine the success of an identity claim. This seems to be guaranteed when the community in question appears to be politically organized, with a defined territory<sup>251</sup> and with the same shared code of conduct<sup>252</sup>. A further observation of a normative nature is now necessary: the conditions listed above refer to the demonstration of a previous situation, of a de facto status of existence of the autonomous community, which legitimizes its legal recognition<sup>253</sup>. Autonomy thus becomes a right to self-government dictated by an original collective experience that can be identified and prosecuted. Through the establishment of independent democratic institutions, the territory acquires a social significance and the individual expresses his belonging by actively participating in public life, which is regulated by multiple systems that answer to different needs, on the one hand of the community and on the other hand of the individual. These stratified legal orders regulate a positive power in the ability to self-administer, a negative power in maintaining the separation between local and central competences, and an integrative power that connects the different systems making them merge into one another<sup>254</sup>. This vicious circle could also perform an educative role for citizens, by getting them used to an inclusive spirit of cooperation between the levels of government.

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<sup>251</sup> The “defined territory” does not allude to the classic interpretation of political frontiers that has matured during the history of national states but to more fluid and less crystallized lines, no longer devoted to separation and confrontation. The stratification of legal orders can be useful in modifying the concept of exclusive and sovereign boundary, attributing to the space an intrinsic quality of a specific place of cohesive aggregation from which the criteria of equality and popular sovereignty that administer it arise (Louvin R., *Legami federativi e declino della Sovranità: quattro percorsi istituzionali emblematici*, G. Giappichelli Editore, 2001, pp. 158-159)

<sup>252</sup> Mastromarino A., *Il federalismo disaggregativo: un percorso costituzionale negli stati multinazionali*, Giuffrè Editore, 2010, p. 59

<sup>253</sup> Mastromarino A., *op. cit.*, pp. 60-61

<sup>254</sup> Mastromarino A., *op. cit.*, p. 66

In order to achieve these results, Levrat<sup>255</sup> proposes a series of strategies for inclusion of minorities that can be used to provide a more or less decentralized level of autonomy. Stressing that the limits of the investigation are always open to include new mechanisms of transfer of sovereignty, he identifies always valid starting points with institutional nature. First, Levrat suggests leaving the democratic system, if and when balanced on the needs of all social groups, to determine the central political dynamics. Taking the example of Switzerland, it is possible to understand how a pluralistic structure does not undermine the efficiency of the federal apparatus but that it indeed shows to be a demonstration of good practices of participatory collective negotiation. Secondly, the warning is to exclude some of the most sensitive issues from the public sphere, so that the latter are not the source of unsolvable debates and harsh social conflicts. This could be the case with religious choice or other areas related to freedom of personal expression that could affect the interests of minority groups subject to discrimination. At the third point there is a concept that has already been treated previously because it is susceptible to conflicting criticisms and interpretations: the weighting of the majority rule within the central institutions. This solution, although it may require a distortion of the majority democratic rule, can provide a rapid and effective escape to the demands of minority groups, which perceive an immediate sense of inclusion in the political life of the state. This can happen either with the guarantee of a fixed representation quota within the central institutions or through the introduction of specific decisional procedures in the case of legislation on issues concerning a specific minority community, which require the direct consent of the social groups in question, or still combining both practices. In addition, the importance of creating ad hoc institutions, on a personal, sectoral or territorial basis, is recalled, even if the latter would be preferable for the discourse mentioned above concerning the weight of a political space in the autonomous administration of a minoritarian group<sup>256</sup>. Levrat, however, goes beyond the concept of territorial autonomy, which he defines to be at the base of the federated states, and proposes three forms of alternative autonomy that are dissociated from the classical idea of place and political

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<sup>255</sup> Levrat N., *Minorités et organisation de l'état*, Bruylant Bruxelles, 1998, pp. 47-60

<sup>256</sup> See previous page

boundary. Referring on the one hand to the Kantian philosophical vision and on the other to the empirical example of the linguistic communities of Belgium, the first proposal is defined as "personal autonomy"<sup>257</sup>. This means a federal form divided into communities of people based on the individual belonging of the members of the group. In the case of cohesive and well-defined minorities, this type of autonomy could easily provide effective legal protection and recognition. The boundary, however, would be weak and the protection of the order could be in contrast with other autonomies better identifiable as the territorial ones. Another proposal refers to the context of sectoral autonomies, which deal with creating independent institutions whose management system remains in the hands of the minority group. It could be useful to regulate some aspects of local management that need particular attention because they are susceptible to cultural homologation or incorporation, but it does not follow strong identity bases because its administration remains in the hands of those directly interested in the sector and has no general vocation for the entire minority community. In the final analysis, forms of mixed autonomy are proposed, which combine different elements of self-administration according to the needs of the community in question, always with a view to reinvent institutional arrangements able to accommodate identitarian claims through a wide degree of juridical flexibility. An alternative to the often suggested autonomization is represented by strong regionalization mechanisms. Regionalism divides the political community into entities of different sizes but autonomous and federated, which are distinguished from other divisional units such as departments or provinces because they limit themselves to reproduce the state's bureaucratic strategies on the internal territory. The regions are instead the incubator of sub-national cultures and should enjoy their own autonomy in order to improve cohesion and coexistence among minorities within the central entity. Chanoux<sup>258</sup> maintains that the advantages of regionalism derive mostly from the socio-political point of view and that they depend on the vision that citizens have of the state bureaucracy. When the central government is considered as a distant power which is difficult to

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<sup>257</sup> Levrat N., *Minorités et organization de l'état*, Bruylant Bruxelles, 1998, p. 56

<sup>258</sup> Chanoux E., quoted by Pasqui G. A. in *L'attualità di Emile Chanoux nella prospettiva federalista*, Le Chateau, 2004, p. 33

understand and even less accessible, and its administrators are perceived as irresponsible and sovereign, the disaffection of citizens to the central government is almost certainly manifested. When instead the place of participation and political representation narrows, dividing into widespread and inclusive centers of power, the perception of civic sense increases and the relationship of trust between citizens and the democratic system is repaired. Restoring this type of relationship is important for the establishment of that civic nationalism capable of producing collective goods, of controlling the stability of the democratic debate and social integration at every level of the order. Also because "constitutional patriotism" seems to be the only form of social belonging that can generate the greatest number of benefits in the modern era. From an economic point of view, it could make it possible to guarantee international competitiveness while maintaining territorial autonomy; regarding the social aspect, it seems obvious that it favors integration; under the cultural perspective, it is the only one to safeguard the collective identity and the sub-national culture while maintaining openness towards external influences; finally, on the political level, it allows to maintain a democratic regime of transparency and efficiency while being able to solve local and international problems with the same level of legitimacy<sup>259</sup>.

Elazar does not agree with the advocates of regionalism, that he defines as some kind of feudal hierarchy even if the concession of autonomy follows the rules of a federal system. This criticism is founded since any devolution of powers to local autonomies calls into question the integrity of the center or its ultimate sovereignty. He proposes instead his matrix model<sup>260</sup> where "authority and power are dispersed among a network of arenas"<sup>261</sup>, sovereignty is distributed according to a non-centralized system which differs from decentralized models in its ability to avoid unitary tendencies.

In fact and obviously, federalism in its most varied forms also presents risks for the functioning and balance of the political community. Among the dangers that can be more easily identified is the possibility that a cultural or religious minority

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<sup>259</sup> Keating M., *Les défis du nationalisme moderne*, Les Presses de l'Université de Montréal, 1997, pp. 71-72

<sup>260</sup> See also section 2.1

<sup>261</sup> Elazar D., quoted by Lépine F. in "A Journey through the history of federalism, Is multilevel governance a form of federalism?", in *L'Europe en Formation*, n.363, 2012, p. 52

can override its opposition role and end up pursuing secession. On the other hand, if one or more groups were to be in a dominant position compared to the others, they might want to push for the centralization of the powers already largely allocated to them. Finally, we should try to limit the phenomena of economic dependence or dependence from the resources by the part of one or more groups towards others to avoid risks of centrifugal or centripetal thrusts<sup>262</sup>. Therefore, to prevent the disintegration of the federal system it would be necessary to respect the autonomy measures analyzed so far, and to combine a strong but essential federal government with effective and respectful decentralization policies. The formal division, as already said, should avoid bureaucratic redundancy and much attention must be devoted to the role of the constitution as to the supremacy of the legal order and to the collective participation in the decisional processes through instruments of democracy taking into account the popular expression in its multiple forms.

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<sup>262</sup> Guibernau M., "Nations without States: political communities in the global age", in *Michigan Journal of International Law*, vol. 25, 2006, p. 1268



#### 4 Case studies

In the previous chapters it has been shown that federal systems have evolved throughout history to become dynamic and multi-faceted, transcending the boundaries of classical forms of state government to better adapt to the social, political and economic dynamics that challenge modern states today. This often happens through an elastic use of the constitutional text (or of the legal document that takes its place), which, where it does not have original federal features<sup>263</sup>, remains the main point of reference for the protection of the interests of the federated bodies or of the minorities seeking autonomy and recognition. Following a inference oriented small-N examination of prototypical cases<sup>264</sup>, where a variance of political and legal experiences are observed in order to find some common features of neo-federalist nature that could be exported or better developed in the same or other realities. Therefore, the analysis of the qualifying

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<sup>263</sup> According to the definition of Elazar, a federal constitution should create a federal government, organize the autonomy of the federate entities and ensure the distribution of powers to each level of government (in *American federalism: A view from the States*, T. Y. Cromwell, 1966)

<sup>264</sup> According to the methodological definition given by Hirschl R., in *The Question of case selection in comparative constitutional law*, University of Toronto, 2006

elements for a federal democratic system is abandoned in order to observe, instead, how different institutional entities deal with the reorganization of the society by applying, according to different decentralization scales, constitutional and political mechanisms of neo-federal nature. The following examples therefore represent heterogeneous political systems united by the continuous search for internal balances in order to accommodate the various social groups that make up the social structure. The observation of the cases in question will propose an interpretation of the federal system that is no longer univocal but flexible and perhaps exportable, in its dynamics, to other disparate global realities. For reasons of space and according to the general scope of this analysis, the following cases will be dealt in synthesis, and only the fundamental features of the events will be reported.

#### 4.1 Canada: a plurinational state

The history of Canada has been characterized by British and French colonization that, starting from the Fifteenth century, have affected the cultural and political destiny of this country. In fact, centuries of coexistence have not remedied the complex and multiple social nature that has come to manifest itself through the encounter between the various cultural and ethnic linguistic groups, also taking into account the survival of local autochthonous groups present on the Canadian territory before colonization. Accomplice perhaps and above all the legacy, on the one hand, of American independence in a federalist key and on the other, the delay with which the British Empire granted the colonies complete administrative autonomy (partially obtained only in 1931 with the Statute of Westminster), Canada today has a peculiar social structure that can be defined as multi-national.

However, the evolution of constitutional history follows a parallel path, which begins with the adoption of the Canadian Constitution by the British Imperial Parliament in 1867, a document which, however, presents clear features of centralization, attributing strong powers to the national government. The political organization conceived in the text clearly reflects a desire to move away from the American federal example but over time this wish will not be respected, and a series of legal and legislative acts will increasingly push towards the federal direction, making Canada one of the most decentralized states to world<sup>265</sup>. The changes made to the system will then finally be crystallized with the approval, also by Westminster Parliament, of the Constitution Act in 1982, which provides for the “patriation” of the constitutional text and the complete independence and sovereignty of the Canadian government. Beside the adoption of the Canadian Charter of Rights and Freedoms, intended as a bill of rights, the Constitution established a bicameral Parliament vested with legislative powers, where the House of Commons is directly elected on national basis, while the members of the Senate are formally appointed by the Governor General under the discretion of the cabinet. Although initially the provincial subdivision of the seats of the Senate had the purpose of guaranteeing the representation of the federated bodies in the second chamber, in reality the method through which the members are nominated renders useless the efforts of federalization of the Parliament, which fully undergoes the inheritance of the first centralized constitutional document. The fulcrum of Canadian sub-national autonomy therefore lies, ultimately, in the exclusive distribution of competences between the various levels of government, rather than in the representation of local interests within the central institutions. Considering also that not all skills end up being completely exclusive, this mechanism often generates strong competition dynamics between vertical and horizontal levels and between the various horizontal levels, leading local governments to compete for their own interests in negotiating execution or widening their skills. The complexity of the Canadian system is also given on the one hand by the modalities of amending the constitution, and on the other hand

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<sup>265</sup> Gardner J., “Canadian Federalism in Design and Practice: The Mechanism of a Permanently Provisional Constitution”, in *Perspective on Federalism*, vol. 9, Centro Studi per il Federalismo, 2017, p. 9

by the possibility of making its interpretation flexible by resorting to the “Living Tree” doctrine exercised by the Supreme Court. In fact, in order to be amended, the Constitution Act requires the “resolutions of the Senate and House of Commons” and the “resolution of the legislative assemblies of at least two thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces”<sup>266</sup>, moreover, a mechanism of opting out from a constitutional amendment could be enforced by a province whether the majority of the members of its assembly did not support its approval<sup>267</sup>. Notwithstanding, a certain degree of flexibility is given to the Canadian Constitution by the famous interpretative doctrine exercised by the Judicial Committee of the Privy Council before, and by the Supreme Court of Canada after, which often apply global legal conversation and extensive instruments of interpretation to the articles of the document. The rightful definition of this doctrine comes from the idea that the Canadian Constitution is “a living tree capable of growth and expansion within its natural limits”<sup>268</sup>. There is no doubt that a similar principle of large interpretation empowers the judicial apparatus with great responsibilities, and since that the “natural limits” do not represent a specific threshold of action, the doctrine could risk to become a dangerous instrument in the hands of the Court, especially in a civil law system where judges are seen as the *bouche de la loi*. In this specific case the balance is gained also thanks to the federal clause required in the procedure of appointment of the Supreme Court judges, that should be made also according to their provincial belonging<sup>269</sup>.

Therefore, if on the one side the importance of a stable and predictable constitution is essential, especially with regard to a federal state where the distribution of powers must be clear in order to protect the internal balance, on

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<sup>266</sup> Under article 38 (1), part V of the 1982 Constitution Act

<sup>267</sup> Under article 38 (3), part V of the 1982 Constitution Act

<sup>268</sup> According to the definition given by Justice Sankey in the 1929 *Edwards versus Canada* ruling, quoted by Pierdominici L., in “The Canadian Living Tree Doctrine as a Comparative Model of Evolutionary Constitutional Interpretation” in *Perspective on Federalism*, vol. 9., Centro Studi per il Federalismo, 2017, p. 92

<sup>269</sup> In fact, three of the nine justices must be from Quebec (Gardner J., “Canadian Federalism in Design and Practice: The Mechanism of a Permanently Provisional Constitution”, in *Perspective on Federalism*, vol. 9, Centro Studi per il Federalismo, 2017, p. 10)

the other hand some dynamic mechanism turns out to be essential for the accommodation of a society to the modern sociological and political challenges. The complexity of the multilayered system of Canadian government facilitate minoritarian groups to avoid the permanent minority in the bosom of political institutions, and the recognition of the original rights of each ethnic and linguistic group seems to help the national integration by minimizing segregation and cultural separation<sup>270</sup>. However, this is only the most recent point of view, since even if Canada does not have a real foundational moment such as for the United States, it has been struggling with a strong nationalist cause coming from a double European tradition of its former colonies. English and French Canadians fought for centuries in order to gain a specific space for their own cultural grounds at the national level. In particular, the Quebec province had always spent quite a lot of its socio-political energies in the building of a nationalist theme based on its religious and linguistic peculiarities. Since the colonization period, Quebec nationalism imagines a story of its own that begins with the French conquest of 1759, and continues with the extension of the provincial prerogatives included in the first Constitution until almost obtaining, through an extended application of provincial competences and the judgments of judges, of a specific status of autonomy and self-government, justified by the recognition of Quebec as a "distinct society"<sup>271</sup>. Three elements contributed to this strong self-recognition: firstly, the French language which survived during time and created a specific linguistic community right in the core of the anglophone territory; then the Catholic Church, openly opposed to the Anglican Church and rooted in a conservative vision of society; finally a specific social class that could be considered as rural and anti-modern was the symbol of a traditional Quebecois culture<sup>272</sup>. Still, at the beginning of the twentieth century the central state started claiming back its prerogatives, reducing the space for provincial autonomy. This

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<sup>270</sup> Keating underlines the difference between the Canadian administration of multi-nationality through the recognition of minority rights and the racial segregation of South Africa or the drastic separation of ethnic groups, such as in the former Yugoslavia example (Keating M., in *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era*, Oxford Scholarship Online, 2003, p. 12)

<sup>271</sup> Guibernau M., *Nations without states: political communities in the global age*, in *Michigan Journal of International Law*, vol. 25, 2006, p. 1269

<sup>272</sup> Keating M., *Les défis du nationalisme moderne*, Les Presses de l'Université de Montréal, 1997, p.83

led Quebecois to a “*révolution tranquille*” which represented a progressist and secularized attempt to reform their nationalism in order to realign its politics according to a pro-sovereignty provincial perspective, following the cultural economic enhancements of the region. The sixties represented therefore the demand for greater powers and competences on the wave of a growing regional nationalism, up to the point where the Quebecois party obtained the majority in the local government<sup>273</sup>, finally questioning the stability of the central state. Only few years after, in 1980, the party launched the campaign for independence, which anyway failed with a sixty percent of rejection in the referendum. During the same period Trudeau was holding the central government by promoting a pan-Canadian doctrine in open contrast with Quebec’s increased nationalism. In line with this perspective, the adoption of the 1982 Charter of Rights and Freedoms suffered severe criticism from Quebecois because its inclusion in the Canadian Constitution, together with the patriation of the document, did not require the consent of the provinces. This controversy showed the exacerbation of the nationalistic claims, that negatively answered to the approval of a bill of rights aimed to ensure individual and collective human rights only because it did not respect completely the federal principle of consultation of sub-national entities<sup>274</sup>. In reality, in order to be approved the amendment did not follow the constitutional procedures because it was considered as a statute with constitutional characters and it had a strong international inspiration<sup>275</sup> that justified the short procedure of its adoption according to the best practice transmigration between the democratic juridical systems. Following the persistent complaints and confrontations between the provincial and the federal governments, two attempts were made to accommodate the nationalist desires of Quebec. In 1987 the Meech Lake Accord and in 1990 the Charlottetown Accord were proposed as amendments to the Constitution with the aim to introduce a distinct status for Quebec and a more integrated participation of provinces to the

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<sup>273</sup> Born in 1968 by René Lévesque, the *Parti Québécois* rose to power in 1976

<sup>274</sup> Guibernau M., “National identity, devolution and secession in Canada, Britain and Spain”, in *Nations and Nationalism*, vol.12, ASEN, 2012, p. 56

<sup>275</sup> Pierdominici L., “The Canadian Living Tree Doctrine as a Comparative Model of Evolutionary Constitutional Interpretation” in *Perspective on Federalism*, vol. 9., Centro Studi per il Federalismo, 2017, p. 88

central institutions (including the requirement of the unanimous consent of all the provinces for the amending the constitutional text). Both the accords failed and the PQ (*Parti Québécois*) had again reason to believe that a referendum about the complete sovereignty of the province could have a positive outcome. In 1995, similarly to fifteen years earlier, the population of Quebec was addressed with this question, along with the premise of an economic and political partnership with Canada<sup>276</sup>. Only the forty-nine percent of the population voted “yes”, and the sovereignty issue was partly abandoned. In any case, the referendum had some important subsequent effects over Canadian and Quebecois politics, seen that the Federal parliament approved a motion which recognized the province as a “distinct society”<sup>277</sup> and provided Quebec, Ontario and British Columbia with a *de facto* veto power on constitutional amendments<sup>278</sup>. Despite those federal acknowledgments, the debate about the status of Quebec did not reach the constitutional edge and the acts are susceptible to be erased. The referendum had nevertheless another important result with the ruling of the Supreme Court, which provided Canada and the international community of a famous judicial precedent about the issue of secession.

One year after the ambiguous results of the referendum, the Governor in Council of Canada presented questions about the constitutionality of the possibility for recession of Quebec. The decision issued by the Court is relevant because it combines “legal and constitutional questions with political questions of great sensitivity”<sup>279</sup>, giving a juridical advice by providing an advisory opinion on the legal nature of secession’s referenda and on their political effects. The questions under discussion were three: “under the Constitution of Canada, can the National Assembly, legislature, or government of Quebec effect the secession of Quebec from Canada unilaterally? [...] Does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec

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<sup>276</sup> “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 June 12, 1995?”

<sup>277</sup> <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp408-e.htm>. In 2006 the Federal House of Commons went even further, by approving the recognition of Quebec as a nation within Canada

<sup>278</sup> See 1996 Act respecting constitutional amendments

<sup>279</sup> Supreme Court Act R.S.C. 1985, c. S 26 – art. 53

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? [...] 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?”<sup>280</sup>. Answering to the first question, the Court found the grounds for the existence of this kind of right in the democratic principle, which has to be applied through the referendum instrument, and whose basis is contained in the Canadian Constitution as a fundamental unwritten precept that heads and guide the text. However, the democratic principle is not the only one to have this supreme quality, and it has to be complemented with other constitutional values such as federalism, constitutionalism and the rule of law and the respect for minorities. In the case of a democratic decision of Quebecois to secede, this would put the other principles at risk, and it is so to be consider unconstitutional. Even if the majority of the population of Quebec would be in accordance with secession, the secession would not guarantee the cohesion of the other principles since federalism, for example, means the cohabitation of different majorities in the same sovereign territory, while the respect of the rule of law entails legitimacy, which is a quality that cannot be deduce by the only sovereign will. Therefore, the legality of secession could not come without inclusive negotiation with all the parties and inside the constitutional framework, “in the event that a clear majority of Quebecers votes on a clear question in favour of secession”<sup>281</sup>. The second question found answer in the fact that, even if the principle of self-determination is recognized in international law as a grounds for secession, it cannot be implemented in the case of Quebec because the right doesn’t come from the existence or not of a unitary “people” of the majority, but it derives only from the case in which this people is subjugated, dominated or oppressed<sup>282</sup>. Clearly, there is no evidence to state that Quebecois are colonized by Canadians and they are perfectly and equally represented in the national political

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<sup>280</sup> Reference Re Secession of Quebec 2 R.C.S. 1998

<sup>281</sup> *Op. cit.*

<sup>282</sup> United Nation General Assembly Resolution n. 2625



set. The territorial integrity principle prevails and the Court highlights that also in the case where unilateral secession give birth to a State that is recognized by international community, this recognition would not give legitimacy to the former act of secession (meaning that neither the Constitution of Canada or the International Law could give a retroactive justification to the act of secession). Finally, in view of the answers given to the precedent questions, according to the Court there is no conflict between domestic and international law in the context of the reference abovementioned.

It could be interesting to highlight that the ruling of the Court stated that, regardless of the assessment of legality, in order to initiate the process of negotiation about secession, the referendum's questions must be clear, and the outcome should demonstrate a clear majority. Now, this generical indication does not contain a specific threshold for clarity although it could be more than debatable that any question could be susceptible to unclarity criticism, such as any majority could be susceptible to minoritarian criticism. Therefore, the issue about the legal requirements for the referendum remains ambiguous. Anyway, with the purpose of clarify the contents of the ruling, in 1999 the Parliament of Canada passed the Clarity Act (Bill C-20), establishing the conditions for the negotiation process to be set up. The legislation was strongly criticised by Quebec parties and population, since it gave the House of Common the power to determine the clearness of both question and majority in case of a referendum of secession, and the possibility to override the results of a referendum if it violates the terms of the act. Finally, a constitutional amendment would be required for the secession to be enforced.

Despite the controversies, the sovereign debate in Quebec does not seem to have escalated and the bankruptcy results of the latest referendums, together with the Court's ruling, have led to a quenching of nationalist claims. A solution for the peaceful federal coexistence and the stability of the central institutions could therefore be to rework the concept of nation and nationality, recognize it and finally exclude it from the political debate, because it represents a source of insoluble and perennial instability. If the constitution of multinational states were guarantors of the nationalities that its territory understands, intending nationality as an overlapping and complex notion of identitarian nature, one could avoid

carrying on the debate on how they can form or not the basis for the functioning of political institutions. The constitutional document should therefore be content to focus its protection on the methods of attribution of sovereignty within a liberal and legal state where, as stated by the Court, federalism, constitutionalism and the rule of law and the protection of minorities are considered as the main values. In any case, if the Canadian legislation has managed over the years to include a right of self-government for the aboriginal peoples who still live there and the possibility for one of its provinces to secede according to confused but precise criteria focused on the negotiation of the parts, this means that the Canadian example already represents a case of post-modern sovereignty and a successful political system of management for a self-recognized multi-national state<sup>283</sup>.

## 4.2 Catalonia, Padania and Scotland: regional nationalisms

### 4.2.1 Catalonia

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<sup>283</sup> Keating M., *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era*, Oxford Scholarship Online, 2001, p. 7

Spain is a country that finds its roots as a modern unitary state already in 1492<sup>284</sup>. For this reason, it has homogeneous ethnic characteristics, and does not contain external national minorities, its territorial integrity and its identity remain almost unchanged for centuries, also because of the absolute dominion of the Catholic religion, recognized in the past as the state religion. However, the Spanish peninsula remains a complex territory, formed by a multiplicity of cultural, economic, linguistic and social differences that do not seem to prevail over one another. The sum of the sub-national peculiarities in fact forms a national and unitary Spanish majority, but the general complexity is reflected in the territorial structure born of the 1978 Constitution currently in force<sup>285</sup>. First of all, it is necessary to note that within the constitutional document there are no specific references to the existence of minority groups, whose presence remains ignored at the legislative level. This happens precisely because minorities are a fundamental feature of the unitary Spanish experience, and they are so numerous that their sum results in the central state<sup>286</sup>. *Nacionalidades* and *regiones* are considered to be the constituent units of the *estado integral*<sup>287</sup>. Article 3 of the constitution, together with the statutes of autonomy and the relevant regional laws, however, guarantee the official nature of sub-national languages other than Spanish, which find their legal protection within their territories. Furthermore, the territorial organization contained in the 1978 text is not definitive but remains open to the regional autonomies that were recognized before the establishment of the constitution through plebiscite approval of the autonomy statute (for Catalunya, the Basque Country and Galicia), or through the application of article 151<sup>288</sup> (for the remaining fourteen). Regions have their own Assemblies with legislative capacity, but, as for the case of the United Kingdom and Italy, they are deprived of a role and representation in the second chamber of the central parliament and their

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<sup>284</sup> Spanish cultural and political unification was confirmed with the capitulation of the last Moorish ruler in Granada and the end of the *Reconquista* by means of King Ferdinand of Aragon and Queen Isabella of Castile

<sup>285</sup> Levrat N., *Minorités et organisation de l'état*, Bruylant Bruxelles, 1998, pp. 230-233

<sup>286</sup> Levrat N., *op. cit.*, p. 234

<sup>287</sup> Di Martino A., *Il conflitto costituzionale sulla Catalogna: origini, svolgimento, prospettive*, *Costituzionalismo.it*, 2018, p. 66

<sup>288</sup> The constitution foresees the approval of a Statute of autonomy, which has been previously agreed by the representatives of the territory which is demanding it, by the *Cortes Generales* and by the majority of the voters through referendum

statutes do not present constitutional characters<sup>289</sup>. Moreover, in regional states sub-national entities do not participate to the constitutional amendment process and therefore they cannot be considered as federal states. However, another point of view could focus on the dynamic nature of autonomic organization of Spain, by highlighting the perpetual negotiation system that allows the strengthening of the decentralization trend, which increase the devolution of powers and require the participation of the Supreme Court for the resolution of the conflicts between the different levels of government<sup>290</sup>. In fact, the Catalan case is taken into consideration during this analysis precisely because the constitutional opening left to the Spanish local authorities has allowed a political debate to ignite, and the conflict has recently seen the opposition of two fundamental principles of the modern democratic state, questioning the unity itself of the Spanish state. Once in force, the autonomous statute organizes the competences that it must assume, and on the basis of the asymmetric nature of the regionalism in question it is often subjected to expansive reform tendencies that do not have clear and precise limits. The Catalan crisis arises precisely from an open conflict, between the expansion of competences and the legal nature of the regional statute, that occurred through a first attempt to reform the document in 2010 and the censorship by the Constitutional Court of these changes four years later<sup>291</sup>. The reform was dictated by the economic measures adopted by the Spanish government to deal with the economic crisis, with centralized maneuvers that for the first time contrasted with the regional decentralization process pursued over the years. The Catalan reaction has shown itself not only in attempts to reform the statute, but also through popular demonstrations and the reference to the historiographical nationality of the territory, in the search for cultural and social

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<sup>289</sup> Fasone C., "What Role for Regional Assemblies in Regional States? Italy, Spain and the United Kingdom in Comparative Perspective", in *Perspectives on Federalism*, vol. 4, Centro studi per il federalismo, 2012, pp. 175-178

<sup>290</sup> Between the advocates of the federal cause in Spain there are Blanco Valdes, Lopez Aguilar and Watts (quoted by Di Martino A., *Il conflitto costituzionale sulla Catalogna: origini, svolgimento, prospettive*, Costituzionalismo.it, 2018, p. 68)

<sup>291</sup> The attempt was unsuccessful because of the changes in the preambles of the statute, which included the definition of Catalonia as a nation within the State. The Constitutional Tribunal denied the legal value of the Catalan nation and reversed the modifications with the Judgment no. 31/2010 of June 28 (Spigno I., in "Constitutional Judges and Secession. Lessons from Canada... twenty years later" in *Perspectives on Federalism*, vol. 4, Centro studi per il federalismo, 2012, p. 122)

roots that could guarantee political legitimacy to the autonomous actions of the regional government. The early elections of 2012 led to a non-homogeneous majority that soon appealed to the principle of self-determination to approve a “Declaration on sovereignty and right to decide of the People of Catalonia”<sup>292</sup>. The central government brings again the decision before the Constitutional Court, which in 2014 declares the inadmissibility of the regional parliamentary decision<sup>293</sup>. The ruling was determined by the unified interpretation of the Spanish people as the holder of sovereignty, but the debate around the possibility of modifying the Spanish territorial structure has not been extinguished. The opening of the constitution, which does not include limits to the constitutional revision, could mean the impossibility of completely rejecting the separatist hypothesis, but the Court refers to the judgment of the Canadian Supreme Court to reiterate the rejection of a unilateral declaration of secession. In any case, the judgment is again ignored and, thanks to a winning separatist majority in the 2015 elections, two sovereign laws are subsequently approved by the Catalan *Cortes* aimed at carrying out the legal basis for the foundation of a new republic<sup>294</sup> and for a popular referendum requesting the self-determination of the territory<sup>295</sup>. The laws were suspended by the Constitutional Tribunal for a violation in the legislative process and on the basis of former judgments on the same subject<sup>296</sup>. In fact, in order to call for a consultative referendum, the constitution envisages that there is a proposal by the President of the Government regarding “special political decisions”<sup>297</sup>, or the authorization of the Spanish Parliament to call regional consultations<sup>298</sup>. This time the reference to the unconstitutionality of the referendum is no longer inspired by the ruling of the Canadian Supreme Court but by that of the Italian Constitutional Court<sup>299</sup>, which had rejected the consultations aimed at the independence of Padania on the basis of the constitutional revision procedures that did not attribute to the regions the power

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<sup>292</sup> Resolution 5/X of January 2013

<sup>293</sup> STC 42/2014

<sup>294</sup> Law no. 19/2017

<sup>295</sup> Law no. 20/2017

<sup>296</sup> Judgment no. 114/2017

<sup>297</sup> Article 92 of the Spanish Constitution

<sup>298</sup> Article 149 *op. cit.*

<sup>299</sup> Judgment no. 118/2015

to call referendums regarding the allocation of territorial sovereignty<sup>300</sup>. Once again, the judgment was ignored, and the referendum was carried out in 2017 in a critical political framework that considered it as completely illegal. The outcome was largely positive, and independence was supported by the ninety percent of the voters, but only the forty-three percent of the population participated to the vote. This resulted in the declaration of independence by the President of the regional assembly Puigdemont, followed by a central government severe reaction, with the approval of the application of article 155 of the Constitution<sup>301</sup> that allows the receivership of the defaulting region. The effects of the measure included the dissolution of the Catalan Assembly, the incrimination of the political leaders and the subjection of regional political activity to the Spanish government. In December 2017 new elections had brought the independentist parties to the majority and the election of a new leader, who was not charged of any accusation, had invalidated the application of article 155 and restored the original status quo of the autonomous community. Although the events of recent years have been resolved with nothing, the serious conflict between the two levels of government is still ongoing and Catalan nationalism shows no sign of abating<sup>302</sup>. However, the issue has focused and polarized around two key principles of the modern state, which have often been exploited by both sides in order to obtain a definitive result in the resolution of the conflict. On the one hand, the Catalan government has justified its work outside the constitutional framework by appealing to the democratic principle of popular expression and self-determination, while on the other hand the central government and the Constitutional Court have called for respect for the principle of constitutional legality. Indeed, this second axiom seems to prevail because it also includes the first: the constitutional principle is to

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<sup>300</sup> Di Martino A., *Il conflitto costituzionale sulla Catalogna: origini, svolgimento, prospettive*, Costituzionalismo.it, 2018, p. 90

<sup>301</sup> "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"

<sup>302</sup> It is important to recall again that in the moment of writing the issue is still to the attention of the constitutional organs of the court. Due to the general object of the analysis, only the fundamental traits of the case have been reported here.

be considered as the foundation of the institutional system, and it is precisely the constitution that protects the democratic principle, guaranteeing its expression within the limits of a non-absolutist conception of the latter.

#### 4.2.2 Scotland

The United Kingdom was born from the 1707 Act of Union between the Kingdom of Scotland and the Kingdom of England, which joined the political entities that were already part of the same monarchy. In 1801 the Kingdom of Ireland was subjected to the control of Westminster Parliament and was formally included in the Union, completing the asset of the United Kingdom together with Wales and England. Although many of the cultural traits and political history are similar for all entities, the Scottish case fits perfectly into the definition of a stateless nation, precisely because it has a strong nationalist autonomy that is easily justified by centuries of independence and confrontation between the crowns of France and England. The entry of Scotland into the Union was mainly dictated by economic interests linked to the expansion of the British Empire and the merger never led to the disappearance of the Scottish bureaucratic and legal system, which was instead integrated into the wider English apparatus while keeping its characteristic socio-political traits<sup>303</sup>. Therefore, Scotland has not to be considered as an ethnic group in the bosom of a majoritarian nation, because it is a civic and social nationality among others, which is part of the encompassing British society, and its nature has never been denied by the central government, not even by the strictest unionist politicians<sup>304</sup>. Nevertheless, towards the end of the nineteenth century, Scottish nationalism started to develop into a political movement, probably in reaction to the modernization and expansion of the British state in conjunction with the grant of autonomy to Ireland through the Home Rule. And again, during the last fifty years the rise of the Scottish National

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<sup>303</sup> Keating M., *Les défis du nationalisme moderne*, Les Presses de l'Université de Montréal, 1997, pp. 187-190

<sup>304</sup> Thatcher is the most suitable example, when she declared that, as a nation, Scots would have right to self-determination (Thatcher M., quoted by Keating M., in *The independence of Scotland: Self-government and the shifting politics of Union*, Oxford Scholarship Online, 2009, p. 3

Party (SNP) led to an increase in the independentist claims. For a long time, the leaders of the party tried to gain a majority between the seats reserved to Scottish at Westminster, believing that this could have given them some kind of political mandate to negotiate independence<sup>305</sup>. The proportional system of representation and the democratic principle brought to focus on the referendum instrument for establishing a possible secession, and attempts had been made from 2003 until 2014, when finally, a referendum was held. Despite the efforts and the sentiment of membership to the Scottish nation, the results of the referendum were negatives, with only the forty-five percent of the voters in favor of independence. Anyway, the campaign that preceded the referendum promoted independence not only through secession but requiring different levels of devolution, and public opinion in Scotland continues to support autonomy<sup>306</sup>. On the other hand, in the hypothetical event that the referendum had given a positive outcome, the Constitution of the United Kingdom, differently from the Spanish, the Italian or the Canadian documents, would have allowed the negotiation for secession to be hold by the central parliament. That is because the British constitution does not include the matter in the written or unwritten conventions and provisions, leaving to Westminster the absolute and ultimate word in sovereignty issues. Moreover, the Irish secession in 1921 and the grant of the Northern Ireland Act in 1998 were creating some heavy precedents for future autonomist movements in Scotland, both in the political procedure and constitutionality of the act and also face to British and international public opinion<sup>307</sup>.

The 2016 Brexit referendum, resulted in the negotiations for the exit of the United Kingdom from the European Union, reopened the nationalist claims in Scotland, given that the large majority of the votes in the region were in favor of the remain (sixty-two percent against thirty-eight). The manifestation of the will of Scottish population to remain in the European Union was taken as a legitimation for the promulgation of another referendum framework bill<sup>308</sup>, which was

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<sup>305</sup> Keating M., *op. cit.*, pp. 4-5

<sup>306</sup> Keating M., "The Scottish independence referendum and after" in *REAF* no. 21, 2015, pp. 73- 98

<sup>307</sup> Keating M., in *The independence of Scotland: Self-government and the shifting politics of Union*, Oxford Scholarship Online, 2009, p. 4

<sup>308</sup> The Referendum (Scotland) Bill, of May 2019



approved in 2019 by the Scottish Government. SNP political leaders stated that a second referendum about independence will be held before the 2021 end of the parliamentary term but after that an agreement about the exit conditions between the European Union and the United Kingdom is reached, in order to simplify the understanding of the effects that the leave would imply. This would be possible because, even if according to the 1998 Scotland Act the regional government is not allowed to hold a referendum following the promulgation of a regional act, the Westminster parliament is likely to approve it, if it is supported by the large majority of the Scottish assembly and given the already precarious political scenario offered by Brexit<sup>309</sup>.

#### 4.2.3 “Padania”<sup>310</sup>

Similarly as Spain, Italy is a regional state<sup>311</sup> with a high degree of cultural homogenization, given by the long historical and social process that allowed its formation in 1861. Its current republican constitution has been adopted in 1947 with a rigid structure that requires an aggravated parliamentary procedure<sup>312</sup> before being amended. Moreover, the republican form<sup>313</sup>, the human inviolable rights and the principle of unity and indivisibility of the state<sup>314</sup> cannot be modified by an amendment to the text. Italy’s territorial organization is explicated by article 5, which “recognizes and promotes local autonomies, and implements the fullest measure of administrative decentralization in those services which

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<sup>309</sup> Sargeant J., *A second referendum on Scottish independence*, Institute for Government, 2019, <https://www.instituteforgovernment.org.uk/explainers/second-referendum-scottish-independence>

<sup>310</sup> The provocative name of “Padania” comes from the geographical area indicating the territories of the Pianura Padana between the Lombardy and Veneto regions, whose name have been used by Northern League party as a catalyzing feature for the identity of regional nationalism.

<sup>311</sup> As it is for Spain and the United Kingdom, according to Fasone C., in “What Role for Regional Assemblies in Regional States? Italy, Spain and the United Kingdom in Comparative Perspective”, in *Perspectives on Federalism*, vol. 4, Centro studi per il federalismo, 2012, pp. 175-178

<sup>312</sup> Art. 138 of the Italian Constitution

<sup>313</sup> Art. 139 *op. cit.*

<sup>314</sup> Implicit limits in, respectively, art. 2 and 5 *op. cit.*

depend on the State [and it] adapts the principles and methods of its legislation to the requirements of autonomy and decentralization”. Linguistic minorities are then safeguarded by article 6. In article 14, “municipalities, provinces, metropolitan cities and regions” compose the republic, and they “shall be autonomous entities having their own statutes, powers and functions”. Although the constitution already contained strong decentralizing tendencies, the regional administrative division came into operation only in 1970 with the adoption of an ordinary law implementing the constitutional provisions in this regard<sup>315</sup>. From this moment, alongside the five, previously established, special statute regions, another fifteen assume the local autonomy competences expressed by the legislation. They have juridical personality and legislative, administrative and regulative capacity. This level of autonomy has been confirmed by the 2001 reform of title V of the Constitution, which established that the local components of the republic benefit from a complete legislative authority, able to satisfy their citizens’ necessities, according to the principle of subsidiarity<sup>316</sup>. Moreover, since 1999 the regional statutes could be adopted by regional sources of law, provided that the procedure respects article 123 of the constitution, meaning that they obtained whole independence from national legislation in their internal administration<sup>317</sup>. Despite the margin of manoeuvre left to local entities by the constitution, regions are not provided with instruments for their participation in the ordinary legislative process at the national level<sup>318</sup>. Besides, the attempts of modifying the constitutional arrangement of the composition of the second Chamber had twice failed<sup>319</sup>, and the Senate remains a purely national institutional organ. Within this territorial context it is articulated the “Padania”’s regional nationalism experience, that in a little more than thirty years of history has developed, consolidated and finally resized according to the political tendencies of

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<sup>315</sup> Law no. 281, of May 1970

<sup>316</sup> <http://www.treccani.it/enciclopedia/costituzione-italiana-riforma-del-titolo-v-della-%28Dizionario-di-Economia-e-Finanza%29/>

<sup>317</sup> Fasone C., in “What Role for Regional Assemblies in Regional States? Italy, Spain and the United Kingdom in Comparative Perspective”, in *Perspectives on Federalism*, vol. 4, Centro studi per il federalismo, 2012, pp. 176

<sup>318</sup> Di Folco M., “Leale collaborazione e procedimento legislativo ordinario” in *Per autonomie responsabili*, by De Martin C. and Merloni F., Luiss University Press, 2017, pp. 125-127

<sup>319</sup> 2006 and 2016 referenda for the regionalization of the Senate through the amendment of title V of the Constitution had negative outcomes

the party to which it has always referred. In fact, at the end of the eighties the Paduan independence came from the regional-nationalist ideologies of the *Lega Nord* party, which saw in the union between the regions of Veneto and Lombardy a possibility of economic and cultural development sufficient to require the first detachment, in the federal sense before, and in a sovereign sense after, from the rest of Italy. In 1997 the political movement began its identity campaign in favor of the secessionist cause of the two territories, unified under the name of “Padania”. The strong gap between the northern and the southern economy in Italy facilitated the Northern League propaganda which, in the wake of the growing regionalisms of other European areas, did its utmost in building a historical and cultural model capable of legitimizing the party’s requests for governmental autonomy. In a few years, however, also due to the reform of the aforementioned title V, secessionist cravings calmed in favor of the request to obtain the devolution of further strategic competences to the regions.

Nonetheless, a constitutional referendum held in 2006 blocked the claims for decentralization and a subsequent attempt to introduce fiscal federalism was interrupted again in the following years by the centralizing needs deriving from the worsening of the economic crisis.

In parallel with the secessionist pressures promoted by the political exploitation of the issue by the League, which will finally abandon the cause to devote itself to the national rooting of the party according to a renewed sovereign perspective, the regional leaders of Veneto are still proposing several consultative referenda regarding a possible autonomisation or independence of the region. In 1992, 1998, 2002 and 2006 regional laws were approved in favor of popular consultations, which however were never implemented because of the negative judgments of the Constitutional Court<sup>320</sup>. In fact, the central government always challenged the constitutionality of the regional legislation allowing the hold of secessionist referenda, and the Court sentenced, among other justifications, that the direct democracy instrument of referendum was to be intended within the limits of the constitutional text, meaning that regions are not entitled with the power to freely take the initiative of calling for a popular consultation that

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<sup>320</sup> Judgment no. 470/1992, Judgment no. 496/2000, Judgment no. 118/2015

overcome its prerogatives (which is clearly the case for constitutional amendments), and, moreover, a secessionist demand would clearly violate the limits set out by article 5<sup>321</sup>. In the last few years the debate seems to have exhausted its energy and the autonomist claims are silenced, maybe because of the great national results of the League party, which gained a majoritarian role in the central government after the 2018 political elections.

#### 4.3 The North-west Alpine territory: a transnational cooperation

Cross-border territories often find themselves to be recognize as a separate social group with respect to the central organization of the state they belong to. The formation of the modern state and the construction of boundaries that are not always ethnically natural have led to the formation of lines of legal separation that do not fully coincide with the identity of the border regions that are to be separated according to political criteria that do not reflect the cultural and traditional affinities in the area. These spaces of local autonomy, in which collaboration and contact between small geographically continuous transnational realities is an habits, can be a first clear example of how it is possible to overcome the exclusivist limits of the nation state to form new shared collectivities on the basis of ancient traditions<sup>322</sup> or economic, cultural and, increasingly, environmental interests. The integration between the neighboring territories of two or more adjacent states often takes place on the basis of ancient relationships of coexistence and adaptation developed in the era preceding the creation of the modern state. The medieval period has cradled the establishment of small-scale social relations, favoring the formation and consolidation of specific local autonomies, especially in those areas of passage of land trade that are now border areas between states. These local cooperative communities have been created and

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<sup>321</sup> Spigno I., in "Constitutional Judges and Secession. Lessons from Canada... twenty years later" in *Perspectives on Federalism*, vol. 4, Centro studi per il federalismo, 2012, pp. 117-121

<sup>322</sup> Lombardi G., *Partecipazione e autonomia nelle territorialità dell'area alpina occidentale, profili storici e giuridici*, Franco Angeli Editore, 1988, p. 7

have survived over time precisely because they are the result of network dynamics rather than the passage of a common dominator, and as spontaneous structures they often find themselves in constant and latent conflict with the other broader social groups, which are stronger because they are legitimized by the state legal system. Moreover, the condition of remoteness that the neighboring localities present with respect to the places of the central political power, that often lie far away from the borders of the state and in a strategic position for the total control of the territory, may have enabled the communities in question to be strengthened according to a certain degree of additional autonomy deriving precisely from the difficulty of management in the face of a spatial distance. On the other hand, as in the case that will be analyzed, the presence of geographical-environmental commonalities can prove to be a key factor for the consolidation of the cooperation between the transnational areas, whose specific needs deriving from the peculiar territorial conformation unite the interests of protection legislation of native groups among themselves rather than with national ones. The focus of this analysis is developed in the European continent, where recently two particular dynamics have been observed that favor today the bolstering of collaboration and integration between frontier territories. On the one hand and as already mentioned, the reactions to globalization have pushed the local realities to the rediscovery of the traditional values and of the identitarian belonging contrasting with the global and national homogenization, to recall to the memory their own spaces of cohabitation, smaller and less complex. In border areas this can happen regardless of political and linguistic barriers, finding pre-modern connections that better satisfy the desire to find identity with respect to those dictated by the instrumental division of the nation state. On the other hand, a push that may seem a priori to be the opposite, such as the one generated by the development of supranational entities such as the European Union, seems instead to favor the relocation of identity on a local, regional or trans-regional basis. Indeed, the very functioning of the supranational order is linked to the overcoming of the static conception of the state as a monolithic political organization, and its new basic ideology is based on a multi-level understanding of social belonging, through a complexity that can easily overcome the national boundaries. If the purpose of the policies promoted by the European Union focuses on bringing its members

closer together, then its commitment to stimulate cooperation between border areas seems to be taken for granted, precisely for improving dialogue and the rediscovery of the European values that form their own roots.

Transboundary mountain regions are a clear and good example for the spontaneous development of a particular form of melting law, which is extending thanks to the systematic use of different types of legal order. The use of national, international, supranational and regional law makes it possible to administer territorial intersection spaces through an effective recombination of regulations and innovative public management tools. The specific needs related to the management of mountain areas, as well as in the case of sea or river basins, offer the possibility of going beyond the national system, precisely because of their peculiar geographical characteristics, which require the intervention of extra-state political entities, the collaboration with other juridical apparatus and the participation of civil society and non-governmental organizations. Levrat<sup>323</sup> defines this type of local governance activity as "melting law" precisely because it is based on the flexibility of state "hard law" and the application of "soft law" external to the internal system but accessible thanks to the legislative combination given by the international opening of constitutions by the members of the Union. Melting law takes into consideration the logic of state law as applied to its borders and questions its functionality in the management of areas that have common management interests while not belonging to the same legal reality. Although the regions in question, as in the case of the Alps, easily recognize their commonalities and their complex legal requirements, it is not always immediate or understandable for the states to which they belong to find effective ways of collaboration. The administration of the territories is thus delegated to the trans-border mountain regions, which are therefore freer to experiment with the new dynamics of melting law. The environmental specificity exceeds the territorial definitions of legal or political theory, creating an area of interstate autonomy justified in the last instance by the community needs to protect the specific naturalistic and cultural heritage. This is increasingly the case for numerous cases of cross-border cooperation which, while remaining in the static conception of

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<sup>323</sup> Levrat N., "Melting law: learning from practice in transboundary mountain regions", in *Environmental science and politics*, n. 49, Elsevier, 2015, pp. 32-44

border conditions, however, take on legal significance from the standpoints of supranational and international systems<sup>324</sup>. Examples such as the Alpine one also show how it is possible to administer a local political reality through the unregulated use of multiple legislative levels that, depending on the context and the management needs, are pitted in their actual functionality without however subtracting the ultimate sovereignty from the host state region in question. The melting pot between the orders is not considered as an intrusion of one into the other but better as a specific collaboration and addressed to the resolution of multilevel problems.

Taking into consideration the case of the North-west Alpine territory, before examining the current situation, it is good to concentrate on the first expressions of will that already during the Second World War intellectual leaders and élites manifested regarding the possibility of establishing a close cultural and political collaboration between in the mountain regions of the Alps. On December 19, 1943 in Chivasso the "Declaration of representatives of the Alpine populations" was drawn up, that is a political expression document oriented on the future of the relations between the Italian, French and Swiss state for the protection and the administrative autonomy of the mountain territories set between their borders. The context of the time was obviously dramatic and, on the wave of the political inventiveness conceived for post-war, among the most plausible alternatives for the reconstruction of the Italian state there was that of a territorial organization in a federal key. The declaration actually expresses this interest, underlining how the Alpine region described the cultural continuity that survived fascism, now claimed its space of autonomy in collaboration with the central state and the regions beyond the Alps. It is thus observed that already during the last century there are documents manifesting the desire to share a community of destiny of the Alpine territory that was able to better manage the economic resources, the social integration of the inhabitants without however depriving the state of a structure

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<sup>324</sup> Levrat N., "Melting law: learning from practice in transboundary mountain regions", in *Environmental science and politics*, n. 49, Elsevier, 2015, p. 43

of sovereign government, imagined as a "federal republican regime based on a regional or cantonal basis"<sup>325</sup>.

Among the signatories of the Declaration there is Chanoux, whose idea of Alpine federalism provides instead for the creation of autonomous cantons, which may or may not constitute a region, but which must be represented within the national institutions regardless of their demographic weight or their willingness to associate themselves in a transnational region. To justify this thought, Chanoux argues that Alpine autonomy is not dictated by the exclusive affirmation of its peculiar identity, but rather by its capacity for intermediation between the states of which it is a part. In this perspective, bilingualism and common environmental interests would be an incentive for the transmission of national interests and mutual understanding between the peoples in question<sup>326</sup>.

Despite the desires of the frontier communities and Italian federalists, the end of the war will sanction the creation of an unitary state with Catholic leadership, while the federal disillusionments will be repaid with the meager promise to include some form of regionalism in the constitution<sup>327</sup>. The liberal democratic ideal had the better of it and the need for unity dictated by the climate of instability of the Cold War crystallized the central state to the detriment of the yearning for pluralism manifested on several occasions and supported by numerous intellectuals and part of the political elite<sup>328</sup>.

Although the federal ideology has weakened over time and has been almost forgotten, also due to the failure of the concept of European federalism and the lack of constitutionalization of the treaties, the desire to independently manage cross-border relations remains and finds expression in some cases of success of independent and trans-regional territorial management. Among the many examples that could be dealt with, the administration of the Alpine area relative to the Mont Blanc is analyzed, given that it is carried out through a cross-border

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<sup>325</sup> Self translation of the "Dichiarazione dei rappresentanti delle popolazioni alpine", in *Dichiarazione dei rappresentanti delle popolazioni alpine, il contesto storico, i protagonisti e i testi*, by Momigliano Levi P. and Perrin J., Le Chateau, 2003, p.9

<sup>326</sup> Chanoux E., quoted by Pasqui G. A. in *L'attualità di Emile Chanoux nella prospettiva federalista*, Le Chateau, 2004, p. 48

<sup>327</sup> Miglio G., *Federalismo e secessione, un dialogo*, Mondadori, 1997, pp. 22-23

<sup>328</sup> Just to mention some of the most important exponents of the Italian federalist current who expressed themselves during the Second World War's clandestinity, there were Spinelli, Mazzini and Einaudi.



cooperation association that brings together the Swiss, French and Italian regions of Savoie, Haute-Savoie, Valle d'Aosta and Valais. These local communities have in common a mountain area with an incommensurable value of naturalistic, landscaped, historical and environmental importance that necessitates the cooperation between the different legal systems in order to be safeguarded. Starting as early as 1988, the regions concerned mobilized to create an international park whose foundation and management was entrusted directly to the local authorities rather than managed by cooperation at central level between the Environment Ministers of the three states in question. The concept of “park” was then replaced by that of *espace*, understood as an innovative space capable of reconciling the needs of protection with those of development, requiring legislative autonomy that would also protect the international economic implications that a heritage of similar value would have could represent. The participation of the resident populations remains at the center of the success of this cross-border program, which relies on national, international and supranational legislation while maintaining a range of legislative action defined and restricted to the territory of Mont Blanc. This was possible thanks to the questioning of the experts on the study for the creation of new forms of cross-border cooperation at sub-state level for the sustainable development of the territory<sup>329</sup>. The legal instruments coming out from the analysis were two: the creation of an international organization or the possibility for the brand-new entity to be submitted to the internal jurisdiction of one of the states. The first option would have given the transnational institution a juridical personality, with international rights and obligations, the ability to act and political immunity. Nonetheless, the international organization could not give a real answer to transnational cooperation, since it would not be possible to create an organization for each zone that need to be administrated through international cooperation. On the other hand, it is essential to find a legislative basis able to provide territorial entities with an institutive power, in order to authorize and discipline the creation of such institutions. This could be done through the application of the constitutional articles regulating the implementation of international

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<sup>329</sup> Ventura E., in *Strumenti giuridici della cooperazione per lo sviluppo sostenibile di un'area montana transfrontaliera*, Eurach Research, 2005, pp. 23-27

agreements<sup>330</sup>, under the assumption that it performs its activities according to the regional competences, but then it would still need the approval of a legal statute to regulate its modes of action<sup>331</sup>. However, the 1980 Madrid Convention laid the legal foundations for European cross-border cooperation, and the additional protocol approved in 1995 gave it application, allowing the stipulation of numerous bilateral agreements between the states that were indispensable for the realization of projects such as the *espace Mont Blanc*<sup>332</sup>.

In addition to this type of international relations, the European Union is responsible for financing these transnational entities, these being an integral part of the line of political action promoted by the Commission through the seven-year development and cooperation programs. In particular, the Interreg program<sup>333</sup> provides funds for the financing of local and regional authorities committed to the implementation of interregional cross-border cooperation projects, through the sharing of experiences on public policy and the improvement of strategies for citizens and communities<sup>334</sup>.

#### 4.4 European Union: a supranational multilevel governance

The Paris treaties of April 18, 1951, promoted by Jean Monnet, inaugurated the long and complex path of European integration, which, starting with the creation of the ECSC (European Coal and Steel Community), to which the first six founding states joined, evolved into an uneasy but surprising political construction that, in half a century of international collaborations, has developed a new form of political organization, whose features are completely peculiar and whose purpose is not only not yet reached, but is not even identified. The ideals

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<sup>330</sup> Italian Constitution, V, art. 117

<sup>331</sup> Ventura E., in *Strumenti giuridici della cooperazione per lo sviluppo sostenibile di un'area montana transfrontaliera*, Eurach Research, 2005, pp. 25-27

<sup>332</sup> Ventura E., *op. cit.*, pp. 57-60

<sup>333</sup> Interreg is a funding program promoted by ERDF (the European Regional Development Fund)

<sup>334</sup> <https://www.interregeurope.eu>

of the Europeanists who emerged victorious from the era of totalitarianisms first clashed with each other, then with the reality of a continent divided by national and sovereign interests, and finally with a situation of precarious world balance in which Europe was not more directly responsible. The dream of a deep union, inspired by the success of the American model and confident in the uniformity of values implicitly common to all the nationalities of the continent, therefore saw itself forced into the grip of history to make compromises that led to the creation of what is today the European Union, the singular political form whose institutions have functions and balances of balance that cannot be found in any other kind of present or past political organization. The Italian political scientist Ferrera, in an attempt to describe what form European integration had taken, appropriated the successful Indian metaphor of the elephant<sup>335</sup>, according to which scholars, blinded by the limits of understanding such a complex phenomenon, would not be they were able to give a complete and convincing definition of the nature of the political animal European Union, inevitably stopping at the analysis of only a part of its characteristic aspects. According to many scholars, a cataloging of today's European political structure would be erroneous and precocious, although a definition has been attempted by many, as Ferrara recalls: "Jurgen Habermas spoke of "community of national states", Joschka Fischer of "federal association", Philippe Schmitter of "European condominium". One of the happiest metaphors is that of the political scientist and philosopher Kalypso Nicolaidis: the EU would be a democracy: not the government of a single people but of many peoples jointly".<sup>336</sup> For a brief historical pattern, after the establishment of the ECSC and the failure of the European Defence Community in 1954, which definitely blocked the federalist perspectives, in 1957 the Treaties of Rome, according to a functional spill-over of interests, gave birth to the European Economic Community and the European Atomic Energy Community (Euratom) disposing for the sharing of resources

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<sup>335</sup> "Some blind people approached an elephant, and each began to touch it, in an attempt to find out what shape it had. Touching a different part of the large animal, each concluded that the elephant had the appearance of the touched part. [...] The result was that no member of the group came to an accurate description of the elephant. Yet each believed that he had collected sufficient tactile evidence to confirm his description and challenge that of others" Self-translation of Ferrera M., *Rotta di Collisione*, Laterza, 2016, p. 69

<sup>336</sup> Ferrera M., op. cit., pp. 45-46

related to the production of nuclear energy and the creation of a European Common Market, the realization of which envisaged the harmonization of the economic policies of the six signatory States, with objectives such as the achievement of a customs union (abolition of duties and a fixed tariff towards third countries), an economic union (centered on the freedom of movement of goods, services, people and capital) and the economic exploitation of the common territory left devalued. During the following decades the Community stabilized and expanded, with the entry of six new members and the adoption in 1986 of the Single European Act. This extended the competences of the EU institutions from the economic sphere to the common foreign security and defense policy, adapting the competences of the various decision-making bodies to a balanced legislative and executive system between intergovernmental and democratic organs. Furthermore, the Union set up an economic collaboration plan that would finally allow for the complete liberalization of movements of people, goods, services and capital within the Community area. This last aspect was simplified by the approval, the previous year, of the Schengen Agreement which since 1990 guarantees the free movement of citizens in a part of the European territory<sup>337</sup>. The Single European Act represents the beginning of a new phase of European integration forces that characterized the period of the end of the Cold War and the desovietization of Eastern European countries and that led to the ratification of the Maastricht Treaty of 1992 , 1993 and to a further enlargement to Sweden, Austria and Finland. In parallel, a rigid system of financial and economic control was also set up comprising five parameters that the Member States had to commit to respecting in view of the forecasts on the single currency, that was finally adopted in 2002 by eleven members of the European Union. At the same time, the first years of the new millennium saw negotiations in Nice for a new treaty, which would take into consideration the problems triggered by the large number of candidatures presented by the neighboring states, which would have considerably widened the demographic and territorial catchment if they had become members of the Union, by complexing the already

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<sup>337</sup> Since 1990 all the members of the European Union have joined the agreement, except for the United Kingdom and Ireland, while Cyprus, Croatia, Romania and Bulgaria, despite having signed the document, still have to take the necessary measures to implement it.

colorful picture of political cultures and lifestyles. The Treaty of Nice therefore worked to re-adapt the European institutions to the potential extended configuration, increasing the number of deputies in Parliament and that of the members of the Commission, modifying the system of weighting the votes in the Council, attributing majority voting to new areas of decision and confirming the co-decision role of the European Parliament. From 2000 to the next thirteen years the enlargement to thirteen new countries was in fact approved. In 2009 the Treaty of Lisbon was adopted with the aim of reforming the democratic system and the efficiency of the institutions. Among the changes, in many policy fields is required qualified majority instead of unanimity, more powers were attributed to the European Parliament, and a bill of rights was added to the Treaties. Nonetheless, the failure of the constitutionalization of the Treaties in 2004 did not facilitate the understanding of the institutional and bureaucratic organization of European integration, that from its beginning had evolved continuously, through entirely peculiar mechanisms with respect to the forms of international political organization previously contemplated. It now seems to have been consolidated in an ex-novo structure that contains multiple facets and hybrid traits between those of an international organization, a confederation and a federated state.

Before trying to organize and classify the European system it is essential to define the sources of laws in order to understand the nature and effects of their application. Firstly, European Union's member states answer to a primary source of law which is derived directly from the founding treaties (the Treaty on the EU and the Treaty on the Functioning of the EU), containing the definition of the powers and functions of the institutions, the distribution of competences, the principles and the fundamental rights of the annexed Charter. Secondly, the treaties put in place a set of legal instruments such as regulations, directives and decisions together with conventions and agreements established between the European Union and other states or organizations. Finally, some supplementary sources of law, which are not included in the treaties, are to be considered as well, such as the case-law of the Court of Justice or, more in general, other principles

of international law are to be included as sources of European law<sup>338</sup>. The supremacy principle guarantees the predominance of European law on internal legal orders of its member states and has been produced by the Court in the 1964 judgment *Costa versus Enel*<sup>339</sup>. The primacy of the law, that could be considered as constitutionally binding, together with the normative quality of its secondary law<sup>340</sup> (which does not require an internal validation from the states before acquiring a binding value) represent an original characteristic of the European supranational model. On the other side, the introduction of the majority vote in the bosom of the intergovernmental organ deprives the governments of the member states from their veto power in the Council, by introducing another feature demonstrating the post-sovereignty nature of the Union, which could not be considered anymore as an example of traditional international cooperation<sup>341</sup>. The coexistence between different and multiple legal orders, each of them acting upon an “overlapping territorial and jurisdictional space such as none has comprehensive or unrivalled normative authority in its own domain”<sup>342</sup>, is allowed thanks to the institutional normative order established by the treaties and embraced by national constitutions.

Some advocate that European Union governance is limited to a state-centric perspective that, according to the intergovernmental theory, considers the integration as a voluntary action of states whose sovereignty is not challenged by any supranational institution, given that they control the entire process of devolution which, at the end, help them to increase their own autonomy<sup>343</sup>.

Moreover, according to the European tradition, the federal nature of the Union is

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<sup>338</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114534>

<sup>339</sup> *Flaminio Costa versus ENEL* 1964 ECR 585 (6/64)

<sup>340</sup> Schütze R., “On “Federal” Ground: the European Union as an (intern)national phenomenon”, in *Common Market Law Review* vol.46, pp. 1069-1105, 2009, pp. 1071-1072

<sup>341</sup> Mac Amhlaigh C., “Late sovereignty in post-integration Europe: continuity and change in a constitutive concept”, in *Micropolities in the margins of Europe* by Adler-Nissen R. and Pram-Grad U., Routledge, 2012, pp. 1-3

<sup>342</sup> Walker N., “Reconciling Mac Cormick: Constitutional pluralism and the unity of practical reason”, in *Ratio Juris* vol. 24, Blackwell Publishing, 2011, p. 375

<sup>343</sup> “The unique institutional structure of the EC is acceptable to national governments only insofar as it strengthens, rather than weakens, their control over domestic affairs, permitting them to attain goals otherwise unachievable” Moravcsik A. quoted by Trnski M., *Multi-level governance in the EU*,

<https://www.sustainableislands.eu/BlockImages/InLibraryData/GalleryData/MULTI-LEVEL%20GOVERNANCE%20IN%20THE%20EU%20by%20Marko%20Trnski.pdf>

completely denied, since the devolution of sovereignty to its institutions does not involve the creation of a new federal state with absolute sovereignty. The nationalization of the federal concept under the European doctrine is therefore in open contrast with the ambiguity of the compounding legal structure of the EU, which can find an explanation only through the classification under a *sui generis* model<sup>344</sup>.

On the other side, according to the American tradition, in the federal theory there is space for mixed and hybrid systems, whose nature is divided between national and international orders<sup>345</sup>. This perspective would allow the understanding of the EU as a new form of multi-level governance, where a variety of different actors, including non-state personalities, are part of the decision-making process<sup>346</sup>. The inclusion of sub-national and supranational actors to the European policy-making system is influencing the work of its institutions, the sovereignty of the member states, and the participation of regionalism and civil society to the ordinary legislative process. The recognition of the constitutional pluralism<sup>347</sup> of the supranational legal order could be made only by leaving aside the idea that nationality and identity are exclusively and unilaterally bonded with the political and jurisdictional system. European Union is indeed demonstrating that a community of shared values that grants democratic principles of participation and civic culture, human rights, constitutionalism and the rule of law is largely sufficient to sustain the legitimation of the system. Alongside this interpretation there should be the abandonment of the exclusive sovereignty concept, with a theoretical openness to shared and multi-layered sovereignty in its successful efficiency in organizing a political community.

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<sup>344</sup> Schütze R., "On "Federal" Ground: the European Union as an (intern)ational phenomenon", in *Common Market Law Review* vol.46, pp. 1069-1105, 2009, pp. 1091

<sup>345</sup> Schütze R., *op. cit.*, pp. 1077-1079

<sup>346</sup> Trnski M., *Multi-level governance in the EU*,

<https://www.sustainableislands.eu/BlockImages/InLibraryData/GalleryData/MULTI-LEVEL%20GOVERNANCE%20IN%20THE%20EU%20by%20Marko%20Trnski.pdf>

<sup>347</sup> Walker N., "The idea of constitutional pluralism", in *The modern Law Review*, vol. 65, Heinonline, 2002

## Conclusions

First of all, it has been shown that a series of transformations in modern society have had such an impact on international relations and on state political communities that they have often altered their behavior, adding new challenges, new demands and new actors to collective public life. The evergreen concept of exclusive sovereignty is finding uncertain ground, as national governments are bypassed by uncontrollable economic flows, supranational organizations, transnational political movements and interest groups, immigration and plurality of identity. It is now undeniable that Western society is going through a critical phase and that the nation state is once again in crisis. The federalist thought has been analyzed, in the history of its evolution and in its empirical development, trying to understand its applicative potential for an imagined post-modern society. It has emerged that by associating the problematic dilemma of individual and



collective identity, which, when not channelled exclusively by national propaganda, seems to be articulated on several levels, with a multi-layered shared governance of a decentralized and federal nature, while maintaining the state as the last responsible of its citizens but endowing the constitution with common and pluralistic fundamental values, it seems possible to theorize the functioning of a neo-federal society that is sufficiently inclusive and cooperative to be able to face the challenges of the new millennium. The division of sovereignty between several institutions would better respond to the needs of citizens, who would solve their political problems on several fronts depending on the nature of their claims. If the global community were to be divided into multiple and blurred lines of belonging, responding to various and shared systems of management of sovereignty, which would protect minorities and local identities through decentralization and constitutionalization, then one could think of a reorganization of society along lines of conflict daily solvable by continuous negotiations. The realization of the individual, as well as that of the social group, would not require the ultimate exclusivity but would be obtained day by day in the debate and through civic participation, for the negotiation of their interests or competences, perhaps eliminating the violent potential of nationalist conflicts. The case studies, moreover, have shown that there already are more or less successful examples, which therefore demonstrate the reality of a world that changes by seeking in the new tools of innovative federalization a response to the social and political needs of the population.

Canada has the characteristics of a multi-national state with a non-traditional federal structure. More and more state realities are facing cultural plurality and the Canadian example could be an excellent starting point for the elaboration of neo-federal projects for the inclusion and diffusion of central powers. Besides, the phenomenon of Quebec should not be considered as a weakness in the federal system, but it should be observed as a stimulus to reflection that arises with the emergence of regionalist complaints. In fact, it represents a good beginning for the understanding of the internal dynamics of multi-national states and offers constitutional, legislative and communicative solutions, of greater or lesser effect, to the centrifugal thrusts of the secessionist movements.

The case of the Western Alps is just one of many examples of active transnational cooperation, articulated on different levels of the legal system, functional because it focuses on specific themes and real needs that cannot be taken away from a coordinated administration between the different states.

European regionalisms, on the other hand, are problematic phenomena that are now often present in the internal realities of states, since the latter are not able to channel and rebalance the globalizing pressures they have undergone in recent decades. Once again, the desire for decentralized reorganization to accommodate the demands for autonomy of regions and local authorities is clearly manifested. However, these requests are not met, perhaps because their battle has now gone on beyond the demands for autonomy, to the point of arriving, not having been satisfied otherwise, at independentist and secessionist movements that threaten the integrity of the state and the very survival of the regions that require it.

Finally, the European Union remains the closest example to the neo-federal ideal, in that it represents the elaboration of a mechanism for the sharing of multi-level sovereignty, partially legitimized by the democratic dynamics of some of its institutional bodies and by the implicit constitutional value of the fundamental treaties, which also presents some identifying traits of belonging, such as citizenship, symbolism and the common basic value structure.

Although the European Union has encountered obstacles and slowdowns, it shows that national cultural pluralism is acceptable, because the multi-level democratic and participatory system can be protected by the constitutional source if and when it contains a pronounced and shared civic spirit that revolves around a core of values shared by all social groups, which, as in the Canadian case, safeguards some fundamental, secularized, non-discriminatory civic principles such as democracy, federalism, the protection of minorities, the rule of law and constitutionalism.

Following this logic, the neo-federal theory could represent a creative, innovative, dynamic and inclusive alternative to the nation state, mitigating the conflict implicit in the nationalist nature of the European division and offering new tools for transnational cooperation, the recognition of plurality of identity and thus the protection of sub-national cultural variety, and a clear and transparent response to

the generalized insecurities deriving from globalization and the complexity of global governance.

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