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Secession and Self-determination in Western Europe: The Case of Catalonia

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This presentation is based in part on the Legal Opinion by an International Commission of Legal Experts addressing the question of Catalonia: The Will of the People and Statehood. The Commission was composed of Professors Marc Weller (UK), John Dugard (South Africa), Richard Falk (USA) and Ana Stanic (Slovenia). Although the Opinion was commissioned by Esquerra Republicana de Catalunya, its findings represent the agreed and independent views of the authors. While based on the Opinion, which will be published in due course, this contribution does not purport to give an authoritative rendering of it, but instead represents the views of the author.

This contribution assesses the claim to statehood of Catalonia, addressing in turn:

- The criteria for statehood;
- The legality or otherwise of unilateral declarations of independence;
- The issue of self-determination;

Objective criteria of Statehood

Catalonia can easily meet the classical, objective criteria for statehood. It has a clearly defined territory of some 32,000 sq km, featuring clearly defined boundaries. Its stable population numbers around 7.5 million, far in excess of many recently independent states in Europe and beyond. It is the most economically viable region when compared to other parts of Spain. Even under autonomy within Spain, Catalonia has exhibited most of the functions of effective government.

Whether Catalonia would in fact exercise fully independent powers of government can only be assessed if and when it decides to implement its declaration of independence, at present suspended in application. Catalonia has generated a substantive transitional law, to apply pending the adoption of a new constitution once independence proceeds. That law

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would assign all public powers to the new state, including foreign affairs powers ('capacity to enter into international relations'). Hence, Catalonia is, at least potentially, capable of statehood.

Negative subjective criterion

In addition to the classical, objective criteria, there are negative and positive subjective criteria of statehood. The negative criterion, confirmed by the International Court of Justice in the Kosovo Opinion, demands that statehood must not be tainted by *jus cogens* violations. There is no suggestion of such conduct by Catalonia in this instance.

First positive subjective criterion: A manifestation of popular will

The positive subjective criteria come in two guises: first, there must be an act of will of the population, and second, that will must be enacted through a declaration of independence.

Any change in the social contract of a political community as dramatic as an act of secession from the established legal order must be based on the will of the people. Ordinarily, this would take the form of a referendum, although in some instances (dissolution of Czechoslovakia), concurrent decisions of the elected national and regional assemblies have been taken to be sufficient.

The international legal requirements for a valid referendum are only emerging. Still, in analogy to emerging standards on democratic governance, at least within Western Europe, it is clear that there must be a free and fair campaign and a transparent and open balloting process. In this instance, any intimidation came from the side of the Spanish government, including arrests, raids and other measures against pro-independence campaigners and officials.

It has recently been asked whether a referendum should take place within the potentially seceding entity, or whether it needs to take place throughout the state from which secession is sought. This argument was attempted by the USSR, when seeking to oppose the secessions of the Baltic republics, before the Union dissolved. Clearly, widespread practice in the dozen or more cases since then has confirmed the obvious fact that the referendum requirements relates to the population seeking to establish a new legal order for itself. The interests of the other parts of the state are to be preserved through the requirement of negotiation, to which reference will be made below.

In some instances, a transition agreement provided for a minimum threshold of voter participation in a referendum (South Sudan). However, there are no firm international standards in this respect. The Catalonia referendum attracted participation of some 42 per cent of the electorate. However, Catalonia asserts that an additional large percentage of voters were precluded from participation due to the forcible closure of voting stations and other acts of interference by the central Spanish authorities. Had they been able to participate, Catalonia claims, participation would

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have been around 57 per cent. It is assumed that the overwhelming majority in favour of independence of some 92 per cent of votes actually cast would have been retained.

Given the active obstruction of the poll by the Spanish central authorities, extending even to forcible interference in it, any claim that that referendum lacks credibility due to insufficient participation rings somewhat hollow. Moreover, non-participation does not provide a way for the side likely to lose in a referendum to frustrate it, provided the poll was sufficiently fair and inviting for all. This was confirmed by the Badinter Opinion in relation to the Bosnian referendum that was boycotted by ethnic Serbs.

Second positive criterion: Declaration of Independence

The nature of the declaration of independence, signed by the President of Catalonia on 10 October 2017, but immediately suspended, has remained slightly uncertain thus far, leaving room for negotiation with the central authorities of Spain. Its entry into force would require a further act on the part of the Catalonian authorities, potentially to be backed by a vote of the elected representatives.

A criterion of internal legality?

Spain has argued that the actions of the Catalan authorities, reaching back to its declaration of sovereignty on 23 January 2013, are in violation of Spanish constitutional law. The Constitutional Court of Spain has consistently supported this view. Somewhat oddly, it has recently started to act as enforcement agent of its decisions, assigning what appear to be disproportionate fines to individuals supposedly disregarding its findings (apparently accumulating at a staggering rate of Euro 12,000 a day in some instances).

This issue raises the question of which legal order governs an act of secession. Obviously, an act of secession consists precisely of the removal of a population and territory from an existing legal order and the consecration of a new, independent legal order. Hence, it is not appropriate to evaluate the lawfulness of unilateral secession according to the legal order against which it is directed.

The international Court of Justice found as much when it considered the declaration of independence of Kosovo. It determined that the declaration was not issued by the elected representatives of Kosovo acting as an organ of the state from which secession was sought (in that case, the Provisional Institutions of Self-government of Kosovo). Rather, one might assert, these representatives were now exercising a direct mandate from the people in founding a new, original jurisdiction. The Court continued: ‘nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated,’ thus clarifying expressly that a declaration of independence does not take place within the legal order from which the

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entity seeks to remove itself [Kosovo AO, para 121.] In relation to Kosovo that legal order was based in a Chapter VII decision of the UN Security Council. The rationale of the Court would, *a fortiori*, apply to cases of ‘ordinary’ constitutional law not based in such a higher-level, supranational decision. Hence, much of the argument relating to the purported unconstitutionality of Catalonia’s conduct at the point of declaring independence appears to be misplaced.

Capacity to Enter into Foreign Relations and Recognition

It is broadly accepted that the existence of a state is a matter of fact, rendering recognition declaratory. This was noted in the *Badinter Opinions* and confirmed in subsequent pronouncements. Hence, the attempt by some to conflate the requirement that a state must have the capacity to enter into international relations with the need to attract widespread recognition is not persuasive—it would mean introducing the constitutive theory of recognition through the backdoor, after having just rejected it. Instead, capacity to enter into international relations means just that: capacity. A state must claim for itself the legal competence to engage in foreign relations. This requirement, drawn from the venerable Montevideo criteria, made sense when the international system was populated with a range of quasi sovereign entities, such as protectorates, which might have been lacking in that attribute.

That said, it is for course clear that recognition remains crucial, if not for statehood as such, then for the ability of an emerging state to actualize its statehood through international intercourse and membership in international relations. As Somaliland has found for over two decades, statehood in the absence of significant recognition remains precarious. And, as Kosovo is still finding despite having assembled some 115 recognitions, independence without membership in key international institutions can be uncomfortable.

No prohibition of independence

In the past, it was sometimes argued that unilateral independence cannot lawfully occur, as it would breach the rule of territorial integrity in international law. The only way to cure this defect would be consent to independence from the central authorities, or perhaps overwhelming international acceptance of statehood in exceptional circumstances. This minority position has now been overcome by the International Court of Justice. In the *Kosovo Opinion*, the Court confirmed that ‘the principle of territorial integrity is confined to the sphere of relations between states.’ [Id., para 80.] That is to say, the principle precludes disruption of the territorial integrity of one state by another, but it does not apply internally, in relation to populations seeking secession.

It is clear that there is a strong policy preference of states for maintaining territorial unity. At times, this preference has been reflected in pronouncements by the UN Security Council. However, as a matter of

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law, rather than policy preference, the international system is neutral on the question of secession. [Quebec Reference, para 140].

An entitlement to secession?

If secession is not prohibited, this means that its success or failure will be determined by the question of whether or not the seceding entity gains and maintains effectiveness. This type of case might be termed an 'unprivileged' secession. Of course, international law also provides for privileged secession. These are instances covered by the principle of self-determination in the sense of secession.

In cases of privileged secession, international law positively supports possible independence as a desired outcome. This effect is particularly powerful in colonial cases. By 1960, the organized international community accepted that colonialism is a historic wrong. It later enacted an aggressive doctrine of self-determination, aiming to ensure that that decolonization would succeed in relation to the increasingly few holdout colonial states (mainly pariah states like the then still fascist Spain and Portugal, and racist South Africa).

The immense power of the doctrine of colonial self-determination is however balanced by its restrictive field of application in the colonial context, by its confinement to self-determination within *uti possidetis* boundaries, and by the fact that the doctrine generally only applies at one single moment in time. Many populations around the world experience what they consider colonial domination or exploitation. However, it is clear that colonial self-determination now only applies to a handful of cases that remain clear instances of classical colonialism so listed by the UN. Or, in other words, these are cases of the acquisition and domination of a territory and population, during the time of imperialism, by a metropolitan power that is radically racially distinct and divided from the colonial territory by an ocean, for the purposes of economic exploitation. Catalonia is clearly not among them.

Catalonia can also not rely, at least directly, on the doctrine of constitutional self-determination which was consecrated in the wake of the secessions from, and then the dissolution of, the former Yugoslavia. Under Spanish constitutional law, Catalonia is clearly an autonomous territory. Indeed, in contrast to some other autonomies in Spain, it is an 'original' autonomy, taking account of its distinct history, language and culture. However, in view of the clear provisions opposing secession in the Spanish constitution, it would not be easy to derive a claim to self-determination from the domestic legal order of Spain.

Catalonia will undoubtedly point to the increasing human rights violations committed by the central government over the past weeks. Moreover, there is the threat of placing Catalonia under direct rule, suspending its autonomy, which may well be implemented before this contribution is posted. It might be tempted to invoke the doctrine of remedial secession in consequence. According to that still contested

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doctrine, repression of a population, or its exclusion from representation in the state, generates a self-determination entitlement in the sense of secession. However, it is not clear that the gravity of repression or exclusion is sufficiently well established as yet to trigger the application of the doctrine.

Self-determination in Democratic Societies

This does however not mean that self-determination as a legal entitlement is irrelevant in this instance. It is universally agreed that the authority to govern must be based on the will of the people, as is stated in innumerable international standards, starting with the Universal Declaration of Human Rights. Virtually all national constitutions are expressly based on this democratic principle which has also been determined to be a 'fundamental feature of the European public order. [Mathiue-Mohin and Clerfays, ECHR Judgement of 2 March 1987, para 47.]

The highly nuanced ruling of the Canadian Supreme Court in *the Quebec* case has applied this doctrine to the present context of possible secession. It was noted above that a declaration of independence marks the point at which the seceding entity steps out of the constitutional order of the central state. Its conduct up to that point remains subject to constitutional law, although even then the central state is not unconstrained. While the Court found that there was no positive entitlement to statehood outside of the colonial context or in the absence of severe repression or exclusion from the state, it nevertheless concluded that a state cannot 'remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec chose that goal, so long as in doing so, Quebec respects the rights of others.' [Quebec Reference, para 87.]

The mechanism to ensure that a seceding entity respects the rights of other parts of the state is, according to the Supreme Court of Canada, negotiation. Secession should not be imposed unilaterally, nor can it be excluded from the outset. Instead both sides are required to negotiate in good faith about a settlement. As the Court put it: 'The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue.' [Id, para 151.] Others might add that alternatives to secession should be attempted, before independence should be contemplated.

In this instance, Catalonia can claim to have embraced alternatives to independence and offered negotiations throughout. In 2006, it settled for an enhanced autonomy arrangements that would have recognized its identity as a nation. This agreement was accepted by the Spanish and

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Catalonian parliaments, followed by a referendum in Catalonia. The Constitutional Court, in 2010, struck down key elements of the deal, including the recognition of Catalonia as a ‘nation’ within Spain.

Since then, Catalonia has taken a series of steps, including its declaration of sovereignty of 2013, an informal public consultation on possible independence of 2014, the regional elections of 2015 billed as a virtual referendum on independence, and now the recent referendum.

Catalonia points to the fact that it has offered negotiations throughout. Spain has refused and instead insisted on compliance with the existing constitutional order, and continues to do so.

To the Catalonians, it may appear as if this legal order has been used at every step as a means to disenfranchise, rather than enfranchise them in relations with Spain. After all, that legal order has already failed to deliver even the modestly enhanced autonomy backed at the time by popular will in Catalonia and by the acts of the Spanish legislative and executive adopted according to the constitutional process.

If discussions within the constitutional order cannot produce results, or if it appears to one side that that order is bound to place it in a position of inequality and disadvantage, it is not surprising that pressure to simply step out of that framework through a declaration of independence increases. Croatia and Slovenia took that view when the central authorities in Belgrade failed to contemplate a looser federal system for Yugoslavia. Belgrade had relied on its dominance in the Yugoslav central institutions, and on the fact that independence did not appear to be available in the alternative. In the end, the entire state dissolved in consequence.

The lesson of the past therefore may be that it is good to talk.

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