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Secessionist seeds have been sown in Catalonia. This will not change, regardless the outcome of the Catalan regional election. Catalan nationalists will argue for a break with Spain, and tensions will likely continue to rise between secessionists and Spanish patriots. At this point, this is not news, and merits no more debate. Instead, this paper will look toward a more pressing, and deeply controversial issue. Catalan secessionists can argue for independence on purely moral grounds for as long as they like. But, no matter their future course of action, they are not likely to receive the recognition they need from both the European Union and the international community to form a new state at large unless they act within the dictates defined by the rule of law. This paper will not make judgments, on either moral or legal bases, on the legality of Catalan secession. It will present the legal arguments of both the Spanish government and Catalan nationalists for and against the legality of secession respectively. The Catalan Crisis is likely to rage on past the December 23rd regional election, and it is highly necessary to understand the legal background of the issue to determine any course of action going forward.

Spanish Domestic Legality of Secession

By all means, the secession of a Spanish territory from its matrix state—the state from which a territorial part separates—is not a legal action under the Spanish Constitution. The Constitution clearly states that Spain is an “indivisible” body, and like the vast majority of states, includes

no provision for the legal secession of a territory. Both of these clauses are extremely common within national constitutions—St. Kitts and Nevis, Ethiopia, and the former USSR are the only states to include secessionist escape clauses. Now, Spain is also different from many “indivisible” states in that it grants a high proportion of competences to its autonomous regions, Catalonia included (Article 155, invoked following the October referendum, suspended many of Catalonia’s exclusive competences, along with its legislative wing). In an important distinction, “autonomy” means nothing in terms of secession. The Spanish matrix state grants the state’s autonomous regions their powers. The relative legal power of Catalonia is derived purely from the greater Spanish Constitution, and under the Spanish Constitution, unless amended at the national level, Article 155 is a legal national instrument and secession is not. However, and this leads into this paper’s core section, unilateral secessionists, by definition, make no claims for secession under domestic law. The pro-secession movement aims to divorce itself entirely from the Spanish matrix state’s jurisdiction. In essence, this means any pro-secession argument necessarily revolves around the dictates of international law.

International Law And Succession

International law traditionally prefers to avoid the concept of secession altogether, which is often the reason states are willing and able to adopt full bans on secession in their constitutions. In fact, Article 34 of the

1978 Vienna Convention on Succession of States in respect of Treaties—a literal treaty on secession treaties—makes no distinction between secession and the devolution of powers. Likewise, The UN Declaration on Friendly Relations, in its secession-themed article, refers to the secession process as the establishment of an independent state.

Most legal scholars accept that international law, in its reluctance to fully address secession, views secession as a neutral concept, neither approving nor condemning it. And keeping with the general theme of inconclusiveness, this means there is no accepted definition of legal or illegal secession within international law—secession legality rulings are always made on an ad hoc basis.

Arguments against neutrality are highly prevalent. Human rights law, a relatively recent full addition to the canon of international law, emphasizes deference to the concept of self-determination over territorial integrity—these being the two basic tenets of international law. Further, the concept of secession has evolved, to the point that both legal and illegal secession can occur without the use of force or the presence of unstable societies. However, while the neutrality of secession within international law is under siege, it is necessary to acknowledge this somewhat consistent approach until courts rule otherwise.

Remedial Secession As An Argument For Secession

International law only fully recognizes and affirms the right to secession in the following cases: peoples subjected to foreign subjugation, peoples subjected to colonial rule, and peoples subjected to racial-based rule. Remedial secession theory says a territory is willing to succeed from its matrix state only when its

fundamental rights are breached. Under this theory, this means that secession is only considered a viable option as a last resort exception to the general rule of territorial integrity. Secessionist states that fit within this model, should, in theory, be looked upon favorably under international law. In practice, only the Bangladeshi secession from Pakistan functions as a concrete example. Even Kosovo's secession from Serbia, looked upon relatively favorably by international law, would be a controversial inclusion within the remedial secession grouping—due to the complex territorial issues in the area. In fact, as this paper will touch on later, the Kosovo ruling may not actually set international precedent, due to the case's relative uniqueness. The legal basis for the remedial secession argument is therefore tenuous at best—there is almost no state practice to back up this argument in the international realm.

The Legal Process Argument

Based on the relatively recent Kosovar secession from Serbia, it may be inferred that international law is now more concerned with ensuring the legality of the secession process rather than determining the ultimate legality of secessionist movements. Secession is a process stemming from years of political and historical background, not an isolated incident arises out of the blue. It may be in the interest of states to impose internationally binding regulations on the secession process in order to prevent secessionist movements from devolving into violence. Violent secessionism further damages both territorial integrity and a state's international reputation. Therefore, there is a legal argument to be made that should a secessionist movement adhere to all international laws in its secession process, it should be granted legal status, due to the right to self-

determination. However, like with the remedial secession argument, the lack of state practice imperils the existing strength of this argument.

Despite the lack of state practice in relation to the above argument, legal scholars have speculated on how such an argument would proceed. According to Antonello Tancredi, a territory with secessionist ambitions would need to do the following: refrain from the use of force, respect the previously administered borders, and hold a successful, legal territorial independence referendum. The final postulate raises the biggest question—what does it take for a referendum to be deemed legal?

Moral Arguments For Succession

Along with the above argument for succession, it's important to acknowledge the moral considerations that come into play when international courts deal with secession. Remember, international law deals with secession on an ad hoc basis, giving much greater weight to the individual facts of each secession case. There are three main types of moral arguments: just-cause, nationalist, and choice arguments.

1. Just-cause argument

The moral argument behind secession depends on the secessionist territory's treatment by the matrix state. That is, secession can be deemed legal if the parent state violates fundamental rights and thereby forfeits its legitimacy.

2. Nationalist argument

A secessionist territory need not have suffered at the hands of its matrix state, but instead must only be a single nation housed within a single territory.

3. Choice argument

A secessionist territory need not either have suffered at the hands of its matrix state or be a single nation housed within a single territory, but does need to be able to better protect and provide for its citizens than the matrix state.

Legal Arguments Against Secession

This paper has thus far focused primarily on the legal arguments in favor of secession, but is by no means endorsing or denouncing secession. Rather, the pro-secession arguments are much less established, and therefore require greater explanation than do anti-secession arguments. Further, defense against secession at the international level often revolves around refuting the pro-secession claims of the secessionist territory. While there are many arguments that have been used to successfully defend against secession at the international level, there exist two primary arguments used to prevent secessionist territories from achieving their ambitions.

1. Inadequate Institutions

The matrix state argues that a secessionist state does not have the democratic institutions necessary to succeed as a splinter state. In such a case, the secessionist state could inadvertently damage regional growth.

2. Inadequate Defense

The matrix state argues that a secessionist state does not have the defense capabilities necessary to protect itself from foreign or internal threat. Without such capacities, the secessionist state could inadvertently damage regional defense.

Pro-Secession Arguments (Catalonia)

Points of Law

First off, Catalonia will argue that due to the right to self-determination (Article 1.2 of the United Nations Charter), the territory should be allowed to determine its own fate. If the territory speaks as a single legal voice, which Catalan nationalists argue they do, then Catalonia should be allowed to split from the Spanish state should Catalans vote in favor of secession in a referendum. If pro-secessionists could establish their right to self-determination, they could then proceed to argue that the state law, which bans their secession, is illegal. By declaring secession illegal, the Spanish Constitution would therefore be in violation of the international principle of self-determination.

In terms of EU law, the Catalans would claim the Spanish state violated Article 2 of the Lisbon Treaty, which protects the fundamental rights of EU citizens. Secessionists will claim that Spain's Constitutional Court, by interfering in local Catalan politics, violated Articles 19 and 20 of the United Nations Declaration on Human Rights, as well as Articles 10 and 11 of the European Convention on Human Rights—both documents protect the rights to the freedom of expression and assembly. They would argue that since these rights stand fundamentally above the dictates of national constitutions, the Spanish government acted illegally in relieving Catalonia of many of its autonomous rights via Article 155. Further, in concordance with the theory of remedial secession, secessionists will argue they resorted to secession as a matter of last resort. They will assert that the greater Spanish state has consistently subjugated the Catalan peoples since the Reconquista, and

therefore there is just-cause for the formation of a new Catalan state. And finally, Catalan nationalists will say that while they organized their referendum unilaterally, without the permission of their parent state, they did so peacefully and as a matter of last resort.

State Practice

In terms of state practice in this realm, the secessionists would cite the Kosovo Independence Precedent as an example of international law embracing a territory that declared independence unilaterally. It is important to recognize that though over 100 secessionist movements cite the Kosovo precedent as their primary example of state practice, including Russian-backed Georgian splinter regions Abkhazia and South Ossetia. The Kosovo precedent has yet to proven as a successful argument in favor of succession. Nevertheless, Catalan secessionists would claim that international law cannot make the principle of self-determination conditional on the amount of abuse a nation suffers. The Kosovars were undoubtedly mistreated by the Serbs prior to 2008, but the Catalans would argue the Spanish government mistreated the Catalan nation as well. Secessionists will agree that that while international law could, in the future, be allowed to dictate the amount of abuse suffered at the hands of the matrix state necessary for legal secession, new laws will need to be established to do so. Any attempt to define an “abuse threshold” in the case of Catalonia will undermine the “neutral” approach favored by international jurists in secession cases.

Anti-Secession Arguments (Spain)

Points of Law

In order to refute the pro-secession arguments in full, Spain will both defend

itself against the claims of the secessionists and provide additional evidence against the illegality of the Catalan secession. First off, and perhaps most importantly, Spain will argue that its right to territorial integrity far outweighs Catalonia's right to self-determination. Spain will assert that it, as a highly functioning democracy, has the right to punish secessionist movements in line with its nationally approved Constitution. Therefore, the invocation of Article 155 and the refusal to endorse the October independence referendum was perfectly legal. Again, in terms of international law, Spain will claim that its government has no fundamental obligation to protect secessionists and state dissidents under Article 2 of the Lisbon Treaty—the right to secession is not an enumerated right of EU citizens under Article 2. Further, they will say that since the United Nations Declaration on Human Rights is not legally binding, and since the European Convention on Human Rights is only legally binding if enforced by the European Court of Human Rights, any potential violations of human rights occurred within perfectly constitutional means.

In defense against the argument that the Spanish government has subjugated the Catalans for centuries, Spanish advocates will point to the fact that the 1978 Constitution was ratified with more than 90 percent of Catalan support. They will acknowledge that Catalan rights have been abused in the past, but that such rights are protected both under the existing Constitution and the 2006 Statute of Autonomy of Catalonia. Spain could also choose to go on the offensive against Catalan secessionists, and argue that without similarly established democratic and defense institutions, Catalan secessionists risk endangering the lives and livelihoods of average citizens. Secession would also compromise Catalonia's EU

status, further jeopardizing Iberian regional stability.

State Practice

Spain could employ the secessionist cases of Scotland and Quebec—both deemed legal although never fully acted upon—as examples of the standards Catalan secessionists failed to meet in their pursuance of independence. In reference to Scotland, Scottish nationalists reached an agreement (the Edinburgh Agreement) with the United Kingdom in 2012 to hold a secession referendum—Scotland eventually voted to remain with the UK. Spain will therefore argue that the legal basis for independence referendums needs to be established under national, rather than international law. Since Spain rejected the Catalan request to hold a referendum, a referendum should never have been held. The case in Quebec reinforces this argument. With the Quebec Reference, the Canadian government bestowed upon Quebec the right to hold a referendum. This again reinforces the idea that without the presence of an extremely high level of state abuse, legal referendums can only be held with the support of the matrix state—Kosovo is the exception, not the rule.

Conclusion

Again, it is important to clarify just how important the legality or illegality of a secessionist movement is to the eventual success of said movement. If a secession attempt is deemed legal, it becomes much easier to achieve international recognition. If a secession attempt is deemed illegal, it becomes nearly impossible for a secessionist state to fully establish itself in the world order. Catalonia needs to win this argument if it is to ever become fully independent of Spain. And Spain needs to defend itself against Catalonia in order to maintain its territorial integrity.

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