Una Solució, Si Us Plau: Self-Determination and the Catalan Crisis

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**UNA SOLUCIÓ, SI US PLAU: SELF-DETERMINATION AND THE CATALAN CRISIS**

**ABSTRACT**

Nestled in the corner of Spain is the birthplace of a people and a political conflict as old as the history of the peninsula itself. Catalonia, long a bastion for independence movements around the world, is caught at the center of tensions between traditional regionalism and political centrality in Spain. As internal unrest continues to intensify, miring discussion and dialogue, the crisis creeps closer to a point of drastic political uncertainty. Exhausted with the enduring lethargy of domestic and European legal fora, the Catalans have often thought of turning to international law for a solution. This Comment draws upon decades of scholarship in the realm of self-determination to argue for a critical re-analysis of these now-dated concepts. Formulated in response to a post-colonial era, the mechanism of self-determination fails to ascertain and address the challenges faced by modern ethnopolitical minorities. A reassessment of the norms of self-determination could provide novel and politically stabilizing options for stateless groups in Europe and other parts of the world.
INTRODUCTION

Greuge in Catalan means “grievance” or “affront.”¹ This is a word at the core of the Catalan character, a word branded on the lips and hearts of those struggling for independence in the region for hundreds of years.² The willful obliviousness towards Catalan culture and its concerns, the neglect, and often deliberate ill-treatment of the region and its people have festered in the collective national memory. Unaddressed grievances, unsettled affronts, and an utter failure of communication are now an essential part of the makeup of the Catalan people, their land, their pàtria³ and its relationship with greater Spain. These grievances, their seemingly interminable nature, and the search for a solution are the subject of this Comment.

This is a conflict about language, history, and the failure to settle upon a cohesive national narrative. The pluri-nationalism of modern Spain is a dizzying descendant of a nation haunted by violent twentieth century totalitarianism,

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which only exacerbated centuries of confused attempts at bureaucratic nation-building amongst the country’s many regions. The political idea that Spain relies on is a kind of “dual nationalism,” comprising of a loyalty to one’s region and the nation of Spain. For a country creeping ever closer to neo-Francoist rhetoric in its political dialogue, the Catalan independence crisis represents a key moment for the future of Spain. This moment hinges on a fragile balance between the anti-regionalist rhetoric of the Vox party and the pro-independence groups of the Catalan secessionists. The contemporaneous demands for separatism, and the subsequent instability resulting from the region’s clash with the central government in Madrid, retrogresses an already historically tenuous situation.

Amidst this startling backdrop, one would assume international law would lend some method of relief: either by custom, action, or at least advocacy. This Comment hopes to gauge why this is unfortunately not the case for the Catalan situation and to offer a potential remedy for an international legal tool that has proven ineffective. Every further action by the Spanish State, in its unfailing resistance and steadfast unwillingness to compromise, further atrophies the already-weakening emotional ties that the region has towards the central government. This tension was a key factor in driving Spain to a civil war less than a century ago, and with the internal situation habitually embittered and motionless, the need for external aid is now.

This is a complex problem which requires all the support international law can lend. This Comment will point out areas in which international law must be refined to assuage problems like the ones faced by the Catalans. Part I will begin by focusing on the local situation of Catalonia in Spain before expanding into international legal obligations under the law of the European Union (EU) in Part II. Finally, this Comment will address to what extent international law speaks to this issue and how its principles may remedy a situation at a standstill in Part III. Ultimately, this Comment attempts to posit three central claims. First, that the


Catalans as an ethnic group and political minority have legitimate, historical claims worthy of acknowledgement. Second, that the EU has a concrete but compromised interest in maintaining order in an increasingly fragile situation. Third, given the compromising predispositions of the EU, international law must confront the challenges presented. This involves reconceptualizing or further developing the principle of self-determination, which has been static since its formation, but must adapt to meet the increasingly common demands of groups like the Catalans.

I. MYTH AND HISTORY: MAKING SENSE OF THE MODERN LEGAL MAZE OF CATALONIAN SECESSION

Catalonia’s history is one that predates the concept of Spain by hundreds of years and as such, it is one of rich contradiction, foundational mythmaking, and profound emotional influence. This section will provide an outline of their colorful past to understand the legal puzzle that the region finds itself in today. This legal-historical sketch is included because it is part of the story, as important an element in modern Catalan life as any bit of the contemporary news, and key to understanding the region’s place in international legal discourse.7 Throughout the journey, it will become clear that there are several common motifs: that abuse, the challenge of dual nationality, the contention of multilingualism, and above all, secession attempts, are not new to Catalonia.

It is important to distinguish what these historical facts do not mean. They have no bearing on the legal status of Catalonia today. These stories are an essential part of Catalans’ cultural story and lend credence to their position as a distinct, minority political group.8 This section will highlight those episodes critical to the formation of the Catalan pàtria, elaborating only on the grievances and the triumphs central to the legal debate currently tearing the nation at its seams. The section ends with a snapshot of the legal situation of modern Spain, stressing the key issues of constitutional crisis and subsequent deadlock stemming from illegal referenda and lack of governmental relief. The problem

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8 See Minorities Under International Law, U.N. HUM. RTS. OFF. HIGH COMM’r, https://www.ohchr.org/en/issues/minorities/pages/internationallaw.aspx#:~:text=According%20to%20a%20definition%20offered,dominant%20position%2C%20whose%20members%20are%20not%20minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors [such as the existence of a shared ethnicity, language or religion] and subjective factors [including that individuals must identify themselves as members of a minority].
that will begin to emerge is the gulf that exists between groups like the Catalans and their ability to attain relief under the law.

A. Early History: Myth and Nation Building

The legend of the pátria of Catalonia begins in an Iberia on the threshold of antiquity, in a city what was then called Barcino, perhaps named by the Romans or after the infamous Carthaginian General. In its first millennium the occupants of the northeastern corner of the rugged, Iberian marchland came to be known as the Catalans, their name possibly deriving from the “Gothic” settlers who originally emigrated to the region. Although their etymology remains shrouded in mystery, it is no secret that their existence was torn between the many powerful kingdoms to the south and the Frankish militaristic state to the north from the beginning. Following a term of occupation under Charlemagne in the ninth century and a period of brief independence, the Catalans secured a marital union with the powerful kingdom of Aragon. This alliance, coupled with the leadership of Count-King Jaume I “the Conqueror,” began Catalonia’s mercantile domination of the Mediterranean with its powerful seafaring and commercial empire based out of what was by now called Barcelona.

In the late fifteenth century Ferdinand and Isabella united in marriage, forging their respective kingdoms of Castile and Aragon, declaring themselves King and Queen of las Españas (the Spains), and creating “a plural political entity, a composite monarchy similar to those found elsewhere in the Europe of their day.” Unfortunately, the Iberian situation would prove immensely more complicated to consolidate, as this “composite monarchy” comprised of the several autonomous territories under allegiance to a single ruler proved difficult to navigate. By the late sixteenth century, the Catalans had grown jealous of the immense growth of the Castilian Crown on account of its burgeoning international empire.

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10 James Anderson, Royal Genealogies, or, The Genealogical Tables of Emperors, Kings, and Princes from Adam to These Times 714 (1732).
11 Elliott, supra note 2, at 7–8.
12 Id. at 8.
13 Id. at 9.
14 Id. at 10.
15 Id.
16 Id. at 21.
B. The Middle Period and La Diada

This jealousy soon turned into fear as many Catalans worried that the growing central monarchy was at odds with the region’s interests, and the rulers were intent on suppressing and undermining the region’s cherished constitution, laws, and freedoms. It was during this period, and probably in response to this perceived threat, that the legendary, nationalistic mythmaking about Catalonia’s past began to appear. With stories of the legendary ninth century ruler Wilfred the Hairy’s final stand, blood dripping down his yellow shield, the emblematic symbol of Catalan bravery and resistance in the name of liberty was born in fantastical historical embellishments, which endure to this day in the region’s flag.

To make matters worse, the seventeenth century saw efforts by many state officials to institute a “Castilianization” of the peninsula, led primarily by Count Olivares who sought to strengthen the centrality of the growing state of Spain. It was during this tumultuous period that Catalonia revolted and participated in their first secessionist experiment that failed after only twelve short years of independence. This revolt left permanent bitterness between Madrid and Barcelona, the hubs of political hegemony in each region, which also have endured to the present day. As Barcelona’s commercial and urban networks began expanding as a result of its thriving textile industry, Barcelonans and other Catalans fought hard to maintain their fueros, the laws and privileges granted to their region which they so firmly feared the Castilian Crown wished to erode.

The death of Spanish King Carlos II, the last of the Habsburg line, threw Spain and much of Europe into chaos, triggering the War of Spanish Succession. After over a decade of fighting and a legendary final stand in Barcelona in a year-long siege, the city and the region fell into the hands of the Bourbons. September 11, 1714 became known as la Diada (the Disaster), and is still seen by Catalans as the triumph of foreign despotism over liberty.
day is one of Catalonia’s major holidays and is avidly celebrated every year in remembrance of the freedoms that were ostensibly stolen from the region.27

This defeat for Catalonia, even more painfully, became a victory for the nation of Spain, as the Nueva Planta28 incorporated all of the regions of Iberia into a more centralized polity under the moniker of nación española, or “Spain.”29 This took a heavy toll on the Catalan people, who were essentially treated as a militarily occupied territory, stripped of their political power, and banned from using their language.30 Many saw this as the end of the Catalan nation, the long-standing notions of liberty “enshrined in a reciprocal relationship between the ruler and the ruled” rendered arbitrarily void under a repressive and authoritarian central government.31 In spite, or maybe even because of this, Catalonia in the eighteenth century began to develop its “dynamic entrepreneurial class,” as well as a new and increased sense of isolation, familial cohesion, and industriousness, which helped establish its economy as the highest performing region in Spain.32 Following decades of prosperity and the chaotic appointment of Napoleon’s brother, Joseph Bonaparte, to the Spanish throne in the beginning of the nineteenth century, Catalonia established a Junta Superior that represented Catalan’s first semi-autonomous government in over one hundred years.33

In 1812, the Spanish Constitution was ratified by the national Cortes,34 uniting Spain into a modern nation and reinforcing the need for a “dual patriotism” of Spanish citizens to both their home region and the collective national community.35 The attitude of liberal reform and sovereignty permeated Spain. However, this era also highlighted the fundamental tension between the political duty of the artificial construction that was the Spanish State, and the organic and ancestral connection to local affairs ingrained in the hearts of

28 The Nueva Planta were a series of decrees designed to incorporate and centralize the many regions of Spain into an official royal administration. Tom Lewis & Francisco Sanchez, Culture and the State in Spain: 1550-1850, at 197–198 (1999).
29 Elliott, supra note 2, at 89.
30 Id.
31 Id. at 98.
32 Id. at 115.
33 Id. at 135.
34 The Cortes is the term long used to refer to the parliament or governing legislative body in Spain. William D. Phillips Jr. & Carla Raisin Phillips, A Concise History of Spain 72, 176 (2010).
35 Id. at 137.
Catalans. This political project is still unfolding to this day, as the question of how to constantly rebalance the fluctuating ties and obligations has gone yet unanswered.

In the time leading up to the twentieth century, Catalonia’s economic explosion became embodied in Barcelona—a city that came to embody the region and soon dwarfed Madrid as an epicenter of political, artistic, and cultural power. With this cultural flowering came the modern articulation of the Catalan nation. This Renaixença (Renaissance) was led by an upper class intelligentsia which, along with the help of artists like Antoni Gaudi and Lluís Domènech i Montaner, gave Barcelona a surreal architectural makeover, and a revived interest in Catalan art and culture. This prosperity also ignited powerful nationalistic spirit in the Catalans, like Pere Muntanola who said “the state is a political entity, artificial and voluntary; the patria is a historical, natural and necessary community.” Fully situated in the Romantic paradigm of the nineteenth century, the Catalans increasingly identified with this poetic national rhetoric and clung to it for more than a century on their road to legally instituting their deeply felt autonomy.

C. Twentieth Century: Terror and Rebuilding

As with Europe and much of the rest of the world, the twentieth century was a tumultuous time for Catalonia and Spain. The recent economic prosperity had aggravated class tensions throughout the country. In 1923, Spanish General Primo de Rivera dissolved the national Cortes and established a military dictatorship, a stark representation of the country’s complete disaffection with its ineffective central government. The question of Spanish nationalism was once again at the fore. Could the government rally and unify the peninsula into an iteration that would finally successfully integrate all of its regions under a respected and effective national government? Early work under the dictatorship was successful, at least for Catalonia, as they received back their Generalitat, a legislative body representing the self-rule of the community of

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36 Id. at 138.
37 Id. at 151.
38 Id. at 153.
39 Id. at 193.
40 Id. at 194.
41 PRAT DE LA RIBA, LA NACIONALITAT CATALANA 83 (1906).
42 ELLIOTT, supra note 2, at 193.
43 Id. at 196.
44 Id. at 203.
45 Id. at 209.
Catalonia which had been dissolved after la Diada.\textsuperscript{46} Thus, Catalonia officially became an autonomous region within the Spanish State. However, the militant conservative backlash against this “cultural Catalanization” was swift and terrible.\textsuperscript{47} General Francisco Franco, in a chauvinistic and vehement tirade, swept through the country and, holding a particular vitriol for Catalonia, violently shut down the region when brought under his control.\textsuperscript{48} The Franco dictatorship was especially harsh for the Catalans and Basques.\textsuperscript{49} When brought under the command of his Nationalist party, he brutally repatriated the region, repressing use of the Catalan language and violently attempting to “extinguish the Catalan identity,” which he believed to be a contravention of the nationalism of absolute power represented in the great past monarchs.\textsuperscript{50}

With grit and perseverance weathered over centuries of challenges, the Catalans survived Franco’s regime, which attempted at nearly every turn to smother Catalan identity.\textsuperscript{51} Following the dictator’s death and the restoration of the monarchy under Don Juan Carlos in 1975, an attempt to bring about a democratically unified Spain was once again within the sights of Spanish lawmakers and was codified in the 1978 Constitution.\textsuperscript{52} The importance of the legal language of this document is still being fought over today. Article 2, in a very carefully crafted ambiguity, establishes the “indissoluble unity of the Spanish Nation, the common and indivisible \textit{pátria} of all Spaniards.”\textsuperscript{53} As previously mentioned, this word \textit{pátria} is very important for the regions of Spain, Catalonia in particular. However, nowhere in the Constitution do the drafters allow any of the regions the legal status of \textit{pátria}.\textsuperscript{54} They are instead \textit{nacionalidades}, or nationalities, “a more neutral term than ‘nation,’ which was carefully avoided except when applied to Spain itself.”\textsuperscript{55} Despite the legalistic language games, Catalonia was once again granted a statute of autonomy in 1979. This statute recognized Catalan as an official language equal to Castilian Spanish and granted significant governing powers to the \textit{Generalitat}, particularly in areas of education and culture.\textsuperscript{56} It seemed then to be a victory for the region. Despite its financial and judicial powers having to comply with the

\textsuperscript{46} Id. at 212.
\textsuperscript{47} Id. at 215–17.
\textsuperscript{48} Id. at 217.
\textsuperscript{49} Id. at 219.
\textsuperscript{50} Id. at 218.
\textsuperscript{51} Id. at 221.
\textsuperscript{52} Id. at 226.
\textsuperscript{53} C.E., B.O.E. n. 2, Dec. 29, 1978 (Spain).
\textsuperscript{54} E LLIOTT, \textit{supra} note 2, at 228.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 229.
national Constitution, the new government based out of the Generalitat and headed by regional President Jordi Pujol was an officially recognized and integral part of a “democratic, decentralized, and modernizing Spain.”

D. Tumultuous Modern Legal and Political Atmosphere

The last chapter in Catalan history has been a steady journey from hopefulness to disarray. Under the leadership of the Pujol government and his Convergencia i Unio (CiU) party, Catalonia pushed for additional regional competences. Playing the game of Madrid politics strikingly well, the CiU-dominated Generalitat was able to increase its original number of competences (eighty-nine under the statute of autonomy, a number that already topped those awarded to the Basque region, and by far the most in Spain) to a whopping 274 in just a few decades. As one historian put it, the “aim of Pujol and his CiU party was to endow Catalonia with as many of the trappings of a sovereign state as they could.” The zealousness of this political mission seeped into pop-culture as well. Writings like Victus and the non-fictional historical work of Victor Ferro pushed arguments that Catalonia was once a great, complete state, maligned by outside forces and destroyed by the Bourbons, and due reparations for this historical malfeasance.

After a long tenure that bureaucratized and complicated regional politics in Spain, Pujol, mired in corruption scandals and increasing unpopularity, stepped down and was replaced by Pasqual Maragall. In a 2005 effort to forward the Catalan nationalist agenda, Maragall made a push to expand and reinforce Catalan autonomy by revising the 1979 statute of autonomy. The new statute significantly and audaciously included language declaring Catalonia a “patria,” a word already shown to be sensitive in Spanish legal culture. In its 2010 ruling, the Spanish Supreme Constitutional Tribunal made several modifications to this statutory revision. It declared the sections referencing Catalonia as a “nation” illegal and held the provisions that made Catalan the preferred language

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57 Id.
58 Id. at 233 (i.e., regional powers).
59 Id.
60 Id at 234.
61 Id.
62 Id. at 237.
64 S.T.C., June 28, 2010 (J.T.S., No. 31/2010) (Spain).
of the region void.65 In response, the “We are a nation. We Decide” movement took to the streets of Barcelona, calling for a referendum.66

Unfortunately for the Catalans, the referendum procedure is firmly within the legal competence of the central government. The Constitution very clearly requires that a declaration of independence would need to gain approval by a majority of the Cortes and would require a general election to decide the matter.67 However, this did little to quell the rising political activity in Barcelona and throughout Catalonia. As during a 2012 summer of massive demonstrations, 1.5 million people took to the streets in the region’s capital under the banner of “Catalonia: a New State of Europe.”68 Artur Mas, the new president of the Generalitat, was now at a pivotal point of no return; faced with the difficult political choice of distancing himself and his party from the CiU, he chose instead to endorse wholeheartedly “Catalonia’s right to decide,” which was a powerful and risky diplomatic move.69

Many historians posit this moment as the fruition of a thirty year process of “Catalanization” begun by the Pujol regime, during which an entire generation of more fervent nationalists were educated, even indoctrinated, in Catalan history and legend.70 In education programs sponsored and run by the Generalitat, children were taught a form of Catalan history that was separate and routinely victimized under the Castilian State—even a geography that deemphasized the rest of the Iberian peninsula in favor of the Western Mediterranean.71 The language of separatism and oppression that had been taught for several decades was now spilling out into the streets in a form of political expression unmatched in the history of modern Catalonia. However, in spite of these strong feelings, Catalonia, as always, was not uniform in its convictions. Despite sloganeering like Espanya ens roba (Spain is robbing us) and the mass demonstrations, resistance parties opposed to independence like

66 Chris Bambery, We Are a Nation. We Decide: Catalonia Calling, COUNTERFIRE (Feb. 16, 2017), https://www.counterfire.org/articles/opinion/18781-we-are-a-nation-we-decide-catalonia-calling.
69 ELLIOTT, supra note 2, at 242.
70 Id.
71 Id.
the Partido Popular, the Catalan Socialist Party, and the Ciutadans performed strongly in elections that put pressure on the Mas government.\textsuperscript{72} This polarization grew and, when the Generalitat declared an illegal referendum in open defiance of the Constitution, only forty percent of Catalans turned out to vote.\textsuperscript{73} This lent credence to the beliefs that outright independence was a dream of the upper class, “while the working class, many of them with a Castilian-speaking background, were either hostile to the idea, or were satisfied with the degree of autonomy Catalonia already enjoyed.”\textsuperscript{74} In the backlash of this fiercely contested and largely decried referendum,\textsuperscript{75} Mas stepped down as president, turning the office over to former journalist, political activist, and mayor of Girona, Carles Puigdemont, in 2016.\textsuperscript{76}

Things again began to heat up between Barcelona and Madrid as charges were brought against several politicians, including former President Mas, for their involvement with the illegal referendums.\textsuperscript{77} Interrupting this political drama, however, were the horrific terrorist attacks that killed fourteen people along Barcelona’s famous main passage, \textit{Las Ramblas}.\textsuperscript{78} Despite the national outpouring of sympathy for Catalonia and a chance for harmony following the attacks, when Spanish President Mariano Rajoy and King Don Juan Carlos visited Barcelona in a show of solidarity and support, thousands marched and booed their presence, blaming them for the attacks and holding them responsible for permitting the sales of arms in Gulf states.\textsuperscript{79}

Only one month following these events, the Catalan parliament passed a law approving another referendum in open contravention of the Constitution, which was subsequently declared illegal by the Constitutional Tribunal the following

\begin{footnotesize}
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\item \textsuperscript{72} Id. at 243.
\item \textsuperscript{74} ELLIOTT, supra note 2, at 248.
\item \textsuperscript{76} Miquel Noguer, Carles Puigdemont Voted In as New Catalan Premier, PAÍS (Jan. 11, 2016), https://english.elpais.com/elpais/2016/01/11/enenglish/1452498704_085748.html.
\item \textsuperscript{77} ELLIOTT, supra note 2, at 250.
\item \textsuperscript{79} ELLIOTT, supra note 2, at 251.
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day. President Rajoy, who was keen on keeping his distance and allowing time for things to simmer down, was under mounting pressure for his perceived passivity in the face of this crisis. Catalonia began to economically suffer as numerous banks and companies began relocating from Barcelona to Madrid (3000 in all), taking with them a great chunk of the Catalan economy and offering little hope that the future held a solution.

At this point, the longtime failure of the Spanish State to build a strong and inclusive national narrative and handle Catalan cries for independence had born a constitutional crisis. Despite the regional division, there was a mass of insatiable cries for more autonomy and democratic representation through referendum, despite the legal consequences.

Thus, on October 1, 2017, another referendum was held and quickly erupted into chaos. Despite Spanish orders to prevent the vote from taking place, the Mossos D’Esquadra (Catalan police force) was largely unwilling to enforce these orders. This led the national police to descend onto polling stations and quickly resort to force and heavy-handed violence to prevent Catalans from casting their votes. Quite predictably, with few dissenters to participate in an illegal referendum, ninety-two percent of voters responded that they would like Catalan to form an independent state. However, the damage was done as the result of the vote, combined with an onslaught of one-sided images of national police striking innocent voters with batons and firing rubber bullets, quickly turned the international mood towards the Catalans.

Puigdemont’s wavering leadership only added to the confusion, and the Spanish parliament demanded he announce whether the declaration of independence was legitimate. If so, the Spanish parliament would trigger Article

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81 ELLIOTT, supra note 2, at 252.
82 Id.
83 Id. at 253.
86 El Govern Anuncia, supra note 85; El Govern Trasllada, supra note 85.
87 ELLIOTT, supra note 2, at 255.
155 of the Constitution, suspending the Catalan regional government for being in breach of the law.\textsuperscript{88} Trapped between mounting pressures from abroad and his internal supporters,\textsuperscript{89} Puigdemont scrambled for any sort of play, delaying and ultimately backing down from signing the decree.\textsuperscript{90} However, the following day, the Catalonian parliament unilaterally declared an independent Catalonia in a secret ballot.\textsuperscript{91}

Predictably, Rajoy’s government invoked Article 155 and imposed direct rule over the region, releasing arrest warrants on a whole host of politicians including Puigdemont on charges of sedition, rebellion, and embezzlement of public funds.\textsuperscript{92} In response, Puigdemont and several of his colleagues fled to Brussels seeking asylum.\textsuperscript{93} In a string of surprising acts, Rajoy’s government and the judiciary released six of the arrested ministers on bail who said they would recant the declaration of independence as merely symbolic. The Spanish government also withdrew the arrest warrant on Puigdemont, allowing him to live without fear of extradition in Belgium, and called for new elections.\textsuperscript{94} This lenience was a risky move, and turned out to be very costly. By again underestimating the power and popularity of Catalan secessionism, the Spanish government was faced with a new election.\textsuperscript{95} A seventy-nine percent turnout rate yielded a forty-seven percent vote in favor of secessionism (concentrated in the more rural areas of Catalonia) and gave secessionists a seventy-seat parliamentary majority.\textsuperscript{96}

The many months of buildup to the present have been filled with more unrest and political uncertainty. At the end of 2019, the national government’s already weak tolerance worn thin. The Supreme Court issued sentences of the Catalan ministers on trial, finding all twelve guilty and sending nine to prison.\textsuperscript{97} The

\textsuperscript{88} Id. at 256; C.E., B.O.E. n. 155, Dec. 29, 1978 (Spain).
\textsuperscript{89} His supporters consisted of radical separatists and anti-capitalists who quickly branded him a traitor for his hesitations. ELLIOTT, supra note 2, at 255.
\textsuperscript{92} ELLIOTT, supra note 2, at 258.
\textsuperscript{93} Sam Jones, Catalan Leaders Facing Rebellion Charges Flee to Belgium, GUARDIAN (Oct. 31, 2017), https://www.theguardian.com/world/2017/oct/30/spanish-prosecutor-calls-for-rebellion-charges-against-catalan-leaders.
\textsuperscript{94} ELLIOTT, supra note 2, at 259.
\textsuperscript{95} Id. at 261.
\textsuperscript{96} Id.
response to this was a mix of peaceful and violent protest calling for the freedom of the jailed ministers, the worst of the violence resulting in the closing of the Barcelona airport and the city’s cherished Sagrada Familia cathedral.98 In late September of 2020, the Supreme Court issued another controversial ruling banning Puigdemont’s successor Quim Torra from holding office for his allowance of pro-independence symbols to remain on public buildings despite orders to remove them.99 This leaves the present situation in as much political turmoil and uncertainty as any moment in Catalonia’s millennia-spanning history. Further, this situation is far from vanishing. As of the local elections of February 15, 2021, the separatists increased their overall majority.100 However, this is not an unfamiliar situation for the Catalans. Internal solutions have never proven successful, and the region is long overdue for pursuing, or at least considering other legal mechanisms to remedy the Catalans’ enduring struggle.

II. WHERE IS THE EU?

If centralized oppression was the source of Catalonia’s domestic woes, then the source of their struggle and frustration with the European Union is one borne of bureaucratic indifference. Following such a rapid, internal decay, most European Union Member States would turn toward Brussels for a guiding hand in achieving peace and stability. After all, these are core values guiding the existence of the EU.101 The Catalans, however, have heard nothing but silence or condemnation from the Union. Frequently keeping the issue beyond arm’s reach with the justification that it is an “internal matter,”102 it is worth examining why the EU seems intent on pursuing this strategy of non-intervention.

The following section argues that there is a clash between the aspirational value of the laws in place and their actual, realistic outcomes. First, there is the legal architecture of EU Treaties themselves. These, while seemingly providing hope for some level of political self-determination, offer nothing but an illusory

promise. Although the law begs to be read as a safe harbor for politically frustrated groups, the substance of its promises is largely rhetorical. This leads to the second key point, namely that the vision of a self-determined political destiny for sub-state groups has largely had to be discounted in favor of more practical considerations.

Perhaps the reason for this is in part tied to the increasingly popular use of referenda as a political tool in Europe. Some posit that the EU is losing the battle against this widespread crusade that “give[s] an impression of democracy,” but which may be nothing more than a “way for populist movements to force democratically elected governments’ hands.” Faced with the daunting challenge to “defend common standards on the core obligations that allow members to trust each other,” the EU’s rational interest lies in choosing stability over quixotic independence campaigns. Thus, as will be demonstrated below, the Catalans are faced with another structural barrier to representation.

A. The Law on Its Face

Problems that arise within Member States of the EU are governed by the “Treaties” (The Treaty of the European Union and the Treaty on the Functioning of the European Union), the interpretations of which extend to include their general purpose and spirit if there is no explicit solution within the text of the documents themselves. For EU Member States, it is only after exhausting these legal remedies that public international law and its doctrines concerning secession may be contemplated.

First, the Treaty on the Functioning of the European Union (TFEU) establishes that “every person holding the nationality of a Member State shall be a citizen of the Union [and] . . . shall enjoy the rights and be subject to the duties

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106 The EU as a Community of Law: Overview of the Role of Law in the Union, at 6, EUR. PARLIAMENTARY RSCH. SERV. (Mar. 2017) (“When interpreting EU law, the CJEU pays particular attention to the aim and purpose of EU law [teleological interpretation], rather than focusing exclusively on the wording of the provisions [linguistic interpretation].”).

provided for in the Treaties.” 108 The Treaty of the European Union (TEU) contemplates among its general goals the concepts of democracy, “rights of persons belonging to minorities[;]” 109 a general “respect [for] the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional[;]” the “principle of sincere cooperation[;]” and a requirement that the “Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardize the attainment of the Union’s objectives.” 110 Both of these documents read on their face to favor the Catalans: through Catalans’ vested right to EU citizenship status and the enumerated commitment to the principles of freedom and democracy, they appear entitled to an institutional remedy.

A twin aspect key to the functioning of the EU, however, is Member State sovereignty. In another portion of the TEU, it is made explicitly clear that Member States, “their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government” are to be respected. 111 In particular, the section continues to make explicitly clear that the EU shall respect “essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security,” and that “national security remains the sole responsibility of each Member State.” 112 The Catalan crisis easily falls within the purview of these sections, relegating the issue to the domestic sphere and entitling the EU to sufficient technical reason for abstinence. Not only does this remove the crisis from the ambit of the EU, it has deeper implications for the Catalans. Their rights to recognition under EU law are attached to their membership of the Spanish State, disentitling the Catalans to any independent recognition apart from the Member State within which they reside.

Furthermore, in the background of all of these rights and procedural mechanisms are the influential legal theories of former President of the European Commission Jose Manuel Barroso, who pronounced in his famous theory (now regarded as the Barroso Theory) as follows:

[T]he EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. If part of the territory of a

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109 Id.
110 Id.
111 Id.
112 Id.
Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory.113

Lurking underneath this theory is a policy position advanced by many, most prominently Professor Joseph Weiler, that:

Europe should not seem like a Nirvana for that form of irredentist Euro-tribalism which contradicts the deep values and needs of the Union. The assumption of automatic membership in the Union should be decisively squelched by the countries from whom secession is threatened and if their leaders, for internal political reasons, lack the courage so to say, by other Member States of the Union.114

Addressing the Catalan situation in particular, Weiler called it “ethically demoralizing” and merely an attempt to put to political use the injustices of the Franco era which are “but a fig leaf for seriously misguided social and economic egoism, cultural and national hubris and the naked ambition of local politicians.”115

It is unclear the extent to which these political-philosophical undercurrents still exist within the current administration in Brussels. However, in response to the referendum, the European Commission did all but declare the act illegal, designating it as an internal matter for the Spanish to resolve amongst themselves.116 This was in addition to a more colorful statement made by the European Parliament Vice President Ramon Luis Valcarcel, who condemned the referendum as:

[A] nationalistic propaganda act, undemocratic; a coup attempt against Spanish democracy, and so a coup against Europe. . . . We are witnessing the first coup against democracy in the history of the European Union. A regional government is angling, in a unilateral, illegal and democratically deplorable manner, to secede from a member state. And in so doing, it is violating the fundamental rights of millions of citizens. . . . Spain is an integral part of the EU, which respects and safeguards the national identities and constitutional

113 Answer Given by Mr. Barroso on Behalf of the Commission, 2014 O.J. (C 208) 1, 217.
115 Id. at 910.
structure of its member states. ‘An attack on the constitution of one member state is therefore also an attack on the Union as a whole.’

Putting aside that this was uttered by an anti-secessionist People’s Party member from Spain, the statement still serves as evidence that the EU frowns upon and wants nothing to do with the cries coming from Catalonia.

Bearing this in mind it seems as though, under EU law, were Catalonia to secede from Spain, it would find itself automatically untethered from its rights as an EU member. Under EU law, it would exist in “some form of legal limbo,” with no legal obligations owed from the EU. Catalans would be utterly alone, in a legalistic oblivion unentitled to relief from any Member State or EU body, in hope only for some Good Samaritan to save them from this costly unmooring. This, as many have pointed out, severely weakens the possibility of arbitrating a solution as the EU retains a weak hand at the bargaining table. Were the EU to try and mediate a solution, it would be unable to offer anything other than automatic expulsion and the normal process of application for EU membership.

One is left wondering about the costs of this governmental apathy. Surely the Treaty writers and the general spirit of the EU could not have intended for the complex web of legal relationships, liabilities, and obligations spun by Treaty law to come unraveling in an instant with no recourse or option for resolution. Surely also, as the general model of the Barroso Theory holds, the EU wishes to avoid an ever-present threat of Balkanization—scenarios in which the vast number of sub-national minorities across Europe follow the efforts of Catalonia, Scotland, and Flanders and lead to an undoing of the project based on interconnectedness and interdependence. The trouble is balancing a firm commitment to international stability with no recursive remedy for all of these groups. It runs the risk of alienation and disillusionment, begging important questions for the future of European cooperation.

118 Id.
119 Edward, supra note 107, at 1165.
120 Id. at 1162.
121 Id.
123 Id.
124 Edward, supra note 107, at 1165.
B. When Law Collides with Aspiration

Despite the initial gloomy outlook, many Catalans for a long time considered the EU to be an ally for their cause, as evidenced by their participation rate in elections to the European Parliament (the only directly elected European body) being thirteen points higher than the European average.\(^\text{125}\) Attitudes began shifting however in response to the EU’s lack of action amidst the Puigdemont exile, with demonstrations to the tune of nearly 50,000 Catalan and Flemish separatists marching through Brussels, decrying the refusal of the EU to uphold their respective rights to self-determination and democracy.\(^\text{126}\) One possibility for redress comes in the form of Article 7 of the TEU which allows the EU to sanction a Member State in the form of revoking voting rights in cases of “clear risk of a serious breach” to the “values referred to in Article 2.”\(^\text{127}\) However, hopes for the triggering of this mechanism are low considering one needs support of eighty percent of Member States and the consent of the European Parliament to even determine whether Spain may be at risk of breaching EU values.\(^\text{128}\)

It is quite clear that Catalonia wants to remain in the EU. There has never been a poll to date that shows otherwise,\(^\text{129}\) and even Puigdemont has spoken of wanting to avoid a “‘traumatic’ split” with Spain, seemingly driven by a desire to avoid the harmful EU ramifications.\(^\text{130}\) Besides the problems laid out under the Treaties and the Barroso theory, it has become increasingly clear that the EU outlook on separatism and self-determination is not as optimistic as it seems.

The EU, at its core, is designed to be a supranational project, aimed at developing into something of a post-national model.\(^\text{131}\) This post-nationalistic political experiment is “a co-determination process based on pooled sovereignties.”\(^\text{132}\) This means that EU Member States have renounced to a

\(^{125}\) Alfred Bosch, Catalonia Says Yes to Europe: So Why Are Our Meps Being Turned Away?, GUARDIAN (June 5, 2019), https://www.theguardian.com/commentisfree/2019/jun/05/catalonia-europe-meps-european-parliament.


\(^{127}\) TEU, supra note 101, arts. 7(1), (3).

\(^{128}\) Martin, supra note 122.


\(^{131}\) Nicholas Levrat, The Right to National Self-Determination Within the EU: A Legal Investigation 18 (Euborders Working Papers, Paper No. 8, 2017).

\(^{132}\) Id.
degree their sovereignty to join this collective, with the long-term objective focused on achieving an “ever closer union among the peoples of Europe.” 133 All European peoples, or those who have won “the historical opportunity to constitute themselves as a national-state” co-determine their common future as a new original polity. 134 This is the key source of frustration for Catalonia. It is a region which touts itself as a historically separate nation, but it is never fully able to achieve recognition by the Spanish national government and now seems forever doomed under the present system of EU law. If this is correct, then “[l]ooking to EU law for a right to self-determination in the classical sense for peoples who do not yet have their own national state is historical nonsense.” 135

To put this another way, what the Catalans are calling for is “the possibility of fully participating in this co-determination of our common European future.” 136 In this respect, achieving independence is indeed a nonsensical and inessential step towards inter-European cooperation. 137 However, it is not clear that this is what Catalonia wants from the EU. It may very well be that the Catalan feeling of companionship with the EU is one based on political opportunism and an intent to seize upon guarantees of self-determination and democracy in light of hundreds of years of stalemate within Spain. This paradoxical uncertainty and legal indecision actually represent a fundamental doubt about where the EU currently is and where it intends to go in the future. The erosion of national boundaries and de-emphasis of individual nation-state interests have certainly worked to an extent. However, it is not clear that these have lived up to the aspirations of the original Treaties given the popularity of these referenda by minority groups in Catalonia, Flanders, and Scotland, not to mention the unilateral self-interest audaciously apparent in an action like Brexit. These are all indicia of stasis, of the EU failing to grapple with problems that hint at fragilities of its very foundations. It is no wonder why the administration in Belgium sits quietly, anxiously attempting to maintain the status quo.

C. Has the EU Well Run Dry?

What, then, does the EU provide for Catalonia? One scholar contends that the best it can offer is that all parties, including the Member State in the process of separation, meaning Spain, “negotiate in good faith in accordance with

133 Id.
134 Id.
135 Id.
136 Id.
137 Id.
principles of sincere cooperation, full mutual respect and solidarity.” A fairly objective read on the situation would not allow this option either. Although Spain was relatively passive at first in response to illegal and wild actions by Catalonia, Spanish lawmakers consistently either dismissed as unimportant or non-serious the possibility that this situation had any concrete reality to it. Spain refused to negotiate until drastic measures had already been taken and invited criticism from all—with one side accusing the government of appeasing the lawless rebels and another side accusing the government of not taking this seriously earlier to avoid the violence and the chaos.

Again, it seems that precedent falls against the Catalans. Whereas the national situation has proven to churn out seemingly endless scenarios of deadlock, the very unprecedented nature of this situation for the EU leads to a similar outcome of silence and inaction. The EU does not want to broker a deal as it is hemmed in by both the language of the Treaties and more practical fears that it has very little to offer Catalonia. A break from Spain in this context means a break from the EU; which means the reestablishment of barriers and likely an increase in hostility, no free movement for Catalan citizens or goods and services, fragility in relation to the Euro, and no more financial support. Perhaps in the face of this deadlock, and without any hope on the horizon for a potential internal or EU-led solution, the parties will seek a solution grounded in international law.

The road for the Catalans seems to point only to international law. Without recourse, they have trudged along chasing a phantom of democracy, only to find a system that lacks the capacity to entertain a seemingly eternal political dispute. At best, it seems like the EU offers an open gesture to take Catalonian qualms elsewhere. The European Court of Justice (ECJ) has held self-determination to be “a principle of international law applicable to all non-self-governing territories and to all peoples who have not yet achieved independence.” The ECJ even went as far in 2016 to write that this generally applicable principle of international law is guaranteed to “all non-self-governing territories and to all peoples who have not yet achieved independence.” These decisions seemingly acquiesce to self-determination referenda held within the EU, like the ones in Saarland, Greenland, and Scotland. However, these referenda were all held under the domestic law from the states where they emerged. It is highly

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138 Edward, supra note 107, at 1167.
139 Sen, supra note 129.
140 Case C-104/16, Council of Euro. Union v. Front Polisario, ECLI:EU:C:2016:973, ¶ 88 (Dec. 21, 2016).
141 Id.
142 Levrat, supra note 131, at 16.
doubtful (given the response to the Catalan attempts) that such a tolerance would be extended to an attempt at self-determination lacking consent of the mother state.143

In summation, the law as it stands holds that “European States that decide to join the EU renounce their right to self-determination.”144 Each European nation, lacking the formal competences of Statehood, must “through the perilous collective exercise of individual human rights” assert its claim to self-determination, even before the recognition of the legitimacy of its national claim has been realized.145 Some have wondered if a treaty revision may be wiser than this system, envisioning a “specific procedure, within EU law, to deal with the legitimate claim of European peoples within the EU that do not yet have their own European State.”146 The present just leaves Catalonia in a confusing situation, born of legal paradox inherent to the structure of the EU project.

III. INTERNATIONAL LAW

Exhausted of national and continental fora, the Catalans must be able to seek redress of their grievances under international law. The biggest challenge at this level of law is, finally, not whether the system has the capability to objectively resolve a dispute. Instead, the issue rests on whether international law can produce effective remedies for novel problems. The problem lies in whether the tools offered have enough sophistication, delicacy, and precision to resolve complex international disputes. This section will contribute to an evolving understanding of what is possible for the tools of international dispute resolution.

The following section will argue that the Catalan situation does not satisfy the threshold to entitle its people to secession or external self-determination under international law. This should not mean that they are not entitled to any remedy, or that international law does not provide one. Building off of arguments from several international legal scholars, this section will argue that the modern state of the world requires a reformed vision of the device of internal self-determination and that this fresh perspective can solve many burgeoning political and legal problems effectively.

143 Id.
144 Id.
145 Id. at 15; TEU, supra note 101, art. 49.
146 Levrat, supra note 131, at 14.
A. Self-Determination and Secession in International Law

A 19th-century concept wrought from the budding nationalism of the era, self-determination has become a modern *jus cogens* norm of international law, tying strictly to the bedrock principle of sovereignty. Its first heavily popularized iteration came from Woodrow Wilson amidst his campaign for his Fourteen Points in 1918. Closely linking it to the grounding principle of state sovereignty, President Wilson stated that the concept of self-determination is “not a mere phrase. It is an imperative principle of actions which statesmen will henceforth ignore at their peril.” Only gaining popularity throughout two world wars, it was later codified as an international right and one of the primary functions of the United Nations (UN). In Chapter I of the UN Charter, the second purpose of the UN is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.” As written, the UN Charter attempts to restrict the potential volatility of the right to self-determination by doubly reaffirming that the goal of such a concept is for peacemaking and international community building.

The right is expanded under Article I of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) as follows: “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The potential explosivity linked to this concept is clearly visible in the last few decades, as numerous independence movements across the world have relied upon this language to bolster their claims for separatism. Unfortunately, these movements are often entangled with local culture and politics, meaning that this treaty language is often an unrefined, blunt instrument that offers more questions than answers. Although a highly contentious and expansive topic, this section will focus on three issues that most directly apply to the Catalan situation: 1) the

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147 See Ardit Memeti & Bekim Nuhija, *The Concept of Erga Omnes Obligations in International Law*, 14 NEW BALKAN POL. 31 (2013) (explaining that *jus cogens* are fundamental norms that apply *erga omnes* “in relation to everyone”).


149 President Woodrow Wilson, Address to Congress Analyzing German and Austrian Peace Utterances (Feb. 11, 1912) (transcript available at www.gwpda.org/1918/wilpeace.html).

150 U.N. Charter art. 1, ¶ 2.

definition of “peoples”; 2) external self-determination and the closely related concept of secession; and 3) internal self-determination.

1. Peoples

International law has struggled to define the breadth of the term “peoples” in the language mentioned above. For the first half of the 20th century, a “people” was squarely limited to denoting the population compromising a state or colonial entity. However, following the end of the Soviet Union and the breakup of Yugoslavia, this definition was expanded to encapsulate a wider category of individuals, including those comprising a federal unit or region of a larger state. The difficulty lies in balancing between being overly general and discriminatorily narrow. For example, as a jus cogens norm applied erga omnes, “peoples” could not be used to refer to any special category without quickly veering into discriminatory character based on race, ethnicity, culture, religious or other grounds. This must be navigated, however, since the meaning of this term “determines who are the holders of the rights of self-determination and has a primary effect on the establishment of the harmony between the principle of self-determination and the principle of territorial integrity.”\(^{155}\)

In an effort to refine this nebulousness, a report organized by the UNESCO Division of Human Rights, Democracy and Peace defined “all peoples” to include “peoples under colonial or alien subjugation or domination, those under occupation, indigenous peoples and other communities who satisfy the criteria generally accepted for determining the existence of a people.” In addition, in an UNESCO International Meeting of the Experts for the Elucidation of the Concepts of Rights of Peoples, a “people” was defined as “a group of individual human beings who enjoy some or all of the following common features: a) a common historical tradition; b) racial or ethnic identity; c) cultural homogeneity; d) linguistic unity; e) religious or ideological affinity; f) territorial connection; g) common economic life.”\(^{156}\) Although meant to be inclusive, the scope of this definition is still inconclusive on the status of national minorities, as the “greatest fear of the states while adopting the Covenants was that the provision

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\(^{153}\) Id.


\(^{155}\) Id.


\(^{157}\) Id.
might be interpreted as conferring the right to self-determination on national
minorities.” Various groups and the difficult distinction between peoples and
minorities make hard and fast rules nearly impossible to draw. For example, do
the Palestinians, Tibetans, Basque, Kashmiris, and Catalans all fall under the
same political status? The answer to this question is enduringly unclear.

In most international law practice, human groups are divided into three
categories: peoples, minorities, and indigenous populations, with the right of
self-determination, as we have already mentioned, only belonging to the first of
those. However, in general practice, many scholars agree that the term
“‘peoples’ acknowledges the existence of only one people where there exists a
State.” A recognized exception is one in which a “State defines itself as
constituted by a plurality of peoples having the right to self-determination and
hence to separate.” So, while there does not exist any comprehensive
definition either by treaty or by custom in international law of the term
“peoples,” practice has tended to illustrate that the subjective factors listed above
are most determinative. This, however, is bound by the important and
restrictive commitment to the maintenance of territorial integrity, a balance
which the law continues to try to adapt around.

The boundaries of the modern right of self-determination under international
law have been in flux since their foundation. Although originally imagined as a
device to remedy and rebuild from colonization, the right as written applies to
“all peoples,” which has been something of a sticking point in modern
commentary on the issue. As has been pointed out many times, an expansive
interpretation of this term is not judicially operable and would potentially lead
to a worldwide Balkanization that is unsustainable and contrary to the goals of
modern internationalism. Thus, under international law, the Catalan question
is twofold. First, where does international law draw the line that constitutes

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158 Gudeleviciute, supra note 154, at 53.
160 Id.
161 Marcelo G. Kohen, Introduction, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 9 (Marcelo G.
162 Id.
163 Milena Sterio, Self-Determination and Secession Under International Law: The Cases of Kurdistan
and-secession-under-international-law-cases-kurdistan.
164 Michael P. Scharf, Earned Sovereignty: Judicial Underpinnings, 31 DENV. J. INT’L L. & POL’Y 373,
166 Christian Tomuschat, supra note 148, at 24.
whether an ethnic group is a “people” under the meaning of the law? Second, do the Catalans fall within this boundary? Once these answers are established, Catalonia must brace for the complementing reality of their legal status.

The starting point in this analysis is to classify whether the Catalans fit the criteria of a “people.” The importance of the pátria to the region cannot be understated. As early as the 17th century, an idealistic conception of a “national constitutionalism” had emerged at nearly every level of society. Even centuries ago, and perhaps even before then, nearly all of the modern criteria for “people” status had emerged in Catalonia. Historian J.H. Elliott claims that not only was there a natural and organic level of kinship, unity, and allegiance that tied this region together, but “there was also a sense of the corporation or community as a legal and historical entity, which had acquired certain distinctive characteristics with the passage of time, together with certain specific obligations, rights, and privileges.”

While the discourse on such matters is in flux at the moment, the Catalans are included in Minority Groups International in conjunction with the UN Refugee Agency’s reference guide as one of the minorities and indigenous peoples of Spain. Despite this inclusion and the fact that the Catalans possibly fall within the definition of a “people,” most agree that the legal status of the Catalans does not entitle them to a right of self-determination in the same way a post-colonial group would be entitled. Perhaps, were this measure to resemble a continuum rather than a mere all-or-nothing determination, the Catalans would fall near the middle, not quite reaching the zone of oppression or colonial status to entitle it to the highest level of “people” status, but also not without any claim to relief. As of now, international law affords them no right to positive relief.

2. External Self-Determination and Secession

Self-determination breaks down into two major sub-categories: internal and external. External self-determination is more focused on international status, reflecting that general right of a people to “constitute itself a nation-state or to integrate into, or federate with, an existing state” thereby earning recognition by

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168 Id.
171 Id.
other nations. The right of external self-determination has typically been reserved for groups separating from a predecessor state following colonization or intense oppression. The possibility for external self-determination outside of the context of colonization remains unclear. The focus of internal self-determination follows the existence of statehood and entitles a people to freedom from governmental pressure preventing a people from selecting its own political, economic, and social system. Simply put, the “main difference between [internal and external self-determination] is that internal self-determination as participatory democracy is implemented inside the boundaries of the existing state; therefore it does not affect the territorial integrity of the state.”

External self-determination is the stronger and more controversial option for bolstering political rights considering it typically involves the rupture of territorial integrity, upsets the primary goal of international stability, and normally entails the formation of a new independent state. The strength of this action is difficult to square with other customary international norms, such as territorial integrity and uti possidetis. This difficulty is only furthered by the lack of mention in any major treaties and lack of general understanding of how to decide what is applicable or how it applies. However, one thing is clear: external self-determination entails separation from the mother state and subsequently begins the process of secession.

Decidedly lacking support in nearly any treaty, the right to secession under international law is found in two principal documents from the General Assembly: The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (“Friendly Relations Declaration”) and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (“Fiftieth Anniversary Declaration”). Principle five of the Friendly Relations Declaration holds that:

172 Salvatore Senese, External and Internal Self-Determination, 16 SOC. JUST. 1, 19 (1989).
173 Sterio, supra note 163.
174 Id.
175 Id.
176 Gudeleviciute, supra note 154, at 49.
177 Id.
178 Sterio, supra note 159, at 12. Uti possidetis means “a principle in international law that recognizes a peace treaty between parties as vesting each with the territory and property under its control unless otherwise stipulated.” Uti possidetis, Merriam-Webster (2021), https://www.merriam-webster.com/legal/uti%20possidetis.
179 Id.
By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the rights freely to determine, without external interference, their political status and to pursue their economic social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.\textsuperscript{181}

There are alternative theories that argue for the validity of secession outside of the colonial context. Some scholars have argued for the possibility of “just cause secession,” or the notion that secession is inherently valid for the cause of abuses, discrimination, or lack of respect for its rights by the mother state.\textsuperscript{182} A renowned theory by Antonio Cassese posits that a non-colonial people may find refuge in the Friendly Relations Doctrine “[w]hen the central authorities of a sovereign state persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of the State structure.”\textsuperscript{183} However, the examination of two prominent cases which have tackled these questions reveal a reality that refuses to allow for neat resolve within a theory.

Highlighting the difficulties of living in a bilingual and non-monocultural, even if affluent, society, the Quebecois population in the 20th century demanded greater rights within Canada.\textsuperscript{184} Due to the Quebec referendum vote very narrowly deciding to remain in Canada, the case was brought before the Canadian Supreme Court, which importantly distinguished between internal and external self-determination. The Court held that the latter is only appropriate in “the most extreme cases” when a people’s right to self-determination is being “totally frustrated” internally.\textsuperscript{185} Thus, in keeping with the theme of earlier international law espoused in the likes of the Aaland Islands Commission,\textsuperscript{186} the Canadian Supreme Court “reaffirmed the supremacy of territoriality and the territorial integrity of existing states over any notions of self-determination; the latter may disrupt territoriality only in the most extreme circumstances, where a people is oppressed by the mother state.”\textsuperscript{187}

\textsuperscript{181} Friendly Relations Declaration, \textit{supra} note 165.
\textsuperscript{182} Sterio, \textit{supra} note 159, at 15.
\textsuperscript{183} \textit{Id.} (quoting Antonio Cassese, \textit{Self-Determination of Peoples: A Legal Reappraisal} 19 (1995)).
\textsuperscript{184} \textit{Id.} at 12.
Kosovo is another matter entirely. Following centuries of occupation by the Ottomans, the Kingdom of Serbia, and Yugoslavia, the Kosovar sought independence in 1991 with the declarations of the surrounding nations of Slovenia, Bosnia, and Macedonia.\textsuperscript{188} After a decade of unrest, fierce domination under Slobodan Milosovic, and a NATO bombing campaign seeking to end the harsh treatment against the Kosovar, Resolution 1244 of the UN Security Council was passed which laid out the framework for forming an international administration for Kosovo.\textsuperscript{189} However, after years of unrest and instability, Kosovo’s legal status remained unclear and, following a declaration of independence in 2008, the case for Kosovar independence was brought by Serbia before the International Court of Justice.\textsuperscript{190} In a ten to four vote, the Court held that the declaration of independence did not violate international law and, while refusing to specify whether a general right to secession existed, the Court tolerated this secession. The Court justified this secession on the grounds that it was achieved by non-state actors and did not violate the principle of territorial integrity.\textsuperscript{191}

Kosovo is a very difficult case to reconcile, considering it was a de facto secession which was recognized as legitimate by roughly half of the world’s countries with seemingly no consensus on why it is valid.\textsuperscript{192} For this reason, scholars like Stefan Oeter tend to categorize the Kosovo case as one of the “hard cases that make bad law.”\textsuperscript{193} According to Oeter and Milena Sterio, Kosovo may be considered bad precedent for other separatist movements because of its uniqueness (although, which of the non-colonial cases does not have its own complex history and unique issues?) and the ongoing interference from the international community.\textsuperscript{194} Detractors point to the fact that the Kosovar were no longer facing oppression at the time independence was declared, the just-cause theory no longer satisfied in the light of the new political leadership and treatment by Serbia. So perhaps the ICJ let the history and messiness of the situation work too far into its ruling. Many legal scholars have made it very clear that the outcome of their decision has been less than sturdy and stable but nevertheless, it stands as an example of non-colonial secessionist precedent.\textsuperscript{195}

\textsuperscript{188} Sterio, supra note 159, at 18.
\textsuperscript{189} Id.
\textsuperscript{190} Id. at 18–19.
\textsuperscript{191} Id. at 19.
\textsuperscript{192} Id.
\textsuperscript{193} Stefan Oeter, Recognition and Non-Recognition with Regard to Secession, in SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW, supra note 187, at 59.
\textsuperscript{194} Id. at 30; Sterio, supra note 159, at 17.
\textsuperscript{195} Sterio, supra note 159, at 17.
In summation, although the normative basis of external self-determination leading to secession remains debated, given the volatility of this legal mechanism, the present preference of international law seems to only want to, “recognise [sic] a right to UNC [unilateral non-colonial] secession in response to the most egregious human rights violations.”

Many have argued for the complete separation of Catalonia from Spain, with one legal scholar musing that when, “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.” Others have more convincingly suggested that the secessionist argument is, “very difficult to craft for Catalonia.” The region clearly has a high degree of autonomy, has not been victimized to the threshold of oppression to satisfy the blessing of international law for secession, and evidence suggests that the central government is willing to negotiate and respect the autonomous position in the future. In summary, it seems that Catalonia does not reach the status typically awarded the right to a complete break from Spain. Although a worthy debate is to be had about the ethics of this standard, there are other considerations that must be made about why Catalonia should not try for complete separation.

Aside from this lack of proper legal positioning, it seems to be against the international order-building norms of international law to destabilize a region so drastically. Several arguments support this claim. First, there is no historical evidence that newly independent countries economically perform better following their breaks from their mother state. At best they tend to maintain their previous growth patterns. Second, there is little to no evidence that Catalanian institutions perform better than the rest of Spain. In fact, pervasive corruption and mismanagement places Catalonia last among the Spanish regions and in the bottom third (130 out of 190) EU regions in a study measuring quality.
of government.\textsuperscript{203} All of this evidence suggests that the prudent solution is to turn away from a destabilizing secession. However, independence movements are rarely prudent. In fact, they are emotionally charged, comprised of grievances that are as essential to a group’s cultural makeup as its very language. It is for this reason that international law provides a better-fitting solution than merely the external/internal dichotomy. The normative strains of self-determination described above can lend helpful solutions to the Catalans.

3. Internal Self-Determination and Beyond

Internal self-determination is preferable in many situations and is often able to be exercised meaningfully due to, “its less intrusive nature and its respect for the principle of territorial integrity of existing states.”\textsuperscript{204} Internal self-determination broadly has to do with the exercise of domestic power. This is done in several ways depending upon the nation. For example, some iterations have concluded with merely the freedom from foreign intervention\textsuperscript{205} while Portugal’s iteration of the concept extends to, “the consent of the people to a certain structure and political organization.”\textsuperscript{206}

Recent developments in the law have suggested that, “granting internal self-determination to racial groups persecuted by the government has become ... customary international law.”\textsuperscript{207} While this is almost certainly an overstatement, the law has responded to critiques that for many groups, including minorities and indigenous peoples, internal self-determination is inadequate.\textsuperscript{208} For while it in theory purports to increase the level of political participation and representation within a given mother state, it often tends to disappoint, as many groups are still forced to work within the confines of the existing structures with which they have qualms.\textsuperscript{209} Admittedly, this is both the problem and the aim of internal self-determination, for even its critics admit that the uncertainty of its premise is “fraught with danger” and the guideline of working within the bounds of the already existing state undoubtedly preserves the international status quo, sometimes for better or for worse.\textsuperscript{210}

\textsuperscript{203} Id.
\textsuperscript{204} Sterio, supra note 159, at 11.
\textsuperscript{206} Id. at 228.
\textsuperscript{207} Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal 120–21 (1995).
\textsuperscript{209} Id. at 161.
\textsuperscript{210} Id. at 178.
However, there is a very good case for the need to develop the concept into a more workable instrument to adequately address current international issues. Clearly the current paradigm of describing self-determination in static terms, or as legal scholar Howard Vogel put it, “the external/internal dichotomy—is overly statist in its conception and denies the rich variety of group identity and claims.”

Important contributors to this area like James Anaya have recognized an ill-founded construction on “a set of premises in service of the state rather than in service of human rights to secure the well-being of human beings.”

Anaya further subdivides self-determination into “normative strains.” The first, labeled the constitutive aspect, “requires that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples governed.” The second, which he terms the on-going aspect, “requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuing basis.”

Former member of the National Security Council Morton Halperin and his colleagues have called for an abandonment of this external/internal dichotomy and the adoption of a new framework more apt at distinguishing types of claims. This new framework contains six categories of self-determination: anti-colonial, sub-state, trans-state, dispersed peoples, indigenous, and representative. While this Comment will not stray far afield into the intricacies of this theory, the sixth category of this list will be analyzed fully in relation to the Catalan situation below since Vogel’s theory holds this categorization as most similar to what is traditionally thought of as internal self-determination.

All of these calls for an increase in nuance to move beyond this inadequate external/internal binary highlight the importance of social relatability in modern international politics. The central ethic of Grotius’ principle of sociability is an effort towards the, “on-going process to support the flourishing of life in recognition of our interconnected common humanity.”

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212 Id.
213 Id.
215 Id.
216 Vogel, supra note 211, at 468–70.
217 Id. at 470.
218 Id.
219 Id. at 495.
ineffective paradigm would be a germane decision in what should be an ever-striving effort to maintain international amity.

Applying this legal philosophy to the Catalan situation opens new doors of juridical opportunity for resolving an escalating international emergency. Firstly, the constitutive element seems to largely be met. Catalans were present at the founding of the modern Spanish State, with several of their requests made including the passage of a statute of autonomy granting them significant amounts of local power.\textsuperscript{220} It is the “on-going” element that is problematic. There has been, in the Catalan estimation, a lack of involvement in the development of the nation of Spain, or a lack of regional say in the direction with which the nation is headed, and repeated deemphasis on the importance of Catalan culture. In essence these claims are very similar to those made by the Quebecois in Canada, highlighting the unique challenges of a multi-lingual and cultural nation. Similar to the Quebecois, it would seem contrary to the Catalan position that they, in fact, have received a rather significant degree of representation, regional autonomy, and even financial and moral support (even the 1992 Olympic games in Barcelona which elevated the city and forever put it on the map as a tourist destination was largely funded by the central government).\textsuperscript{221} However, distinct from the Quebecois, the Catalans, in the face of a desire for more regional control, have been met with fierce resistance by the government, often even physical in nature.

The lack of attention from Madrid, illegal actions taken by the Catalans, and the subsequent violent governmental response has only further elevated the problem and alienated both sides. For a peaceful resolution we should look to Halperin’s theory of representative self-determination. This claim, “results when the population of an existing state seeks to change its political structure in favor of a more representative (and preferably democratic) structure.”\textsuperscript{222} For Catalonia this could take many forms. An important first step may just be the Spanish state’s willingness to enter into a dialogue on such matters, legitimizing long-ignored claims. Next may be the allowance of similar financial competences that the Basque region holds as this has been a longtime sore spot. Compromise should be possible. Perhaps one possible solution could be a promise for Catalonia to be as financially independent as the Basque region by a certain designated year. This would secure Catalan allegiance to the nation while still

\textsuperscript{220} Elliott, supra note 2, at 229.
\textsuperscript{222} Vogel, supra note 211, at 470.
retaining and actually achieving a greater level of autonomy while simultaneously avoiding a “Catalexit” situation that would almost inevitably tank their own economy and destabilize the region, risking a slip into more violence and unrest. Whatever the solution may end up being, this more nuanced and detailed approach allows for more grievances to be heard and addressed without relying on political showmanship, polarization, and destabilization.

To address the kinds of problems groups like the Catalans face, international law must cease trying to use 20th century tools to address 21st century issues. No longer are the questions of peoples reserved for a post-colonial context: they encompass intra-state disputes, loaded with cultural complexity. No longer can self-determination be matter-of-factly resolved by either remaining within a mother state or breaking completely. International law must sharpen its tools, enhance its understanding and classification of these problems, and open the door to novel solutions that make achieving peace, prosperity, and liberty possible.

CONCLUSION

The Catalans, while defined by their grueges (struggles) have not been swallowed by them. In fact, another word has proven a stronger part of the Catalan character, solidaritat (solidarity). A longtime theme of the Catalan people, this word speaks to their sense of communal strength and political determination (so much so that two political parties have been named after the word). Language has been a key theme of this centuries-old fight and it will hopefully be language and dialogue that resolves it. International law must evolve its outdated notions to provide workable options for parties to utilize during complex political dispute negotiation. The perversity of requiring a degree of oppression for a people to be entitled to certain political rights is a blunt and brutal legal standard. There must be more options for people simply if not enough body bags have been filled. This Comment has illustrated some tensions in international law, why it is necessary for it to take reformatory steps,

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and some options for doing so. There is no “correct” side to this crisis, only varying levels of failure. Hopefully, with new ways of looking at the problems new solutions will emerge.

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