

CATALONIA: THE NEW EUROPEAN STATE?

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I. INTRODUCTION

On September 11, 2012, a sea of Catalonians, 1.5 million according to the Urban Guard and 600,000 according to the Government Delegation, protested under the slogan: “Catalonia, new European State.”¹ The Government of the Generalitat encouraged this manifestation, which took place on the National Day of Catalonia.² The protesters demanded the independence of Catalonia as well as improved funding to Catalonia from the Spanish State.³ The 2012 National Day of Catalonia protest was of historic significance for the Catalonian people, not only because it was the largest protest ever in Barcelona, but also because of its triggering effect on

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1. Antonio Baquero & Carlos Márquez Daniel, *Catalunya Clama por la Independencia [Cataluña Cries for Independence]*, EL PERIODICO (Sept. 11, 2013, 3:14 PM), <http://www.elperiodico.com/es/noticias/diada-2012/print-2202293.shtml> (last visited Oct. 29, 2013).

2. Cristian Reino, *Una Marea Soberanista Reclama la Independencia en Barcelona [A Sovereignist Tide Claims for Independence in Barcelona]*, DIARIOVASCO.COM (May 5, 2013, 7:22 PM), <http://www.diariovasco.com/rc/20120911/mas-actualidad/nacional/pacto-fiscal-marca-diada-201209110257.html> (last visited Oct. 29, 2013).

3. *Id.*

the independence process.⁴ The strong pro-independence nature of this day took over the political arena in Catalonia, including the Government of the Generalitat:

Catalonia had never been so close to its aspiration and wish of independence, as it is right now. Every day that goes by, more and more Catalonians join the sentiment that it is us, the seven and a half million people that are part of Catalonia, who are responsible for deciding our future as people and as a nation.⁵

II. CATALONIA AS A NATION

Historically, the Catalonian people enjoyed approximately 700 years of total and secular independence.⁶ Before its gradual incorporation to the new Spanish State following the marriage of Fernando and Isabel in 1469, Catalonia was a predominant part of the Crown of Aragon, which controlled an empire across the Mediterranean.⁷ After the combination of the kingdoms of Castilla and Aragon, Catalonia continued as a constitutional regime and an important independent state.⁸ Catalonia maintained its own administration, jurisprudence, fiscal, monetary, and economic policies.⁹ The remains of the Catalonian kingdom remained until the eighteenth century, when Catalonia lost the War of Secession.¹⁰

In the nineteenth and twentieth centuries, Catalonia witnessed a rise in its nationalism, which took the form of a political movement.¹¹ This period, known as the “Renaixença,” coincides in time with the industrial and

4. Cristina Saiz, *El Independentismo Catalán, Más Allá del Ruido Mediático* [The Catalan Independence, Beyond the Mediation Buzz], POLITICACRITICA (Feb. 7, 2013, 12:36 AM), <http://politicacritica.com/2013/02/07/el-independentismo-catalan-mas-alla-del-ruido-mediatico/> (last visited Oct. 29, 2013).

5. Artur Mas, *Missatge Institucional del President de la Generalitat Amb Motiu de la Diada Nacional de Catalunya* [Institutional Message from the President of the Generalitat Amb Motiu of the Catalan National Dyad], GENERALITAT DE CATALUNYA (2013), available at http://premsa.gencat.cat/pres_fsvp/docs/2012/09/10/18/21/f895cf81-5e64-4258-abfd-2904fa601896.pdf (last visited Oct. 30, 2013).

6. *La Independencia de Cataluña* [Cataluña's Independence], CATALUÑA NUEVO ESTADO EUROPEO (June 26, 2013, 6:18 PM), <http://www.freewebs.com/nacioncatalana/03.htm> (last visited Oct. 30, 2013).

7. Christopher K. Connolly, *Independence in Europe: Secession, Sovereignty, and the European Union*, 24 DUKE J. COMP. & INT'L L. 51, 55 (2013).

8. *La Independencia de Cataluña*, *supra* note 6.

9. *Id.*

10. See Connolly, *supra* note 7, at 7.

11. *Id.*

economic development of the region, making it more advanced and prosperous than Spain.¹² However, after the Spanish Civil War (1936–1939), Catalonia lived one of the darkest periods in its history.¹³ Catalonians suffered repression of their individual and collective rights, including the ban of all use of the Catalan language, denial of the Catalan identity, and punishment for cultural expression.¹⁴

The Catalan identity and the request for political autonomy reemerged during the democratic transition period.¹⁵ During the time of democracy, the nationalists have worked toward a greater autonomy within the existing legal and political framework.¹⁶ Nonetheless, there is an increasing tension between Catalonia and Spain.¹⁷ In addition to the existing economic tension derived from the distribution of the wealth, there is a palpable exasperation due to the passing of the Estatut of Catalunya of 2006. This law approved the existence of an independent Parliament.¹⁸ In addition, the cutbacks of the Constitutional Tribunal was the triggering factor of a large manifestation entitled “Som una nació, nosaltres decidim.”¹⁹

III. THE ECONOMIC INSTABILITY AND THE COFFEE FOR ALL, THE TRIGGERS OF THE INDEPENDENCE PROCESS

Recently, the independence process has gained momentum as a result of the economic crisis and basic cutbacks experienced in Catalonia, including health and education.²⁰ For some time now in Catalonia, the idea that “there is a fiscal plundering caused by the central government,” and that the so-called “Coffee for all no longer works,” has taken center stage.²¹ This idea comes from the wealth distribution system that exists in Spain.²² In order to understand this system, one must look at the model of territorial organization designated by the Spanish Constitution.

12. *Id.*

13. *Id.*

14. *Id.*

15. *See Connolly, supra* note 7, at 8.

16. *Id.*

17. *Id.*

18. Saiz, *supra* note 4.

19. *Id.* (“We are a nation, we decide.”).

20. *See generally id.*

21. *Id.*

22. *Id.*

Article 137 of the Spanish Constitution establishes that the Spanish State is divided in municipalities, provinces, and independent communities.²³ Further, it establishes that all these entities enjoy autonomy to manage their own affairs.²⁴ The State model is set forth in the Constitution in an imprecise manner.²⁵ It is understood that it is a social and democratic state under the rule of law,²⁶ and that its type of government is a Parliamentary Monarchy.²⁷ However, it is not certain whether it is a central state or a federal state, or something in between with characteristics of both.²⁸ The Constitution is silent on this aspect; it does not define the Spanish State with any particular structure.²⁹ The Constitutional Tribunal has defined the constitutionally unnamed type of state as “the State of the Autonomies.”³⁰

Several authors have analyzed this model.³¹ However, the interventions made by the different parliamentary groups during the creation of the Constitution of 1978 are of special interest.³² Among these opinions, there is a large amount of testimony that states the constitutional assembly chose a unitary or central state, as opposed to the federal thesis.³³ For this reason, Sanchez Agesta states that “the Spanish State, as an autonomous state, identifies itself as a national state. This state is ‘based on the indissoluble Spanish national unity’—and which recognizes and guarantees the right of autonomy of the cultural nationalities, and the historic regions that contributed to its formation over the centuries.”³⁴ Other representatives, such as Letamendia, regretfully stated that, “not only has the path for defense of the right to autonomy been closed by this Constitution, but it has also closed the path for federalism.”³⁵

23. C.E., B.O.E. n. 311, Dec. 29, 1978, art. 137 (Spain).

24. *Id.*

25. Julio Castelao, *Sinopsis del Artículo 137* [*Synopsis of Article 137*], CONGRESO DE LOS DIPUTADOS, http://www.congreso.es/consti/constitucion/indice/imprimir/sinopsis_pr.js (last visited June 6, 2013).

26. C.E., B.O.E. n. 311, Dec. 29, 1978, art. 1.1 (Spain).

27. *Id.* art. 1.3.

28. Castelao, *supra* note 25.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Castelao, *supra* note 25.

34. *Id.*

35. *Id.*

Article 2 of the Spanish Constitution, after stating that the Constitution is based on the insoluble unity of the Spanish nation, recognizes and guarantees the autonomy of the nationalities and religions that are part of them and the solidarity between all of them.³⁶ In that way, Article 138 guarantees the attainment of what its provided by Article 2. Article 138 does this by attempting to establish an economic balance, suitable and fair among the diverse parts of the Spanish territory. This is accomplished by the peculiarity it identifies as insular, stressing that the difference between the regulations in the distinct autonomous communities “will not be able to implicate, in any case, economic or social privileges.”³⁷

The solution to the territorial instability problem is not feasible without the use of redistributive techniques that involve a transfer of the public capital from the richest to the poorest communities with the end of accomplishing the solidarity principle.³⁸ Article 157.1(c) of the Constitution, establishes among the financial resources of the autonomous communities the transfer of a compensation fund and other assignments in charge of the State’s general budgets.³⁹ The goal of the compensation fund is to correct inter-territorial economic instability and to implement the solidarity principle.⁴⁰

For this reason, the Generalitat considers that the return of the Catalanian contribution to the state should be a lot higher.⁴¹ In other words: The difference between the income of the Central Catalanian Administration and the expenses of the Catalanian territory.⁴² As per the calculation of the financial scales, this is complex because it is difficult to separate among the State’s taxes such as the sales tax or the society tax, as it is very uneven between the State and the Generalitat.⁴³

In addition, we must add the problems of the lack of liquidity and resources that must be addressed by the Catalanian Government.⁴⁴ These problems are related, for example, in social policies; the assistance of the

36. C.E., B.O.E. n. 311, Dec. 29, 1978, art. 2 (Spain).

37. Castelao, *supra* note 25; *see also* C.E., B.O.E. n. 311, Dec. 29, 1978 (Spain).

38. *Id.*

39. *Id.*

40. *Id.*

41. Maria Teresa Coca, *A que Aspira Cataluña con el Pacto Fiscal [What does Cataluña Aspire with the Fiscal Pact]*, EL MUNDO (Sept. 20, 2012, 7:41 AM), <http://www.elmundo.es/elmundo/2012/09/19/barcelona/1348077306.html> (last visited Oct. 30, 2013).

42. *Id.*

43. *Id.*

44. *Id.*

State to Catalonia has been reduced by 92% in the last three years.⁴⁵ In numbers, out of the 72.8 million Euros that were received in 2011, the Generalitat received approximately 5.8 million Euros in 2013 (according to the State estimates).⁴⁶ This drastic reduction in the State's contribution to the social policies affects all the social programs of the Department for Social and Familiar Well-being.⁴⁷

The plan formulated by the Department for Social and Familiar Well-Being focused on basic social services, a network of social services of basic needs, and controlled by local corporations, which has decreased by 68.31%. This is because its funds have gone from 1,293,386 Euros in 2011 to 3,896,106 Euros in 2013.

The social integral intervention project for the attention, and prevention of the marginalization and integration of the Gypsy people has suffered a reduction of 61.48%, as it went from receiving 99,629 Euros in 2011 to 38,374 Euros in 2013.

The dependence plan—at the agreed upon level—has been reduced by 100% and has not received any financial contribution since 2011.

The fund for the reception, integration and support of immigrants has been reduced by 100% and has not received any contribution since 2011.

The Program and benefits or services that guarantee the right of integral social assistance to the victims of gender violence has been reduced by 19.88%, as it used to receive 632,408 in 2011 to 507,676 in 2013.⁴⁸

All of this equates to a peak in Catalanian nationalism in an attempt to search for more political and financial autonomy.⁴⁹ For this reason, and after the manifestation of the National Day of Catalonia, the President of the Generalitat, Artur Mas, asked the Spanish President, Mariano Rajoy, for a fiscal deal for Catalonia.⁵⁰ This deal would allow Catalonia to take in money and manage all taxes through its own fiscal agency.⁵¹ The intent was for agency to take up the role that the State and the Generalitat

45. *España Ahoga Económicamente a Cataluña* [Spain Drowns Cataluña Economically], HELP CATALONIA (Mar. 26, 2013), <http://es.helpcatalonia.cat/2013/03/espana-ahoga-economicamente-catalunya.html> (last visited July 7, 2013).

46. *Id.*

47. *Id.*

48. *Id.*

49. Connolly, *supra* note 7, at 10.

50. *Id.*

51. Coca, *supra* note 41.

currently have, and to avoid that the former only act as a tax collector.⁵² After the denial of the Rajoy administration, the Generalitat responded by voting in favor of having a referendum for the independence and summoned elections. These elections have the goal of forming a nationalist government and to gather the maximum amount of nationalist seats in the Parliament.⁵³ The current Generalitat President has recently made a deal with the leader of the Republican Esquerra, Oriol Junqueres, to have Catalonia hold a referendum for the auto-determination during 2014.⁵⁴

IV. FOUR WAYS TO INDEPENDENCE

A. Consultative Referendum in Catalonia

The consultative referendum is a way of democratic exercise that is direct.⁵⁵ The referendum is an institution in which the citizens are the protagonists in making the political decision.⁵⁶ In other words, the final decision is attributed to the citizens.⁵⁷ This method of direct democratic exercise, is an indication of the Constitutional compromise that “allows for the participation of all the citizens in the political, economical, cultural and social life.”⁵⁸

The Spanish Constitution allows for a consultative referendum regarding “political decisions of particular importance.”⁵⁹ The Constitutional Tribunal has defined the referendum as an instrument of participation that is direct and political.⁶⁰ More specifically, it has determined that a referendum is a type of “popular inquiry” through which the popular opinion is not gathered for any matter of public interest, but rather it is an inquiry regarding public matters as defined in Article 23 of the Constitution⁶¹ and that is carried out through its respective electoral

52. *Id.*

53. Connolly, *supra* note 7, at 11.

54. *Cataluña Votará la Independencia [Catalunya will Vote for Independence]*, E-NOTICIES (June 26, 2013, 2:14 PM), <http://www.e-noticies.com/popup/imprimir/?iddoc=71199&idi=es> (last visited Oct. 30, 2013).

55. MIGUEL ÁNGEL APARICIO, *MANUAL DE DERECHO CONSTITUCIONAL [MANUAL OF CONSTITUTIONAL LAW]* 107–14 (2009).

56. *Id.*

57. *Id.*

58. C.E., B.O.E. n. 311, Dec. 29, 1978, art. 9.2 (Spain).

59. *Id.* art. 23.1.

60. *See* S.T.C., Sept. 11, 2008 (B.O.E., No. 245 Supp., p.10) (Spain).

61. C.E., B.O.E. n. 311, Dec. 29, 1978, art. 23.1 (Spain) (“Los ciudadanos tiene el derecho a participar en los asuntos públicos, directamente o por medio de representantes, libremente elegidos en

process.⁶² In these types of cases, the subject to be consulted is the electoral body, and as such, their summonses are within Article 149.1.32⁶³ of the Constitution.⁶⁴

The consultative referendum must be summoned by the King through a proposal by the government's President, and previously approved by Congress.⁶⁵ Such approval must be passed by an absolute majority of the House of the Presidential proposal, and said proposal must contain the exact terms by which the inquiry will be formulated.⁶⁶ The House will debate this proposal, and the debate will be done under the same norms previously used.⁶⁷ The President of the House will then communicate Congress's decision to the government.⁶⁸

Once authorization is given, there will be a summons by the King through a Royal Decree, as agreed between the Board of Ministries and its President.⁶⁹ In any case, the Royal Decree must contain the complete text of the decision, state the question or questions that will be answered by the electoral body, and establish a date on which election will be held, which must be within 365 days of the publication of said Decree.⁷⁰ This date must be given the utmost publicity, including: Publication in the State's Official Bulletin, publication in the Official Bulletins of all the autonomous communities affected, publication in all newspapers edited in said

elecciones periódicas por sufragio universal") ["The citizens have the right to participate in public matters, directly or through representatives, freely elected in periodical elections through universal suffrage."].

62. See S.T.C., Sept. 11, 2008 (B.O.E., No. 245 Supp., p.10) (Spain) (La sentencia, resuelve el recurso de inconstitucionalidad interpuesto contra la Ley del Parlamento Vasco 9/2008, de 27 de Junio, de convocatoria y regulación de una consulta popular al objeto de recabar la opinión ciudadana en la Comunidad Autónoma del País Vasco sobre la apertura de un proceso de negociación para alcanzar la paz y la normalización política.) [The sentence, resolves the unconstitutional recourse brought against the Basque Parliament's law of 9/2008 June 27, for a consultation and regulation of a public vote in order to collect the citizen's opinion in the Basque country in regards to the start of a negotiation process to reach peace and political normalization.].

63. C.E., B.O.E. n. 311, Dec. 29, 1978, art. 149.1.32 (Spain) ("El Estado tiene competencia exclusiva sobre . . . la autorización para la convocatoria de consultas populares por vía de referendium") ["The State has exclusive power in regards to . . . the authorization to propose a popular vote by means of a referendium."].

64. See S.T.C., Sept. 11, 2008 (B.O.E., No. 245 Supp., p.11) (Spain).

65. C.E., B.O.E. n. 311, Dec. 29, 1978, art. 92.2 (Spain).

66. L.O.P.J., B.O.E. n. 20, Jan. 23, 1980, art. 6 (Spain).

67. Reglamento del Congreso de los Diputados [Regulations of Members of Congress], B.O.E. n. 55, Mar. 5, 1982, art. 161.2 (Spain).

68. *Id.* art. 161.3.

69. L.O. 50/1997, B.O.E. n. 285, Nov. 28, 1997, art. 2.2(e) (Spain).

70. L.O. 2/1980, B.O.E. n. 20, Jan. 23, 1980, art. 3 (Spain).

communities and with circulation in all of Spain, publication of the attachment to the edicts in all the affected local governments, diplomatic and consular representations, and broadcast over radio and television.⁷¹

In Catalonia's case, the consultative referendum's process would consist of the central government's summons and would authorize the Generalitat to know the will of its citizens.⁷² In other words, Catalonia would continue its development of local and state laws as it is established in Article 149.1.32 of the Spanish Constitution.⁷³ The Academic of Political Science of the Universidad de Barcelona, Rodríguez-Aguilera, stated, "[i]f the yes were to win, it would open a constitutional reform process to recognize the right of auto determination."⁷⁴ According to Professor García Roca, professor of Constitutional Law at the Universidad Complutense de Madrid, this system would be based upon and would support the decision by the Supreme Court of Canada, which recognizes the right to call for a referendum with a clear question, full guarantees, and a qualified majority.⁷⁵

The decision referenced by Doctor García Roca is the "Reference re Secession of Quebec," in 1996.⁷⁶ This decision establishes that a clear and majoritarian vote in Quebec regarding the question favoring the secession initiative would confer democratic legitimacy to it, and that all the other participants in the confederation should recognize the vote.⁷⁷ The decision states, that even though a unilateral secession would be illegal, doing so through a referendum under Canadian Law would be valid, leaving the rest of Canada without grounds to negate the right of Quebec's Government to pursue secession.⁷⁸ However, Allen Buchanan, professor at Duke University, does not believe that Spain should follow the Canadian path.⁷⁹

71. *Id.* art. 3.2.

72. María Salgado, *Los Expertos Aseguran que la Secesión de Cataluña es Posible si hay una Mayoría y Negociación* [*The Experts Guarantee that secession is Possible in Cataluña if there is a Majority and Negotiations*], 20MINUTOS.ES (Jun. 29, 2013), <http://www.20minutos.es/noticia/1585767/0/cataluna-secesion/independencia/mayoria-negociacion/> (last visited Oct. 30, 2013).

73. *Id.*

74. *Id.*

75. *Id.*

76. Reference re Secession of Quebec, [1996] 2 S.C.R. 217 (Can.).

77. *Id.* at 220.

78. *Id.* at 221.

79. Allen Buchanan, *Cataluña Tendría que Pedir la Mediación de la ONU si España Menospreciase el Referéndum, Entrevista* [*Cataluna Would Have to Request Mediation from the UN if Spain Dismisses the Referendum, Interview*], SINPERMISO.INFO (July 7, 2013), <http://www.sinpermiso.info/textos/index.php?id=6132> (last visited Oct. 30, 2013).

It is his opinion that Spain could offer Catalonia, as a response to a referendum in favor of secession, substantial autonomy, similar to one in the Basque Country,⁸⁰ with some sort of guarantee that an autonomy agreement would not be breached.⁸¹

In Catalonia's case, it is important to remember that a referendum regarding a decision about secession would be consultative. However, because the referendum is merely consultative, the President of the Superior Tribunal of Justice, Miguel Angel Gimeno, states

[T]hat the result of the election would not have a legal effect. We would go ahead with the inquiry, we would find out an answer, but what would that imply? The effect would not be legal, but rather political, and as such, we would continue to have a political discussion."⁸²

Nevertheless, professors in this school of thought, such as Satamaria Pastor, are of the opinion that it is "essential that the institution that would adopt the decision would do so contrary to the pronouncement of the will of the people."⁸³ The problem in Catalonia's case is that once there is a result for the inquiry there would be a reference to the government so that it adopts the measurements for the formalization of the popular decision.⁸⁴

In June 2013, the Center for Opinion Studies of the Generalitat published a poll that stated 55.6% of Catalonians would vote in favor of independence in an electoral inquiry regarding auto-determination.⁸⁵ Among the survey respondents, 51.2% thought that the quality of life would be better in an independent Catalonia.⁸⁶ Similarly, the Center for Sociological Investigations, which is dependent of the Spanish Presidential

80. *Id.*

81. Buchanan, *supra* note 79.

82. Luis B. Garcia, *El Presidente del TSJC ve "Francamente Complicado" Celebrar una Consulta* [*The President of TSJC Sees as "Honestly Complicated" to Celebrate a Conference*], LAVANGUARDIA.COM (June 7, 2013, 8:27 PM), <http://www.lavanguardia.com/politica/20130606/presidente-tsjc-francamente-complicado-celebrar-consulta.html#> (last visited Oct. 30, 2013).

83. Jose Luis López González, *El Referéndum Nacional Consultivo Sobre Decisiones Políticas de Especial Trascendencia* [*The National Consultative Referendum in Regards to Political Decisions of Special Transcendence*], in CUADERNOS CONSTITUCIONAL DE LA CATEDRA DE FADRIQUE FURIO CERIOL 215 (Universitat de Valencia ed., 2002).

84. *Id.*

85. *El 55% de los Catalanes Votaria a Favor de la Independencia* [*55 % of Catalonians Would Vote in Favor of Independence*], LAVANGUARDIA.COM (June 6, 2013, 9:15 AM), <http://www.lavanguardiad.com/politica/20130620/54376823885/55-catalanes-votaria-favor-independencia.html> (last visited Oct. 30, 2013).

86. *Id.*

Ministry, states that 41% of those asked would be in favor of Catalonia becoming independent.⁸⁷ In sum, the data reveals that in a hypothetical election, Catalonians would vote in favor of the creation of a new independent state.⁸⁸ This inquiry would also require that the Spanish Government consider a constitutional reform.⁸⁹ Today, that would be the only way to change the “unity” that is established by Article 2 of the Spanish Constitution. Furthermore, on a Parliamentary-level, the viability of this inquiry is even more complicated.⁹⁰ The Catalanian nationalist movement should look for support in the State’s political parties in order to have a constitutional reform that would allow binding referendum, which requires an approval of two-thirds of both Parliamentary Houses.⁹¹

Under the idea that Catalonia could summon for a referendum on the question of secession under the Spanish legal frame, it is important to ask if Catalonia could summon for this inquiry through the Generalitat. First, it is important to note that Catalonia lacks competence regarding referendums. This is because the Catalonia Autonomy Statute only attributed the Generalitat with power to establish the following: A judicial regime, the modality, procedure and way in which is done, the summons, the polls, public hearings, participation forums, and any other forums of popular inquiry.⁹² Without previous reform in the Organic Law Regulating the Diverse Forms of Referendum, a summons by the Generalitat to a referendum could fall outside the Spanish legal frame, and thus potentially be a unilateral secession.⁹³

B. Consultative Referendum in All of Spain

A consultative referendum in all of Spain would consist of the Spanish Government calling for a consultative referendum at the state level.⁹⁴ “It is not evident that Spaniards would vote against the Catalanian Session.”⁹⁵ In

87. Saiz, *supra* note 4.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Estatuto de Autonomía de Cataluña [Cataluna’s Autonomy Status], B.O.E. n. 172, July 20, 2006, art. 122 (Spain).

93. Emilio Pajares, *Constitución y Referéndum de Independencia en Cataluña* [Constitution and Independence Referendum in Cataluña], DIARIOJURIDICO.COM (Nov. 26, 2011, 12:00 AM), <http://www.diariojuridico.com/opinion/constitucion-y-referendum-de-independencia-en-cataluna.html> (last visited Oct. 29, 2013).

94. *Id.*

95. *Id.*

fact, there are more English people in favor of the independence of Scotland than Scottish people according to University of Barcelona professor Rodriguez Aguilera.⁹⁶ The polls in Scotland show that 43% of the English people would approve Scottish independence.⁹⁷ Nonetheless, the Scottish secession process is radically different than the Catalanian one.⁹⁸ First, the constant dialogue between the English and Scottish Governments have made it possible to set a date for the election, September 18, 2014.⁹⁹ On the other hand, the Spanish Government has not heard the claims of secession made by the Catalonians.¹⁰⁰ In addition, the Scottish people do not show a strong support to the secessions demands; only 30% of those asked show support for independence.¹⁰¹ In Catalonia, secession is supported by more than 50% of its people.¹⁰²

Among the arguments in support of a consultative referendum at the state level, as it is established in Article 92 of the Constitution, is that political decisions of special importance should be submitted to all citizens, and not only to a portion of the population.¹⁰³ For that reason, Maria Dolores Cospedal, member of the Popular Party (PP), affirmed that the future of Spain should be decided among all Spaniards.¹⁰⁴ Further, she also stated that the future of the region is to be decided not only by those who live in Calatonia, but also by those that do not.¹⁰⁵

96. *Id.*

97. Ainhoa Paredes, *Inglaterra Dice si a Escocia [England Says Yes to Scotland]*, NABARRALDE.COM (July 30, 2013, 10:27 PM), <http://www.nabarralde.com/es/munduan/7798-inglaterra-dice-si-a-escocia?tmpl0component&print=1&layout=default&page=> (last visited Oct. 29, 2013).

98. *See generally El Secession Independentista de Escocia se Celebrará el 18 de Septiembre de 2014 [The Scottish Independence Secession will be Celebrated on September 18, 2014]*, PUBLICO.ES (July 20, 2013, 10:40 PM), <http://www.publico.es/internacional/452492/el-referendum-independentista-de-escocia-se-celebrara-el-18-de-septiembre-de-2014/version-imprimible> (last visited Oct. 29, 2013).

99. *Id.*

100. *Id.*

101. *Id.*

102. *See generally El 55% de los Catalanes Votaria a Favor de la Independencia, supra* note 85.

103. Francisco Rubio Llorente, *Un Referéndum que Nadie Quiere [A Referendum that Nobody Wants]*, ELPAIS.COM (July 30, 2013, 10:15 PM), http://www.elpais.com/elpais/2013/02/01/opinion/1359716070_365196.html (last visited Oct. 29, 2013).

104. *Id.*

105. Alberto R. Roldán, *Cospedal: El Futuro de Cataluña lo Decidimos Entre Todos los Españoles [Cataluña's Future Will be Decided Amongst all Spaniards]*, LARAZON.ES (July 17, 2013, 1:23 PM), http://www.larazon.es/detalle_hemeroteca/noticias/LA_RAZON_488764/8286-maria-

This argument, however, seems to be construed under the premise that a representative can only do what the Constitution allows him or her to do.¹⁰⁶ This seems an erroneous premise if compared with the Constitutional principle that establishes that a representative has the freedom to do, and is only limited by what the Constitution prohibits.¹⁰⁷ Under these parameters, the General Courts, as owners of sovereignty and representatives of the Spanish people, could authorize a referendum in the territorial scope of what is restricted.¹⁰⁸ This would allow the first method discussed: The consultative referendum in Catalonia.¹⁰⁹

C. *Declaration of Independence and Referendum for Auto Determination*

“This method is always the result of a break up and it tends to be violent, complex, and hard,” according to Perez Francesch, Professor at the Universidad Autonoma de Barcelona.¹¹⁰ The Catalanian Parliament would make a unilateral declaration of independence and would call for a referendum of auto-determination for shelter of international law, reason for which there should be ample support for the secession.¹¹¹ After this, the construction of the new State, new Constitution, and new laws would begin.¹¹²

This method actually has the support of the international legal community, which normally takes a neutral position regarding secession.¹¹³ The actions of secession are analyzed under the domestic laws of each country, while the international law is only concerned about its consequences.¹¹⁴ Even though international law recognized auto-determination, application of said law would result in a dramatic weakening of the state sovereignty and a restructuring of the framework of the

dolores-de-cospedal-el-futuro-de-cataluna-lo-decidimos-entre-todos-los-espanoles (last visited Oct. 29, 2013).

106. Llorente, *supra* note 103.

107. *Id.*

108. *Id.*

109. *See id.*

110. Salgado, *supra* note 72.

111. *Id.*

112. *Id.*

113. Connolly, *supra* note 7, at 67.

114. *Id.*

international community.¹¹⁵ For this reason, application of this law to auto-determination has been very selective and limited in several aspects.¹¹⁶

To date, public international law has recognized the right of free determination in two different notions of people.¹¹⁷ For “colonial people” and by extension, any persons submitted to foreign control, are qualified as contrary to international law. The other group is referred to as nationals or citizens of a state.¹¹⁸ Among the latter, international law has made a distinction between “minorities” and “indigenous people.”¹¹⁹

Catalonia is among the group of people known as a group of nationals or citizens of a State. More specifically, it is among the “minorities” subcategory.¹²⁰ The Declaration of the United Nations regarding Minorities, approved in 1992, in its first article, defines minorities based on their national, ethnic, cultural, religious, or linguistic identities, and it establishes that the states must protect their existence.¹²¹ The most accepted definition of minority is that one given in 1977 by Francesco Capotorti, Special Narrator of the Sub-commission for the Prevention of Discrimination and the Protection of the Minorities:

A group that in numbers is inferior to the rest of the population of a State. A group that is located in a non-dominant position and whose members, who are citizens of the State, have ethnic, religious, or linguistic characteristics that are different to the rest of the population. A group of people that manifest, even if its just in an implicit manner, a sentiment of solidarity to preserve their culture, traditions, religions or language.¹²²

This definition encompasses people such as the Catalonian, Scottish, or people from Quebec in Canada.¹²³ Matters regarding minorities are in a legal sphere ruled by Article 27 of the International Pact of Civil and

115. *Id.*

116. *Id.*

117. Víctor M. Sánchez, *Autodeterminación, Secesión y Derecho Internacional [Autodetermination, Secession and International Law]*, ELDEBAT.CAT (July 6, 2013, 6:33 PM), http://www.eldebat.cat/client/print/print_notice.php?IDN=64352 (last visited Oct. 29, 2013).

118. *Id.*

119. *Id.*

120. *Id.*

121. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, Annex, U.N. GAOR, 47th Sess., Supp. No. 49 (Vol. I), U.N. Doc. A/47/49 (Vol. 1), en 210 (18 de Diciembre de 1992).

122. U.N. Doc. E/CN.4/Sub.2/384/Rev.1, para. 568.

123. Sánchez, *supra* note 117.

Political Rights of 1966 (PCPR). This Article makes this definition mandatory for states, such as in the case of Spain and Catalonia.¹²⁴ Article 27 specifies that “in States in which there are ethnic, religious or linguistic minorities, people that belong to such minorities will not be denied their due right to have their own cultural life, to live and to preach their religion, and to use their own language.”¹²⁵ Although, international law does not promote the discrimination of minorities, it does, however, lack assurance for political autonomy.¹²⁶ Thus, the Declaration of the United Nations regarding Minorities promotes certain minority political rights, as long as such rights are not incompatible with the national legislation.¹²⁷

Even though international law has not created a “right to secession” for “minorities,” it has not prohibited minorities from aspiring to create a new State through secession from another State.¹²⁸ If a portion of the territory separates international law-only states that, if at the end of this process the State holds the elements of nationalization, it must be treated like any other state in the world.¹²⁹ After nationalization, it is understood that the new state will have a defined territory, a stable population, and a government that can exercise its public functions for a sustained amount of time in a sovereign and independent manner.¹³⁰

In addition, it is important to remember that the international community generally looks at these phenomena with suspicion.¹³¹ For example, the above-mentioned Declaration points out that every attempt geared towards the partial or total break up of the national unity and territorial integrity of a country, is incompatible with the purpose and principles under the United Nations Charter.¹³² In the same fashion the Declaration on international law regarding the relations and cooperation among the States, in accordance with the Charter, confirms these sentiments¹³³ even though its primary declaration establishes that all the people have the right to freely determine its political condition without external influence, and to look after their economic, social, and cultural

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Sánchez, *supra* note 117.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961).

development, further establishing that all states must respect these rights.¹³⁴ Next, it marks the limits and conditions of these rights:

None of the preceding will be understood as authorizing or encouraging any action geared towards shattering or scorning, partially or completely, the territorial integrity of the sovereign and independent States that conduct themselves in conformity with principles of equality of rights and free determination of the aforementioned people. Thus, they have a government that represents the totality of the people in their territory, without racial, or religious distinctions.¹³⁵

In conclusion, the principle of free determination of the people, outside the colonizing framework, refers to the internal channels of every state to listen to the demands of secession of its minorities.¹³⁶ Even taking this into account, some authors have stated that every minority or group has the right to secession as a right to “correct.”¹³⁷ Allen Buchanan, a professor from Duke University, stands out among said authors.¹³⁸ According to Buchanan, the right to “correct” recognizes four types of injustice:

- 1) The unfair attachment of the territory of a sovereign State;
- 2) Large scale violations of fundamental human rights;
- 3) Continued discriminatory redistribution; and
- 4) The State’s infringement on the duties of the autonomous interstate regime or continued denial to negotiate a way of continued intrastate autonomy.¹³⁹

In Catalonia’s case, the unfair attachment of the territory of a sovereign State would not be met. Catalonia was added to the Spanish territory in 1714, after the city of Barcelona’s surrender and the Nueva Planta Decree, more than three hundred years ago.¹⁴⁰ Trying to find

134. Sánchez, *supra* note 117.

135. *Id.*

136. *Id.*

137. *Id.*

138. See generally Allen Buchanan, *¿Tiene Cataluña Derecho a la Secesión? [Does Cataluña Have the Right to Secession?]*, ELPais.COM (July 2, 2013, 11:24 AM), http://www.politica.elpais.com/politica/2013/05/24/actualidad/1369396168_202422.html (last visited Oct. 29, 2013).

139. *Id.*

140. *El Régimen de Nueva Planta [The Regime of New Plant]*, GENERALITAT DE CATALUÑA (July 17, 2013, 2:14 PM), <http://www.gencat.cat/generalitat/cas/guia/antecedents/antecedents9.htm> (last visited Oct. 29, 2013).

justification in a territorial attachment that took place so long ago could cause massive political instability and widespread violence.¹⁴¹

The second case of injustice that is proposed by the corrective right does not apply to Catalonia either. Today, Catalonia does not suffer of violations of fundamental human rights by the Spanish State.¹⁴² The main arguments that justify the right to secession of Catalonia are: First, an argument that demonstrates that Catalonia is subdued due to a discriminatory, grave, and permanent redistribution, and second, there has to be an argument that demonstrates that Spain consistently denies granting the suitable autonomy for Catalonia within the Spanish State.¹⁴³

Regarding the discriminatory redistribution, we must take into account that in practically all states that are engaged with the well-being of all of their citizens will have a considerable redistribution of their regions.¹⁴⁴ Unless we reject the idea of a state engaged in the well-being, we must accept the redistribution.¹⁴⁵ In order to determine whether the unjust redistribution is legal under the corrective right, we must also determine whether it is unfair or discriminatory.¹⁴⁶

In 2012, the Catalanian parties agreed and demanded the payment of the 11,000 million Euros owed to Catalonia by the Spanish government.¹⁴⁷ This debt comes from the decisions made in Madrid that will cost Catalonia 2,428.9 million Euros.¹⁴⁸ In addition, we must add the former the debt which amounts to more than 8,605.4 million Euros, as well as other outstanding debts, such as the competitive fund, 1,450 million Euros, the investment liquidations, 759 million Euros in 2008, 219 million Euros in 2009, or the efforts of the Generalitat, 235 million Euros in the dependency law or 70 million Euros in abortion law.¹⁴⁹

To these numbers, we must add a report published in the Spanish Studies Institute's periodicals under the sponsorship of the Spanish Confederation of Corporate Organization. This report concludes that the

141. Buchanan, *supra* note 138.

142. *Id.*

143. Buchanan, *supra* note 79.

144. Buchanan, *supra* note 138.

145. *Id.*

146. *Id.*

147. M. Bataller & O.A. Etxearte, *Los Partidos Exigen que el Estado Pague lo que Debe a Cataluña* [The Parties Demand That the State pays What it Owes to Cataluña], ESTADOCATALAN (July 1, 2013, 3:15 PM), <http://estadocatalan.wordpress.com/2012/03/29/los-partidos-exigen-que-el-estado-pague-lo-que-debe-a-cataluna/> (last visited Oct. 29, 2013).

148. *Id.*

149. *Id.*

current funding system is insufficient, unfair, and unclear in its functioning.¹⁵⁰

Even when taking this information into account, which is favorable for Catalonia's position, we must also look at other information such as presented by Free Market. According to this publication, the Generalitat received an autonomous share four times higher than the one received by Madrid's Government, or 60% compared to 17%, respectively.¹⁵¹ The conclusion that this information presents is that discriminatory redistribution is currently happening. Further, it concludes that it is severe enough to justify the radical response of secession, even though it may be harder than it appears.¹⁵²

Another strong argument for Catalonia's unilateral secession is that Spain has not acted in good faith when responding to the demands of an increased level of intrastate autonomy.¹⁵³ The Spanish Government has refused to negotiate with Catalanian nationalists.¹⁵⁴ When faced with current demands by the Catalanian Government, the Spanish Government has limited itself to repeating that a referendum would be constitutionally illegal, and that it would do anything necessary to prevent it.¹⁵⁵ If the Spanish Government continues to refuse the referendum while not presenting another viable alternative, Catalonia's Government will have to look for international support, e.g., the United Nations, or regional, e.g., the European Union (EU), in order to pressure Spain to cooperate.¹⁵⁶ Nevertheless, the EU could refuse to help because it would fear the creation of precedent and be called to intervene in more auto-determination conflicts.¹⁵⁷

Even though doubt exists as to the support or mediator role the EU could have, there are also doubts as to whether a Catalanian State would be

150. Luis Izquierdo, *Un Informe Difundido por el CEOE Admite Discriminación con Cataluña* [A Report Circulated by the CEOE Admits Discrimination Towards Cataluña], LAVANGUARDIA.COM (June 30, 12:37 PM), <http://www.lavanguardia.com/politica/20130603/54374623627/informe-ceoe-admite-discriminacion-catalunya.html> (last visited Oct. 29, 2013).

151. *Las Mentiras de Mas: la Inversión en Cataluña Casi Triplica la Media Nacional* [Mas's Lies: The Investments in Cataluña Almost Triple the National Median], LIBREMERCADE (July 1, 2013, 9:27 PM), <http://www.libremercado.com/2013-01-08/artur-mas-insiste-en-la-falacia-de-que-el-estado-maltrata-a-cataluna-1276478669/> (last visited Oct. 29, 2013).

152. Buchanan, *supra* note 138.

153. *Id.*

154. Connolly, *supra* note 7, at 59.

155. *Id.*

156. Buchanan, *supra* note 79.

157. *Id.*

accepted as an EU Member.¹⁵⁸ During an interview in 2012, the President of the European Commission, Jose Manuel Barroso, said that a State that separated from an already-existing Member State would have to apply for admission to the EU by itself, following all the proper procedures.¹⁵⁹ Even though there is no precedent or communitarian agreements on the subject, international law and the practice of international organization seem to support Barroso's opinion.¹⁶⁰

The legal uncertainty of the still-fictitious secession ranges from the continuity of European rights to Catalanian citizens, until the state is re-admitted.¹⁶¹ Furthermore, Catalonia's currency is the Euro¹⁶² and its border control is ruled by the Schengen Agreement.¹⁶³

In conclusion, Catalonia must present strong arguments based on an uneven or unfair redistribution, or the denial of the Spanish Government to hear its demands. Even taking that into account, the future of a unilateral secession is uncertain, both under the international and EU legal frames.

D. Independence—Association

"Independence not always means that Catalonia has to completely leave Spain," according to Perez Francesh, professor from the Universidad Autonoma de Barcelona.¹⁶⁴ This method would entail in Catalonia having its own government, and then have the liberty to freely associate itself with the Spanish Government, similar to the relationship between Puerto Rico and the United States.¹⁶⁵

Spain relinquished Puerto Rico to the United States in 1898.¹⁶⁶ As a result, Puerto Rico became a territory of the United States, and as such, it became one its assets.¹⁶⁷ In the 1901 case of *Downes v. Bidwell*, the United States Supreme Court established that Puerto Rico was an unincorporated

158. *Id.*

159. *Id.*

160. Connolly, *supra* note 7, at 84.

161. *Id.*

162. *Id.*

163. *Id.*

164. Salgado, *supra* note 72.

165. *Id.*

166. Yolimari Garcia, *Puerto Rico: A U.S. Unincorporated Territory or a Protectorate?*, SUITE101.COM (July 2, 2013, 4:17 PM), <http://suite101.com/article/puerto-rico-a-us-unincorporated-territory-or-a-protectorate-a348597> (last visited Oct. 29, 2013).

167. *Id.*

state.¹⁶⁸ In this case, Samuel Downes, owner of Downes & Company, imported oranges to New York, and was obligated to pay taxes under the Foraker Law.¹⁶⁹ His claim was that Puerto Rico was a U.S. territory, and thus, subject to the Uniformity Clause of the Constitution, which establishes that all taxes would be uniform throughout the entire nation.¹⁷⁰

Since the tax for oranges did not exist anywhere else in the United States, it could not exist for Puerto Rico.¹⁷¹ In its decision, the Court held that new territories that are attached were not under the scope of Article I, Section 8 of the U.S. Constitution.¹⁷² Today, the political status of Puerto Rico is uncertain.¹⁷³ Although their defense and military issues are under United States control, Puerto Rico maintains their own governmental branches, economy, and post offices, all while still being considered Americans.¹⁷⁴

Taking into account that the increase in Catalonian nationalism has coincided in time with the current economic downturn, and the constant economic and fiscal policy disagreements under the Spanish rule, a type of association where Catalonia is still under Spain's control is highly improbable.¹⁷⁵

V. THE VIABILITY OF THE CATALONIAN STATE

The purpose of this section is not to analyze every economic, social, and cultural aspect that could affect the viability of a Catalonian State. It is imperative, however, to analyze some of the key facts and commentaries in the event that Catalonia does become an independent state.

A. Pension Rights

Catalonia would be able to afford its pension and unemployment compensation as an independent State, according the calculations of the

168. *Downes v. Bidwell*, 182 U.S. 244, 341 (1901).

169. *Id.* at 247.

170. *Id.* at 249.

171. *Id.* at 247.

172. *Id.* at 310.

173. See generally *Gobernador de Puerto Rico Solicita a Estados Unidos Definir el Estatus Político de la Isla* [Puerto Rico's Governor Request for the United States to Define the Political Status of the Island], TELESUR (Aug. 1, 2013, 9:25 AM), <http://www.telesurtv.net/articulos/2013/08/01/solicitan-a-estados-unidos-definir-el-estatus-politico-de-la-isla-2536.html> (last visited Oct. 29, 2013).

174. Garcia, *supra* note 166.

175. Salgado, *supra* note 72.

Economic Ministry.¹⁷⁶ If Catalonia had had its own Social Security between 1995 to 2010, it would have accumulated more than 24,774 million Euros. Catalonia, however, contributes 19.2% of the social contributions to the Spanish State, and it only receives 17.3% of the benefits.¹⁷⁷

B. Exports and Their Importance for Catalonia's Economy

Exports constitute an important part of the growth of any economy. They are especially important for regional economies, which because of their small size, depend in great part on the rest of the world in order to conduct trade.¹⁷⁸ The nationalists present information that demonstrates that in 2012, Catalonia exported merchandise in value of 58,282.9 million Euros, 5% more than the previous year.¹⁷⁹ In addition, they allege that in 2011, for the first time in history, sales to other countries were more than the rest of Spain combined.¹⁸⁰ According to evaluations made in this field, the openness of the Catalanian economy is comparable to that of countries like Denmark.¹⁸¹ The nationalists use this information to help explain that if there were a Spanish boycott on their economy, less than half of the Catalanian economy would be affected.¹⁸²

The Catalanian economy has an important weight in the Spanish economy.¹⁸³ The total Catalanian population (approximately 7,539,618) accounts for about 16% of the total Spanish population (approximately

176. *L'Estat Català Disposarà D'una Seguretat Social Pròpia i Viable que Pagui Pensions i Prestacions D'atur?* [The Catalanian State Will Dispose of It's Own Viable Social Security Which Will Pay the Pensions and Loans], ELCLAUER.CAT (June 29, 2013, 8:29 PM), <http://www.elclauer.cat/LEstat-catala-disposara-duna-Seguretat-Social-propia-i-viable-que-pagui-pensions-i-prestacions-datur/animated/preguntes/41.html#.UfwEQhbKJER> (last visited Oct. 29, 2013).

177. *Id.*

178. Clemente Polo, *El Peso de las Exportaciones en la Economía Catalane* [The weight of Exportations in the Catalanian Economy], in *LA CUESTION CATALANA HOY* 57, 60 (Instituto de Estudios Económicos ed., 2012).

179. *Les Exportacions Catalanes Serán Suficientes per Esquivar un Hipotètic Boicot del Mercat Espanol a Una Catalunya Independent?* [Will the Catalanian Exportations be Enough to Avoid a Hypothetic Boycott from the Spanish Market Towards the Independence of Catalunya?], ELCLAUER.CAT (June 29, 2013, 8:41 PM), <http://www.elclauer.cat/LEstat-catala-disposara-duna-Seguretat-Social-propia-i-viable-que-pagui-pensions-i-prestacions-datur/animated/preguntes/41.html#.UfwF5xbKJET> (last visited Oct. 29, 2013) [hereinafter *Les Exportacions Catalanes Serán Suficientes*].

180. *Id.*

181. *Id.*

182. *Id.*

183. Polo, *supra* note 178, at 57.

47,190,493).¹⁸⁴ The National Statistics Institute establishes the GDP in 200,323.5 million or a GDP of 18.7% in 2011.¹⁸⁵ For this reason, Clemente Polo, Professor from the Universidad de Barcelona, considers that Spain continues to be an important part of the Catalonian economy, and thus an eventual independence could put the well-being of an important portion of the population at risk.¹⁸⁶

For this reason, nationalists tend to go back to the campaign against cava sales in 2004, a period in which sales dropped 10%.¹⁸⁷ Some experts calculated that Catalonia's GDP would be reduced by 4%, and approximately 13,000 jobs would be lost as a consequence of a 40% boycott by consumers and 20% of the business in the case of independence.¹⁸⁸ In the nationalist's words, the experts admit that these are worst-case scenarios. It is further presumed that in an agreed independence, the hostility level would be lower than that experienced in 2004, when the tension between the Generalitat and the central government started to take shape.¹⁸⁹

IV. CONCLUSION

It is very hard for the international community to disregard the push toward the Catalonian independence.¹⁹⁰ Secession goes against the two pillars of the State system: Sovereignty and territorial integrity.¹⁹¹ For this reason, the first conclusion is that the secession process is uncertain and tortuous. It is uncertain because international and state legislation do not support a unilateral secession in Catalonia. It is tortuous because the citizens of this new and old state could be affected economically, and they could potentially lose their rights, as would be the case if Catalonians are forced to leave the EU.

The second conclusion that can be reached is that the secession process in Catalonia is more uncertain and tortuous than it would be in Scotland, given the Spanish Government's refusal to negotiate. The Generalitat's Government attempted to negotiate a fiscal pact after Catalonia's National Day manifestation. The pact was supposed to give

184. *Id.*

185. *Id.*

186. *Id.*

187. *Les Exportacions Catalanes Serán Suficientes*, *supra* note 179.

188. *Id.*

189. *Id.*

190. *See Connolly*, *supra* note 7, at 67.

191. *Id.*

greater financial autonomy and self-government without secession. However, the lack of dialog by the Spanish Government has made forced Catalonia's demands to reach the point of asking for nationalization and secession from Spain.

Europe has not made any pronouncements as to how it will act in the event that Catalonia were to declare its independence in a unilateral manner. Will Catalonians be forced to leave the EU? Will they lose the Euro as their currency? Will they lose their communitarian rights? The EU should make a pronouncement in the matter and open the communication between Spain and Catalonia. If secession is inevitable, it is better that it is done under EU terms as opposed to unilaterally between Spain and Catalonia directly.