

Federalism Monitor

Territorial Conflict in the Spotlight: Unveiling Paths to Territorial Clarity

Marc Sanjaume-Calvet ^{*}, **Lesley-Ann Daniels** ^{†,‡}, and
Pau Bossacoma Busquets [§]

^{*}Universitat Pompeu Fabra, Spain

[†]University of Oslo, Norway

[‡]Institut Barcelona d'Estudis Internacionals, Spain; ldaniels@ibei.org

[§]Universitat Oberta de Catalunya, Spain

The tensions between centralization and autonomy inherent in territorial conflicts can give rise to entrenched positions and stalemate. This Federalism Monitor article describes an attempt in Catalonia to find new ways to resolve the Spanish-Catalan conflict over self-determination, which culminated in a referendum and unilateral declaration of independence in 2017, followed by a backlash by the central authorities, including the suspension of political autonomy. We summarize the context, contents, and potential impact of the Report on the Clarity Agreement (2024). Our analysis draws on our experiences as members of the plural and independent council of academic experts appointed by the Catalan Government to produce the report. This experience, we argue, can guide and inspire other experiences of conflict resolution by offering a description and analysis of this case, which has many generalizable features.

Introduction

Multinational democracies are no strangers to political conflict, especially when minority nations seek to either “enhance, or at least preserve, their territorial autonomy” or renegotiate their relationships with other political communities or the central state itself (Lecours, Brassard-Dion, and Laforest 2021, 1). Resolution of such conflicts can require changes to the powers, institutions, and procedures of self-rule and shared rule, as well as recognizing national, linguistic, or other forms of cultural pluralism, which may challenge the unitary vision of the state. However, central institutions, usually representing the majority or larger nation, often lack incentives to negotiate and accommodate territorial minorities. Political preferences and legal provisions can sometimes seem irreconcilable, which can result in

Publius: The Journal of Federalism volume 55 number 1, 201–221

<https://doi.org/10.1093/publius/pjae023>

Advance Access publication 30 July 2024

© The Author(s) 2024. Published by Oxford University Press on behalf of CSF Associates: Publius, Inc.

This is an Open Access article distributed under the terms of the Creative Commons Attribution License (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted reuse, distribution, and reproduction in any medium, provided the original work is properly cited.

entrenched positions and increased polarization. Although there are multiple forms of territorial accommodation, the process of reaching agreement on an arrangement that is satisfactory to all parties is often fraught. In such situations, it is useful to explore alternative ways forward that can center democracy and the will of the people (or peoples). This article describes such a process in the case of Catalonia.

After the transition to democracy in 1978, Spain granted some autonomy to national minorities, but without becoming a federal state.¹ The Spanish constitution is based on the “indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards,” which also “recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed.”² The different aspirations exposed by these two statements have led to years of conflict over self-determination in Catalonia (Bossacoma Busquets and Sanjaume-Calvet 2019; Castellà 2018; Cuadras-Morató 2016; McRoberts 2022).

In a context of increasingly polarized debate and perceptions of zero-sum options, in April 2023, the Catalan Government decided to commission a report from an independent committee of academics, named the Academic Council for the Clarity Agreement.³ This approach aimed to be a novel attempt to address the problem in a more inclusive, sophisticated, and nuanced way. A previous commission, the Advisory Council on the National Transition, set up by the Catalan Government in 2013, was more factional, since most of its members were secessionist and more one-sided since its reports “identified the crucial aspects in order for Catalonia to become a State of its own with full guarantees.”⁴ By contrast, the 2023 Council was a political novelty. The Catalan Government appointed a plural and independent Academic Council⁵, bringing together scholars from different universities and, most importantly, different views on the conflict.⁶ The authors of this Federalism Monitor article were privileged to be part of the Council and write in their personal capacities with an insider view.

The Council’s members were to consider a potential agreement between Catalonia and the Spanish authorities that would resolve the territorial conflict. The Council’s advice was to be organized around five specific questions on the characteristics, mechanisms, actors, and institutions of a potential agreement, and the role of referendums as well as their characteristics. These questions were led by the notion of Clarity, inspired by the Canadian Supreme Court’s 1998 Quebec Secession Reference.⁷ While the Reference essentially refers to the clarity of the question and quorum of the Quebec secession referendum, the Academic Council’s Report significantly broadens the scope of the notion of clarity to include the political ideal that the relevant parties of a territorial conflict should agree the rules of the game in order to satisfy the general idea of fair play.⁸

For the Government of Catalonia, the Report was intended to serve as a basis for guiding the political, social, and civic debate. Its final aim was to “articulate a

solution to the political conflict that, from an inclusive, democratic, and internationally-recognized perspective, allows the citizens of Catalonia to decide the political future of the country.”⁹ Over the course of 6 months, the Academic Council worked on the questions posed by the Catalan Executive and produced by consensus a public report on the issue.¹⁰

Our objective in this Federalism Monitor article is twofold. First, we aim to make the Academic Council’s Report known beyond the Catalan and Spanish academic community. Additionally, drawing on our roles as scholars involved in writing the document to describe the making of the Report, we seek to inform other situations of territorial accommodation. The article is structured as follows. First, we contextualize how the Report was commissioned within the framework of the conflict. Second, we describe the process of elaborating the document and then summarize the ideas of the Report. Third, we evaluate the public impact after its publication and the reception from the Catalan and Spanish actors. Finally, we reflect on the potential future influence of the Report, both internally in Spain and in other situations where territorial relations are contested.

The Political and Legal Context of the Report

Over the last two decades, an intense conflict on the constitutional status of Catalonia has been a defining feature of Spanish politics. One important catalyst for this conflict was the controversy arising from a 2006 reform of the Statute of Autonomy for Catalonia. The reform, which developed from a 2005 proposal of the Catalan Parliament, incorporated a number of enhancements to territorial autonomy, including the recognition of Catalonia as a nation, the foundation of its self-government on the historical rights of the Catalan people, the specification of many precise matters over which the Catalan government was meant to genuinely have exclusive competence, and the improvement of fiscal autonomy. Passed with important cuts by the Spanish Parliament in 2006, the reform was ratified by a referendum in Catalonia. Yet in 2010, the Spanish Constitutional Court deactivated several key components of this reform, effectively reducing Catalan autonomy. This series of events was perceived by the political elites and public opinion in Catalonia as indicative of an impasse in the existing political mechanisms for change within the existing constitutional setup. Alternatives such as self-determination and secession became more seriously considered as options in the Catalan political arena.

The conflict escalated when several main Catalan parties adopted popular demands on holding a referendum on independence. When central Spanish authorities refused to accommodate these demands, the Catalan Government, backed by a fragile majority in the Parliament of Catalonia, chose a unilateral strategy to achieve independence by organizing self-determination referendums in

2014 and 2017 and declaring independence in October 2017. As a result, the central Government dismissed the Catalan Government and imposed direct rule from Madrid. New elections in the region were held, which produced a new pro-independence majority; and members of the Catalan Government and Parliament, as well as civil leaders and activists, were prosecuted and imprisoned under accusations of serious crimes, such as rebellion and sedition (Bossacoma Busquets 2021; López and Sanjaume-Calvet 2020).

Since 2017, self-determination and the pro-independence objective have remained the official demand of the regional Government and a Parliament majority, but there has been little room for maneuver to resolve the conflict. On the one hand, the Catalan sovereigntist coalition that once gathered the main pro-independence parties from left and right and backed a common unilateral strategy has become less coordinated since 2017 and did not rebuild a common strategy. Instead, part of the pro-independence movement has remained officially loyal to the unilateralist strategy (*Junts per Catalunya* [Together for Catalonia] and CUP [*Candidatura d'Unitat Popular*: People's Unity Candidacy]) while a more moderate approach was gradually adopted by another party (ERC [*Esquerra Republicana de Catalunya*: Republican Left of Catalonia]). Thus, there is a fracture between ERC, who moved its position away from a pro-independence unilateral strategy, and Junts, who has radicalized and pushes for independence. Meanwhile, ERC became the leading party within the pro-independence block, albeit by a small margin. This situation allowed for a more incremental approach towards seeking an agreement with the Spanish Government and was a facilitator of the political space for the Clarity Report.

On the other hand, the Spanish Government did not address any territorial demands and used a “law and order” approach, although this slowly changed with the new Spanish premiership. In June 2018, the socialist party (PSOE [*Partido Socialista Obrero Español*: Spanish Socialist Workers' Party]) came to power in coalition with *Podemos* [We Can] through a vote of no confidence, which required the support of the ERC deputies.¹¹ This change in Spanish leadership and its continuation after the 2019 and 2023 elections has slowly opened up some space for exploring a conflict-resolution approach. These initiatives include an official strategy for Catalonia of the Socialist Government called “*Agenda para el reencuentro* [Getting-together Agenda]”¹², along with the one adopted by the Catalan Government in commissioning the Report.

Additional contextual factors also helped a conflict-resolution approach. In 2021, the Spanish Government pardoned nine jailed Catalan leaders. This gesture and the political collaboration marked a significant change from the previous approach of the Conservative Government of the PP [*Partido Popular*: People's Party], and even the former stance of PSOE itself, which had supported direct rule from Madrid and criminal prosecution of pro-secession leaders and activists.

Furthermore, several statements made by European institutions during the conflict also echoed the need for dialogue. In October of 2017, the European Parliament held a debate on the Constitution, the rule of law, and fundamental rights in Spain, where the President of the Parliament called in the conclusions for “a calm and profound reflection that will encourage dialogue in Spain.”¹³ The same month, the High Commissioner for Human Rights, Zeid Ra’ad Al-Hussein, and the European Commission released statements calling for “all relevant players to now move very swiftly from confrontation to dialogue.”¹⁴ Four years later, the Council of Europe issued a resolution addressing the question: “Should politicians be prosecuted for statements made in the exercise of their mandate?” The Council’s answer to this question was that “Everyone, and in particular politicians, has the right to make proposals whose implementation would require changes of the constitution ... even independence.” In a section specifically on Spain, the resolution criticized the use of criminal law against the Catalan politicians and called on the Spanish authorities to “enter into an open, constructive dialogue with all political forces in Catalonia.”¹⁵

At the same time, the change toward a conflict-resolution approach adopted by the Catalan Government faced, and still faces, important obstacles. Despite the political shifts in Madrid, a potential change in the constitutional status of Catalonia had, and still has, little political support among Spanish parties. The PSOE did not include any provision for constitutional change for Catalonia in its electoral agenda. Moreover, the emergence in 2019 of an extreme-right party, *Vox* [Voice], generated even more polarization on the issue at the national level (Barrio and Rodríguez-Teruel 2017; Ferreira 2019; Sanjaume-Calvet and Riera-Gil 2022).

In parallel, following the events of 2017, Catalan voters and political parties after 2017 became more polarized (Balcells, Daniels, and Kuo 2023a, b). For example, in the 2017 Catalan elections, celebrated after the imposition of direct rule from Madrid, it was a unionist party that won the most seats. Despite this, the pro-independence parties were able to revalidate their parliamentary majority and form a new cabinet.

The legal aspect of the conflict is also crucial for understanding the obstacles to its resolution. The response from the Constitutional Court to the unilateral strategy pursued by the pro-independence coalitions in Catalonia erected a jurisprudence that made secession, including a non-binding referendum on this matter, close to impossible in practical terms. On the basis of the existing jurisprudence on the Basque case (2008) and the ruling on the Catalan Statute of Autonomy (2010), the Constitutional Court responded to the unilateral declarations and actions from the Catalan Parliament and Government by deepening a restrictive interpretation of the Constitution on territorial self-determination. On the one hand, the Constitutional Court recognized the Catalans’ right to decide as a legitimate political aspiration if pursued in accordance with the Constitution including its

amending procedures, while reiterating that Spain is not a militant democracy. On the other hand, in several decisions,¹⁶ the constitutional judges defined Spanish sovereignty as strictly belonging to the entire Spanish people and narrowed the path for holding a referendum on independence. Therefore, this constitutional jurisprudence emerged as an important obstacle to even a potential agreed procedure without a prior constitutional revision.

Finally, the events that took place in 2017 demonstrated the essentially domestic nature of the conflict. In spite of several recommendations calling for dialogue and a political agreement, the European and international institutions remained silent on the appeals for recognition from the Catalan Government and did not get involved in what, according to the European institutions, was judged a domestic affair (Holesch and Jordana 2023). Therefore, except for aspects related to individual rights and legal prosecutions, the political conflict was framed as a problem to be solved within Spain by the Spanish peoples and institutions.

The Origins of the Clarity Report

In September 2022, the President of Catalonia, Pere Aragonès, addressed the Catalan Parliament with these words: “In the context of negotiations with the State, we are addressing how to end repression and return the conflict to politics . . . We must begin to outline how we respond to the will of the citizens of Catalonia to decide their future democratically. Therefore, I want to propose a *clarity agreement* with the State, an agreement that identifies when and how Catalonia can exercise the right to decide again, as Canada and Quebec have done, and how we can reach an agreement on how to vote again, as the UK and Scotland knew how to do.”¹⁷

The idea of a clarity agreement came from the dispute on Quebec sovereignty in Canada. After many years of negotiations in the 1990s and two failed referendums, the Federal Government requested the Supreme Court’s advisory opinion on a potential new referendum in Quebec. The Court produced a Reference (*Reference Re Secession of Quebec* 1998) defining the dispute as a political one, excluding a unilateral right to secede for Quebec, but construing an obligation to negotiate in the case of a clear pro-secession majority answering a clear question (Mathieu and Guénette 2023). This Reference remains a landmark in the comparative politics of self-determination and secession claims in liberal democracies. In fact, the Reference is a rare but remarkable accommodation of secessionism through judicially made constitutional doctrine, and thus over the years has been an object of analysis in academia and has had a crucial impact in many territorial debates and conflicts as source of inspiration (Delledonne and Martinico 2018).

Against the background of a lack of strategic coordination among pro-sovereignty parties, in April 2023, the President of Catalonia formed an independent Academic Council to write a Report on a clarity agreement. The

group drew on scholars in the fields of law and political science, including specialists in constitutional law, conflict resolution, secession, federalism and multi-level democracy, and democratic theory. In the selection of the members, the overriding priority was to construct a plural group and so the selection criteria did not have predetermined constraints, and specifically did not require candidates nominated by external parties, such as political parties, parliamentary groups or the Spanish Government, nor the deliberation of the appointments in Parliament.¹⁸

This Council was also distinctive for the plurality of views on secession and self-determination amongst its members. Several members had public profiles in both traditional and social media, and their views were known to the general public. Having said that, unionists and secessionists were never expressly counted. Indeed, in one exchange within the group, one member expressed the view that unionists were a majority within the Council, yet in the eyes of another member secessionists were the majority. Certainly, there was no clear-cut split (even less clear factions) between unionists and secessionists. A feature that was probably more important is that there was an overwhelming majority of moderate positions regarding both secession and union within the Council, and a grand consensus emerged in the need to pursue negotiated and agreed solutions to territorial conflicts like the one in hand.¹⁹ It seems that agreement and consensus can be more easily reached between moderate positions supporting different territorial preferences than between moderate and radical secessionists.

Crafting the Report

The Catalan Government agreed to five guiding questions to be addressed in the Report (table 1), which were previously discussed with the members of the Council

Table 1 The five questions to be addressed in the Clarity Report

Question 1	What characteristics should a clarity agreement with the Spanish state include in order to resolve the political conflict?
Question 2	What mechanisms exist in comparative politics that could provide solutions to the political conflict?
Question 3	Which political actors and institutions should take the initiative in order to implement these solutions?
Question 4	What role should a referendum on the political future of Catalonia, or other similar mechanisms, play in resolving the political conflict?
Question 5	What characteristics should a referendum on the political future of Catalonia, or other similar mechanisms, fulfill in order to obtain the maximum legitimacy and inclusiveness and ensure its validity and implementation?

who proposed several successful amendments. For instance, a member of the Council that is also authoring this article recommended to open the questions to alternative mechanisms beyond the referendum.

The answers to these questions were left entirely to the Academic Council. Nevertheless, the Government made clear that the answers were to be accessible, not written in an overly academic tone, and directed to inform a public debate among citizens and parties on the future constitutional status of Catalonia. Throughout, the questions put to the Council and the profiles of its members were made public and widely discussed in the media.

During a half-year period, from April to September 2023, the Academic Council gathered several times to discuss in successive sessions the contents of the answers to the five questions. The logistics of the gatherings meant the Council met regularly both virtually and in person. The Council held eleven plenary meetings during these months, along with a multitude of sub-group meetings. The guidance from the Government, posing five specific questions on the issue, presented both advantages and disadvantages. In prior discussions, Council members encouraged the Government to keep the questions open, for example, not limited to a referendum, in order to allow more leeway for the future answers of the Council. This meant that the questions were somewhat ambiguous and allowed for different interpretations. However, having prior questions allowed for a more focused discussion without having to debate a definition of the framework of the Report or discuss what it should contain. The first three questions seemed to be open to a variety of potential institutional solutions, including self-government within the current system, while the fourth and fifth questions directly referred to a referendum (and analogous mechanisms).

An initial task of the Council, once the questions were agreed, was to discuss the scope of the answers and the whole Report. During this phase, the Council members expressed their concerns regarding a multitude of issues including the objectives, characteristics, procedures, majorities, and other technical details. Several aspects, such as definitions of the causes of the conflict, the subjects involved, and the objective of the conflict-resolution approach, raised important discrepancies of view. Some of these issues, such as the causes, were not ultimately dealt with in the Report. Silence and vagueness are techniques for seeking consensus, while also leaving space for different interpretations to coexist and agreed implementations to find their way through negotiation between political representatives.

The Council agreed from the very beginning to draft (if possible) a consensual report, i.e., a report without individual opinions but expressing a plural view on the conflict and its potential solutions. This consensual objective made it close to impossible to address some issues such as the nature of the conflict or its historical roots and immediate causes, including, for instance, the debates on the evolution of

the Spanish State of Autonomies and the controversial reform of the Statute of Autonomy of Catalonia. The diversity of views on the definition of the political subject and its objectives were also too difficult to reconcile and therefore were left outside the Report.

However, the consensual approach to the creation of the Report allowed for a more pragmatic discussion. Arguably, the confidentiality of the meetings and deliberations of the Council made a consensual result more achievable. Time also helped: initially, the Government wanted a report done in less than 3 months (before municipal elections), but one of the members of the Council and authors of this article warned that consensus between academics with different views is likely to take time to emerge, especially to put into a well-argued report. It finally took 6 months for the Report to be issued.²⁰

Initially, each question was taken on a voluntary basis by a small team of two or three with knowledge of the topic in hand. The plan of work was for these groups to draft an answer and then discuss amendments in plenary sessions with the rest of the Council. This procedure allowed for a more precise discussion in the small groups, drawing on specific expertise, followed by a debate that allowed input from the whole Council, ensuring a broad representation of views and ownership of the Report as a whole. The Council did not have staff to assist with the Report. This brought advantages for confidentiality and creating trust and collegiality within the Council. Yet it also meant that the Report took a significant time commitment, such that some members were more actively involved than others.

Due to differences in experience and time available, and because drafting each answer by different teams posed a challenge to the global coherence of the text, a more centralized approach was taken in the production of the final report. Tasks were concentrated on a small team of two members: one (who we could call the *diplomat*) facilitated agreement through persistently negotiating bilaterally or in small groups; the other (who we could call the *drafter*) put forward written formulas that expressed the agreements reached in these smaller-group negotiations or that had the potential to reach consensus, taking into account any disagreements during the meetings of the Council. We expect that similar concentration of labor takes place in other such collective bodies, especially when they are created for a single, specific task and without qualified staff to assist. Political initiatives that create this kind of ad hoc group of academics in the field of law and politics should keep these insider issues in mind.

The Content of the Clarity Report

The Report on the Clarity Agreement, unanimously adopted by the Academic Council, is focused on conflict resolution. It seeks to widen the horizon of possibilities of how to make the agreement between opposing forces more

attainable, including both the accommodation within the Spanish state and the accommodation of the willingness to separate from it. The Report does not draw a specific roadmap. Rather, it argues that ways forward must be proposed and agreed upon by democratic representatives and discussed in the public domain. In other words, it offers theoretical keys and practical tools for a sophisticated and fruitful debate to be generated amongst both institutions and citizens.

In the following paragraphs, we provide a summary of the answers the Academic Council has given to the five questions asked by the Government.

Question 1: What Characteristics Should a Clarity Agreement with the Spanish State Include in Order to Resolve the Political Conflict?

A clarity agreement should include two distinct, yet closely related, elements: first, the definition of a legitimate mechanism of expression of preferences in relation to the territorial organization and, second, the political and institutional consequences of expressed preferences. A clear demand for independence would generate an obligation to negotiate an eventual separation or a new constitutional accommodation.

The principles that should guide a clarity agreement, as the Supreme Court of Canada upheld in its celebrated Quebec Secession Reference, are those of democracy, constitutionalism and the rule of law, as well as federalism and the protection of minorities. The Report aims, therefore, to incorporate into the Catalan-Spanish context this Canadian jurisprudence, which has become a recognized guide for addressing deep territorial conflicts. After explaining these principles, the Report notes that there should not be a hierarchy between them as they should be in harmony.

A clarity agreement, the Report argues, should aim for legitimacy and viability. In principle, reaching an agreement between opposing parties is a decisive factor in terms of both legitimacy and viability. A potential agreement that is legitimized by both sides will be more viable. At the same time, if the agreement is viable, it will have greater legitimacy, since it will be perceived as an adequate and effective means to manage or resolve the conflict.²¹ Conversely, an agreement that is unlikely to be implemented or that is reached in bad faith will not be perceived as legitimate.

Question 2: What Mechanisms Exist in Comparative Politics That Could Provide Solutions to the Political Conflict?

To answer this question, the Report draws on a wide variety of examples, including:

- The UK, Scotland, Northern Ireland, and Wales;
- Italy, Austria, and South Tyrol;

- France, Corsica, Algeria, and New Caledonia;
- The United States of America and Puerto Rico;
- Denmark and Greenland;
- Germany, Belgium, and the European Union;
- The Soviet Union and the Baltic Republics;
- Yugoslavia, Serbia, Montenegro, and Kosovo;
- Ethiopia and Eritrea;
- Sudan and South Sudan;
- East Timor;
- Australia; and
- Saint Kitts and Nevis.

As the Report's review of these cases suggests, independence claims have been accommodated through mechanisms such as constitutional or quasi-constitutional secession clauses, constitutional case law, specific laws governing a secession procedure and ad hoc political agreements. Accommodation demands within the current state have often been satisfied through specific laws, constitutional reforms, or international treaties establishing new mechanisms of self-rule and shared rule. While self-rule focuses on the idea of territorial autonomy, the concept of shared rule refers to the participation of sub-state territories in the deliberation and decision-making of central authorities, such as when German *Länder* (states) have representatives in the Bundesrat (upper chamber) who contribute to federal legislation.

The resolution of territorial conflicts is typically long and complex. Although there is no single model but rather a broad range of options, the Report finds that the use of a referendum is common in territorial dispute resolution processes and that these referendums are usually held in the secessionist territory rather than in the whole state. Nevertheless, the parent state often has legitimate interests to participate in the accommodation decision, and it is common for this participation to be channeled through political representation, whether at the executive or legislative level. Finally, in liberal-democratic contexts, legitimate, effective, and lasting solutions usually go through agreed formulas, such as power-sharing institutions and constitutional clauses derived from multilateral accords.

Question 3: Which Political Actors and Institutions Should Take the Initiative in Order to Implement These Solutions?²²

The Report distinguishes between primary and secondary actors. Primary actors should play a leading role in the proposal, negotiation or implementation of a clarity agreement. The legitimacy of such an agreement is linked to the principles of democracy and federalism, in the sense that they represent or express democratic preferences linked to the respective territorial spheres. These primary actors are the

corresponding governments, parliaments, and citizens. The secondary actors mentioned in the Report are local authorities, supra-state bodies, the rest of the Spanish autonomous communities, the courts and, particularly, the Constitutional Court.

The Report devotes particular attention to the Constitutional Court, as its role has been, and may well be, essential in terms of the legitimacy and viability of a clarity agreement. In addition to its major legal role, the Court's prominence and authority in territorial conflict has been reinforced by the main state-wide political parties. With repeated rulings, this top court in Spain has forged a jurisprudence that requires a previous constitutional amendment to hold a referendum whose response would entail a constitutional revision. Accordingly, not only major territorial changes involving sovereignty and secession are to follow the most stringent amending procedure, but such a constitutional amendment is also needed to call a referendum on these issues. Given that this case law has been erected in order to prevent Basque and Catalan unilateral projects and actions, the Constitutional Court could nuance or ignore it if an agreed route for resolving the conflict was challenged before this court.

The Report also highlights the importance of individual or institutional mediators, who are increasingly present in conflict-resolution processes. Mediation is often rejected by the larger and more powerful party as formalizing the process. However, mediation conversely can allow for back channel contacts and exploration of possible points of agreement, opening up more creative solutions. For example, mediators can find areas of common ground between parties that they can admit in a one-on-one private setting but would not recognize in public. Indeed, external or international mediators can bring experience of other resolution processes. Informal mediators may emerge, so the issue may be whether a process of selecting person or body with such a role is recognized, negotiated, agreed, and made public.

Question 4: What Role Should a Referendum on the Political Future of Catalonia, or Other Similar Mechanisms, Play in Resolving Political Conflict?

The Report finds that referendums are mechanisms with great political force and widely used in the resolution of territorial conflicts. Yet not all referendums are alike. As the Report points out, referendums initiating a conflict-resolution process usually serve to identify voters' preferences. By contrast, ratification referendums more frequently perform a legitimizing function. However, in order to fulfill these functions, it is necessary that the referendum be agreed, accepted, and recognized by the relevant parties to the conflict. In other words, it cannot be perceived as a one-sided or biased instrument, as is often the case with unilateral referendums, such as the Catalan independence referendum held on October 1, 2017.

Thus, referendums can be held at significantly different times in the political process in which they are to take place. At the beginning, they can serve to give an initial boost to a deliberating and decision-making process, while at a later time, they can be used to ratify a way to close this process, with the usual purpose of validating a prior decision of democratic representatives. For example, the 2014 referendum on Scottish independence asked the question, “Should Scotland be an independent country?”. The referendum was the result of the “Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland” in 2012, but in case of a Yes outcome of the vote a process of negotiation between governments would have started, with uncertain results. On the contrary, the Catalan Statute of Autonomy referendum in 2006 was held to ratify the text of the Statute and the question was “Do you approve the draft Statute of Autonomy of Catalonia?”. The Report identifies, for the purpose of ordering the debate, several referendum options (table 2). These options are intended to open up the range of possibilities and, in fact, could be implemented in different and complementary ways.

The Report considers that it is reasonable to treat Catalan and Spanish citizens asymmetrically in terms of holding a referendum. While state citizens’ participation is typically channeled within central Government and Parliament, it is common and acceptable that there is direct involvement of sub-state citizenship in a decision about its political future. Participation of all citizens of the whole state, especially at an initial time, could break any possibility of agreement and negotiation, while their participation at a final stage is foreseen in the amending procedures of the Spanish Constitution. In a multinational democracy, we may often find distinct legitimate majorities that may well be territorially overlapped.

If the clarity agreement were to stay away from a referendum, then it would be necessary to identify and agree on an alternative democratic mechanism that would allow for identifying citizen preferences while legitimizing political decisions of the utmost importance. There are analogous mechanisms that could replace the referendum: for instance, a series of elections that meet certain conditions or requirements such as specific majorities of votes and seats in favor of pro-secession political parties, or parties that include secession in their manifestoes. The Report

Table 2 Possible referendum options

(1) an initiating referendum in the sub-state territory	(3) an initiating referendum in the state as a whole	(5) a referendum in the sub-state territory and in the state as a whole
(2) a ratification referendum in the sub-state territory	(4) a ratification referendum in the state as a whole	

also notes that there are complementary mechanisms to the referendum, such as citizens' assemblies, deliberative polls or citizen juries.

Question 5: What Characteristics Should a Referendum on the Political Future of Catalonia, or Other Similar Mechanisms, Fulfill to Obtain the Maximum Legitimacy and Inclusiveness and Ensure Its Validity and Implementation?

While guidelines on good practice provide that referendums must respect the rule of law, it is also appropriate to keep in mind that central authorities can use legality to curb the expression of preferences and the legitimization of options that question the status quo. It is often in the hands of central actors to rewrite or reinterpret this legality in a way that makes a clarity agreement possible. Reaching a compromise is one of the keys to overcoming many of the actual and potential obstacles of referendums and analogous mechanisms.

The Report recommends that the question of the referendum and its response options be short, simple, direct, understandable, neutral, and unambiguous. Regarding participation quorums, the Report argues that, especially in consultations of the highest constitutional importance, it would be acceptable to establish minimum participation quorums in order to ensure that the results of the referendum are significant. However, the Report also warns that these thresholds can generate a strategic campaign in favor of abstention. Approval quorums may also be acceptable in referendums of special political significance. However, requiring a minimum threshold for approval that gives the minority an excessive ability to block this type of constitutional change could harm the principle of equitable voting.

The Report ends with some considerations on the effects of an agreed and legal referendum. If the result is favorable to a change of territorial status in accordance with the agreed requirements, all parties should address its subsequent management under the aforementioned principles. Failure to observe the clarity agreement and the underlying principles animating it could result in unilateral action.

Release of the Report

The Academic Council's Report was publicly released on October 16, 2023. Immediately, the Catalan Government publicly announced that it would adopt one of the potential avenues referred to in the fourth question as its own political option (specifically, the choice of an initiating referendum in the sub-state region). This hasty pronouncement in favor of the Scottish option was an ultimately futile attempt to avoid criticism of not being committed to a referendum from radical pro-secession factions. In trying to satisfy and silence extreme positions, the

Government missed the opportunity to broaden the debate around possible routes to resolve the conflict and failed to involve other actors, such as parliamentary groups.

As of this writing, the path opened by the Report remains unclear. There has been little media coverage and the Catalan Government has shelved the Report and the planned follow-up focus groups and public debate. Thus, its public salience has been low and the prospects of political initiatives related to the Report are scarce. The reasons for this situation are found in the political landscape of Catalan and Spanish politics. The Report was commissioned by a minority government in Catalonia that does not count with the parliamentary strength and leadership to set an agenda in line with the Report.

Spain's shifting political priorities also help to explain the low political impact of the Report. Over the last years, the political agenda has been monopolized by the effects of the repression and the debates and negotiations around the pardon and amnesty of Catalan leaders and activists. Recent developments in Spanish politics are still increasing the salience of this agenda, since in 2023 the Prime Minister Pedro Sánchez was re-elected with the support of ERC and (this time) Junts. The leverage of Catalan pro-independence parties has been mainly used to support an Amnesty Act, a statute that at the time of writing is to be passed by the Spanish Parliament to shield leaders and citizens from criminal liability related to the independence process. Therefore, in this phase of the Spanish and Catalan politics, we see little leeway from a political perspective to turn the debate towards a conflict resolution approach as the one suggested in the Report.

Influence and Limitations

The Report creates possibilities for thawing a frozen conflict. First, this potential can be found in the making of the Report. As explained, the discussion within the Academic Council in itself was a novelty in Catalan and Spanish politics by gathering a diversity of views on a public set of questions on the conflict. It is important to remember that after 2017 Catalan and Spanish societies were increasingly polarized on the solution to the conflict, and the repressive strategy from central authorities, together with the vindication of unilateralism by part of the Catalan secessionist movement, fostered these dynamics.

Second, the Report suggests new paths that have not previously been explored. Since 2012, both the Spanish and Catalan Governments have been unable to find a common ground to address the territorial conflict. In a first phase of the conflict, central authorities repeatedly refused a referendum on independence in Catalonia while the Constitutional Court maintained that this referendum required a previous constitutional revision. Moreover, since this court considers that the constitutional amending procedure to be taken in sovereignty and secession

matters is the most rigid one, this practically makes certain elements of the Spanish Constitution unchangeable. In addition, an agreed referendum has been blocked from the very beginning by the Spanish political majorities, which partly explains why Catalan secessionists have opted for a unilateral strategy since 2015. As a result, the conflict resolution approach suggested in the Report had not been adopted by relevant actors.

Moreover, the Report gives a flexible and gradualist approach to the conflict both in terms of objectives and procedures. The objectives include, as a novelty, a continuum between internal and external self-determination, by introducing the language of accommodation of demands as a substitute for more confrontational approaches (such as unilateral secession vs. union). Even though Catalonia currently has a substantial degree of autonomy, self-determination could involve greater autonomy and even intermediate options in an integrated Europe. Regarding the procedures, the Report refers to the existence of a double (and overlapped) demos (Spanish and Catalan). Both peoples can be involved in the solution, either in symmetric ways (holding a state-wide referendum, for example) or in an asymmetrical fashion (by parliamentary intervention alongside a regional referendum). The Report notes that the latter may well be reasonable and practical. The plural *demos* involvement can be *ex ante*, by intervening as an expression of preferences and legitimacy before the negotiations, or *ex post*, as a veto and source of legitimacy after negotiations. In other words, it can serve either as a catalyst for political action or as a means to ratify a prior agreement. Beyond these novelties, the Report offers a wide range of references to other experiences and does not rule out the possibility of avoiding a referendum in undesirable circumstances or as a political end in itself, and it points out alternative avenues to conflict resolution. Although not the same as referendums, similar mechanisms can be explored as alternatives, such as agreements among representatives or referendary elections. Additionally, complementary instruments for citizen participation and deliberation, such as citizens' assemblies, deliberative polls, and citizen juries, can also be considered.

Finally, the Report acknowledges that, besides the necessity of a minimal political consensus (not unanimity) which constitutes an obvious limit, the current constitutional framework is an important limit as well. The Report is explicitly not a legal document, though does not neglect crucial legal issues since legality emerges as the elephant in the room and a crucial obstacle to be discussed when designing and implementing a clarity agreement. Spain is not Canada. While legal instruments might be adapted to political will, i.e., legitimacy might open legal doors, it is evident that the constitutional jurisprudence produced by the Spanish Constitutional Court during the last years is remarkably restrictive.²³

Will the document be useful in the future? Despite being pessimistic on the potentialities of the Report in Spain in the near future, we do see potential to

impact the debate in the longer term. We draw on parallels with the Bélanger-Campeau Commission established in 1990 in Quebec. This non-partisan commission included federalists and sovereigntists. The report they produced recommended a referendum, which did not take place, but the suggestions informed the future political discourse and the referendum of 1995. We therefore hope that the principles of the Report can inform future dialogue in Spain.

Looking further afield, we are also optimistic about the opportunities in liberal-democratic contexts for territorial conflicts to be addressed in ever more reasonable, negotiated, and agreed ways. The innovations summarized in this Federalism Monitor article stand out as key contributions of the Report and are the take-away lessons from this specific Academic Council that might be useful for similar experiences.

In summary, we would highlight that a Clarity Report can address two interrelated tasks involved in territorial conflict-resolution: determining how territorial preferences can be expressed and establishing the procedures for adopting those legitimately expressed desires. The Report should be underpinned by interdependent principles, in our case, democracy, constitutionalism and the rule of law, federalism and the protection of minorities. We would also emphasize the following key suggestions about the process, drawn from our experience as members of the Council: to bring together a plural committee, to ensure that there is internal commitment to contribute to the debate by opening up new options (which may involve not engaging with the points of difference such as views on the causes of the conflict), to be open and transparent about the terms of the report and the members of the committee but to maintain confidentiality of the discussions, and to recognize that this is a political process and so have a strategy for the implementation of the report. As has already occurred in the inspiring case of Canada and Quebec, the reflections on accommodation and resolution of territorial conflicts should probably aim at the long, rather than the short, term.

Notes

Since ordering alphabetically may have negative implications for authors whose names appear late in the alphabet, this article opts for reversing the alphabetical order. All authors contributed equally. The authors would like to thank the editors and reviewers for helpful suggestions.

1. We refer here to the *de jure* status of the state, considering that the more descriptive notion of a federal state is narrower than the much broader and more normative idea of federalism (see [Tierney 2022](#)). There has been rich discussion about whether Spain should be considered a *de facto* federation or quasi-federation (see, for example, [Colomer 1998](#), [Sala 2014](#), [Fenna and Schnabel 2024](#)).
2. See [Spanish Constitution \(1978\)](#).

3. See the full text of the Report [Sanjaume-Calvet et al. \(2023\)](#).
4. See [Government of Catalonia \(2014\)](#).
5. The members of the Academic Council were: Marc Sanjaume Calvet, Pompeu Fabra University (Chairperson); Mar Aguilera Vagués, University of Barcelona; Eva Anduiza Perea, Autonomous University of Barcelona; Marco Aparicio Wilhelmi, University of Girona; Astrid Barrio López, University of Valencia; Pau Bossacoma Busquets, Open University of Catalonia; Elisenda Casañas Adam, University of Edinburgh; Lesley-Ann Daniels, Barcelona Institute of International Studies (IBEI) and University of Oslo; Josep Lluís Martí, Pompeu Fabra University.
6. Other differences between those councils are that the members of the former had more senior, male profiles than the latter. While the former consisted of mainly full professors, the new one was composed of younger scholars and with more women than men.
7. See [Supreme Court \[SCC\] \(1998\)](#).
8. These rules can either be procedural and substantive, as well as take the form of principles that may apply according to their weight or importance in the particular issue in hand rather than precise rules that apply in an all-or-nothing fashion. A clarity agreement may in this sense be a frame for future, more precise agreements and decisions.
9. See [ACORD \(2023\)](#).
10. See [Catalan News \(2023\)](#).
11. See [BBC \(2018\)](#).
12. See [Spanish Government \(2021\)](#).
13. The debate is available at [European Parliament \(2017\)](#).
14. See [Office of the Commissioner for Human Rights \(2017\)](#).
15. See [Čilevičs \(2021\)](#).
16. See, among others, [STC \(2008, 2010, 2014, 2015, and 2017\)](#).
17. See [Catalan Parliament \(2022\)](#).
18. To give a recent contrasting example, the members of the Expert Commission in charge of drafting the project of a new Chilean Constitution were elected in proportion to the present political parties represented in Parliament by a qualified majority in a single vote in each legislative chamber. See [Ley 21533 \(2023\)](#).
19. While such moderation was probably looked for in the appointment of the members of the Council, it is also true that some potential members with more radical positions declined to become members.
20. It took 6 months to issue the Catalan version, and several more months to issue the Report in Spanish and English, despite the initial intention of publishing the Report in these three languages at the same time.
21. Both legitimacy and viability require the parties to feel bound by a duty to negotiate in good faith. A good faith negotiation takes seriously the agreed rules of procedure and tries to harmonize the corresponding principles. Conversely, bad faith would be a negotiation in purely strategic terms that wants to become a Machiavellian play to thwart the legitimate expectations of the counterparty and a reasonable weighting of the principles. In the event that one of the relevant parties refuses to negotiate and proceed in good faith, this could trigger the other party to resort to unilateral actions.

22. Since the Academic Council preferred to offer a guide in which possible itineraries, procedures, and instruments are provided to reach different destinations rather than to indicate a single destination or a single route, it has understood the term “initiative” in a considerably broad sense to include notions such as participation and intervention and, at the same time, to encompass both initiative in a political sense and initiative in a legal sense.
23. Far more so than the Canadian Supreme Court, though less so than the German or Italian Constitutional Courts. See [Bossacoma Busquets \(2020\)](#).

References

- ACORD GOV/88/2023, de 18 d'abril, per a l'impuls d'un acord de claredat per a la resolució del conflicte polític entre Catalunya i l'Estat [To foster a clarity agreement for the resolution of the political conflict between Catalonia and the Spanish State]. (Diari Oficial de la Generalitat de Catalunya, núm. 8898, 19 April 2023). <https://dogc.gencat.cat/ca/document-del-dogc/?documentId=957936>. Date accessed 10 July 2024.
- Balcells, Laia, Lesley-Ann Daniels, and Alexander Kuo. 2023a. The “Weight” of territorial issues: Evidence from Catalonia, Scotland, and Northern Ireland. ” *Comparative Politics*. <https://doi.org/10.5129/001041523X16801126705016>.
- . 2023b. Territorial disputes and affective polarization. *European Journal of Political Research* 63 (3): 906–926. <https://doi.org/10.1111/1475-6765.12640>.
- Barrio, Astrid, and Juan Rodríguez-Teruel. 2017. Reducing the gap between leaders and voters? Elite polarization, outbidding competition, and the rise of secessionism in Catalonia. *Ethnic and Racial Studies* 40 (10): 1776–1794. <https://doi.org/10.1080/01419870.2016.1213400>.
- BBC. 2018. *Mariano Rajoy: Spanish PM Forced Out of Office*, 1 June. <https://www.bbc.com/news/world-europe-44327573>. Date accessed 10 July 2024.
- Bossacoma Busquets, Pau. 2020. *Morality and Legality of Secession. A Theory of National Self-determination*. London: Palgrave Macmillan. <https://doi.org/10.1007/978-3-030-26589-2>
- . 2021. Self-determination and Coercion in Spain. The Case of Catalonia. *Revista d'Estudis Autonòmics i Federals* no. 34 (December): 291–327. <https://doi.org/10.2436/20.8080.01.76>
- Bossacoma Busquets, Pau, and Marc Sanjaume-Calvet. 2019. Asymmetry as a Device for Equal Recognition and Reasonable Accommodation of Majority and Minority Nations. A Country Study on Constitutional Asymmetry in Spain. In *Constitutional Asymmetry in Multinational Federalism: Managing Multinationalism in Multi-tiered Systems*, ed. Patricia Popelier and Maja Sahadžić, 429–460. New York: Springer. https://doi.org/10.1007/978-3-030-11701-6_16.
- Castellà, Josep Maria. 2018. Constitution and Referendum on Secession in Catalonia. In *Claims for Secession and Federalism: A Comparative Study with a Special Focus on Spain*, ed. Alberto López-Basaguren and Leire Escajedo San Epifanio, 405–421. New York: Springer.
- Catalan News*. 2023. President Launches Quebec-style Clarity Act Committee, calls meeting with parties in June, 11 April. <https://www.catalannews.com/politics/item/president-launches-quebec-style-clarity-act-committee-calls-meeting-with-parties-in-june>. Date accessed 10 July 2024.

- Catalan Parliament. 2022. Parliamentary Report, Session 37, 27 September, p. 22. <https://www.parlament.cat/document/dspscp/297653568.pdf>. Date accessed 10 July 2024.
- Cilevičs, Boris. 2021. *Should Politicians be Prosecuted for Statements made in the Exercise of their Mandate?*, Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights. <https://assembly.coe.int/LifeRay/JUR/Pdf/TextesProvisoires/2021/20210603-ProsecutionPoliticians-EN.pdf>. Date accessed 10 July 2024.
- Colomer, Josep. M. 1998. The Spanish “state of autonomies”: Non-institutional federalism. *West European Politics* 21 (4): 40–52.
- Cuadras-Morató, Xavier, ed. 2016. *Catalonia: A new independent state in Europe?: A debate on secession within the European Union*. Abingdon: Routledge.
- Delledonne, Giacomo, and Giuseppe Martinico. 2018. *The Canadian contribution to a comparative law of secession: Legacies of the Quebec secession reference*. New York: Springer.
- European Parliament. 2017. *Verbatim Report Proceedings*, 13. Constitution, rule of law and fundamental rights in Spain in the light of the events in Catalonia (debate). 4 October, Strasbourg. https://www.europarl.europa.eu/doceo/document/CRE-8-2017-10-04-ITM-013_EN.html. Date accessed 10 July 2024.
- Fenna, Alan, and Johanna Schnabel. 2024. What is federalism? Some definitional clarification. *Publius: The Journal of Federalism* 54 (2): 179–200. <https://doi.org/10.1093/publius/pjad034>.
- Ferreira, Carles. 2019. Vox as representative of the radical right in Spain: A study of its ideology. *Revista Española de Ciencia Política* 73–98. <https://doi.org/10.21308/recp.51.03>.
- Government of Catalonia. 2014. White Paper. The National Transition of Catalonia. Department of the Presidency. https://presidencia.gencat.cat/web/.content/ambits_actuacio/desenvolupament_autogovern/iea/observatori_autogovern/01_estudis-i-informes/informes-externs/catn/informes/llibre_blanc_angles.pdf. Date accessed 10 July 2024.
- Holesch, Adam, and Jacint Jordana. 2023. The Politics of unilateral secession in the European Union: The case of Catalonia. *Territory, Politics, Governance* 11 (6): 1185–1204. <https://doi.org/10.1080/21622671.2021.1886979>.
- Lecours, André, Nikola Brassard-Dion, and Guy Laforest. 2021. Constitutional Politics in Multinational Democracies. In *Constitutional politics in multinational democracies*, ed. André Lecours, Nikola Brassard-Dion, and Guy Laforest, 3–22. Montreal: McGill-Queen’s University Press.
- Ley 21533. 2023. *Modifica la constitución política de la República con el objeto de establecer un procedimiento para la elaboración y aprobación de una nueva constitución política de la República [Amends the Political Constitution of the Republic in order to establish a procedure for the preparation and approval of a new Political Constitution of the Republic]*, 17 January, Chile.
- López, Jaume, and Marc Sanjaume-Calvet. 2020. The political use of de facto referendums of independence The case of Catalonia. *Representation* 56 (4): 501–519. <https://doi.org/10.1080/00344893.2020.1720790>.

- Mathieu, Félix, and Dave Guénette. 2023. The Quebec secession reference and the federal Clarity Act: The fascination with clarity and the value of ambiguity. *Revista Catalana de Dret Públic* 67: 187–201. <https://doi.org/10.58992/rcdp.i67.2023.4077>
- McRoberts, Kenneth. 2022. *Catalonia: The struggle over independence*. Oxford: Oxford University Press.
- Office of the Commissioner for Human Rights. 2017. *Comment by the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein on the situation in Catalonia, Spain*, 2 October. <https://www.ohchr.org/en/press-releases/2017/10/comment-un-high-commissioner-human-rights-zeid-raad-al-hussein-situation>. Date accessed 10 July 2024.
- Sala, Gemma. 2014. Federalism without adjectives in Spain. *Publius: The Journal of Federalism* 44 (1): 109–134.
- Sanjaume-Calvet, Marc, and Elvira Riera-Gil. 2022. Languages, secessionism and party competition in Catalonia: A case of de-ethnicising outbidding? *Party Politics* 28 (1): 85–104. <https://doi.org/10.1177/1354068820960382>.
- Sanjaume-Calvet, Marc, Mar Aguilera Vaqués, Eva Anduiza Perea, Marco Aparicio Wilhelmi, Astrid Barrio López, Pau Bossacoma Busquets, Elisenda Casañas Adam, Lesley-Ann Daniels, and Josep Lluís Martí. 2023. Report on the Clarity Agreement. https://acordclaredat.cat/wp-content/uploads/2024/02/InformeAcordClaredat_EN.pdf. Date accessed 26 July 2024.
- Spanish Constitution. 1978. *BOE*, 29 December, n. 311. <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>. Date accessed 10 July 2024.
- Spanish Government. 2021. *Agenda para el reencuentro [Agenda for the reunion]*, 15 September. https://www.lamoncloa.gob.es/presidente/actividades/Documents/2021/150921-Agenda_Reencuentro.pdf. Date accessed 10 July 2024.
- STC. Pleno. Sentencia 103/2008, de 11 de septiembre de 2008 (BOE núm. 245, de 10 de octubre de 2008).
- . Pleno. Sentencia 31/2010, de 28 de junio de 2010 (BOE núm. 172, de 16 de julio de 2010).
- . Pleno. Sentencia 42/2014, de 25 de marzo de 2014 (BOE núm. 87, de 10 de abril de 2014).
- . Pleno. Sentencia 138/2015, de 11 de junio de 2015 (BOE núm. 160, de 6 de julio de 2015).
- . Pleno. Sentencia 138/2017, de 17 de octubre de 2017 (BOE núm. 7, de 8 de enero de 2018).
- Supreme Court [SCC]. 1998. Secession of Quebec, Re, Reference to Supreme Court, [1998] 2 SCR 217, (1998) 161 DLR (4th) 385, (1998), 55 CRR (2d) 1, ILDC 184 (CA 1998), 20 August, Canada.
- Tierney, Stephen. 2022. *The Federal contract. A constitutional theory of federalism*. Oxford: Oxford University Press.

© The Author(s) 2024. Published by Oxford University Press on behalf of CSF Associates: Publius, Inc.
This is an Open Access article distributed under the terms of the Creative Commons Attribution License (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted reuse, distribution, and reproduction in any medium, provided the original work is properly cited.
Publius: The Journal of Federalism, 2024, 55, 201–221
<https://doi.org/10.1093/publius/pjae023>
Federalism Monitor