

“Behind-the-Table” Conflicts in the Failed Negotiation for a Referendum for the Independence of Catalonia

Oriol Valentí i Vidal*

Spain is facing its most profound constitutional crisis since democracy was restored in 1978. After years of escalating political conflict, the Catalan government announced it would organize an independence referendum on October 1, 2017, an outcome that the Spanish government vowed to block. This article represents, to the best of the author’s knowledge, the first scholarly examination to date from a negotiation theory perspective of the events that hindered political dialogue between both governments regarding the organization of the secession vote. It applies Robert H. Mnookin’s insights on internal conflicts to identify the apparent paradox that characterized this conflict: while it was arguably in the best interest of most Catalans and Spaniards to know the nature and extent of the political relationship that Catalonia desired with Spain, their governments were nevertheless unable to negotiate the terms and conditions of a legal, mutually agreed upon referendum to achieve this result. This article will argue that one possible explanation for this paradox lies in the “behind-the-table”

*Attorney; Lecturer in Law, Barcelona School of Management (Universitat Pompeu Fabra) as of February 2018. LL.M. ‘17, Harvard Law School; B.B.A. ‘13 and LL.B. ‘11, Universitat Pompeu Fabra; Diploma in Legal Studies ‘10, University of Oxford. This article reflects my own personal views and has been written under my sole responsibility. As such, it has not been written under the instructions of any professional or academic organization in which I render my services. I would like to thank Professor Robert H. Mnookin for his continued support and supervision of an earlier draft of this article. I also owe a debt of gratitude to the whole community at the Harvard Negotiation and Mediation Clinical Program for the good it brings to the world. A special note goes to Professor Robert C. Bordone, friend and mentor, for his constant inspiration. Finally, I am also particularly grateful to “la Caixa” Foundation, without which this beautiful journey would have never started. All errors, omissions and opinions are my own.

conflicts on both sides. For Catalan secessionists, this conflict related to the role that unilateralism had to play, if any, in the negotiations with Spain to organize an official referendum for independence. For those against it, most notably the Spanish political parties, the pressing internal conflict concerned the scope of the negotiations that had to be conducted with the Catalan government. These internal “behind-the-table” conflicts blocked an “across-the-table” agreement, leading to a deadlock in negotiations. This article hopes to contribute to the academic conversation around the barriers to progress in high-stake negotiations, and it suggests that the failure to negotiate an independence referendum for Catalonia reveals the limits of unilateral action in the context of a supranational region like the European Union, the dynamics in negotiations where there is a sharp power imbalance between the parties, the tensions between democratic legitimacy and the rule of law, and the risks of path dependency for negotiated agreements.

CONTENTS

I.	INTRODUCTION.....	1
II.	CONTEXTUALIZING THE CATALAN-SPANISH POLITICAL CONFLICT ...	3
A.	Background	3
1.	Catalonia: Population, Economy, and Language	3
2.	Political Structure and the Fiscal Issue	6
B.	A Brief Perspective on the Catalan-Spanish History.....	9
C.	The Underlying Narratives of Both Sides of the Conflict.....	11
III.	UNDERSTANDING THE INTERNAL CONFLICTS	13
A.	The Paradox	13
B.	The Internal Catalan Conflict.....	17
1.	The First Decades of the Restored Democracy (1980-2003): Progressive Increase of Self-Government Through Constant Bargaining	18
2.	Attempts to Redefine the Institutional Framework (2003-2012): the (partially failed) 2006 Statute of Autonomy and the (failed) Fiscal Agreement	20
3.	The Last Negotiating Bullet (2012-2015): the Five Legal Proceedings to Consult Catalan Citizens.....	23
4.	Towards a Three-Dimensional Political System: The de facto plebiscite (2015) and the Unilateral Referendum for the Independence of Catalonia (2017)	27
C.	The Internal Spanish Conflict.....	34
IV.	THE ESCALATION OF THE CONFLICT AND THE AFTERMATH OF THE OCTOBER 1, 2017 REFERENDUM.....	38
V.	CONCLUSION	45

I. INTRODUCTION

On January 28, 2017, the New York Times published an article that contained a list of the “potentially disruptive issues and events looming for the year that could reshape –or at least deepen– the fractures in the European Union.”¹ Together with Brexit and Italy’s banking crisis, the newspaper included Catalonia’s process of independence as a significant contributor to a turbulent 2017 in Europe.

After years of escalating political conflict, the Catalan government announced that it would hold an official referendum over the independence of Catalonia on October 1, 2017, an outcome that the Spanish government vowed to block. Although the vote, declared illegal by the Spanish Constitutional Court, eventually went through, images of the Spanish police cracking down on voters popped up on computer screens around the world.² And yet, Catalans turned in millions to express their political views on whether they wanted to secede from Spain.

According to the Catalan government, as many as 2.3 million votes were cast (approximately 42% of the electoral list), excluding those that were seized by the Spanish security forces during violent raids. 90% of votes favored constituting a new Catalan Republic, 8% of them rejected independence from Spain, and the others were either blank or void.³

The events that followed will be remembered in history, with the subsequent weeks punctuated by Catalonia’s “political” declaration of independence, the Spanish government’s decision to impose direct rule over it, the jail without bail of members of the Catalan government, and the “exile” of the Catalan President to Brussels.

¹ Rick Gladstone, *The Questions That Could Reshape a Worried Europe in 2017*, New York Times (January 28, 2017), available at <https://www.nytimes.com/2017/01/28/world/europe/europe-worries-populism-trump.html?ref=europe>.

² The UN High Commissioner for Human Rights, Zeid Ra’ad al Hussein, declared on October 2, 2017 that he was “very disturbed” by the violence in Catalonia in the day of the referendum. The UN human rights experts requested the Spanish government to visit the country to investigate the alleged violations of fundamental human rights. See UN News Centre, *UN Human Rights Chief Urges Probe into Violence During Referendum in Catalonia* (October 2, 2017), available at <http://www.un.org/apps/news/story.asp?NewsID=57785#.Wi8FrEyZNAy>.

³ Sam Jones and Stephen Burgen, *Catalan Referendum: Preliminary Results Show 90% in Favour of Independence*, The Guardian (October 2, 2017), available at <https://www.theguardian.com/world/2017/oct/01/dozens-injured-as-riot-police-storm-catalan-ref-polling-stations>.

In this context, the goal of this article is limited in nature but novel in its approach: it aims to provide a possible explanation as to why the Catalan and the Spanish governments were unable to engage in any political dialogue that would have led them to organize a legal, mutually agreed upon referendum on October 1, 2017. In particular, the article aims to apply to this conflict Robert H. Mnookin's insights on internal conflicts as a barrier to progress in negotiations.⁴ With his framework in mind, this article will explain the apparent paradox that characterizes the Catalan-Spanish conflict. While it was arguably in the best interest of the majority of Catalans and Spaniards to know the nature and extent of the political relationship that Catalonia desired with Spain, their governments were unable to negotiate the terms and conditions of a legal, mutually agreed upon referendum to achieve this result.

This article does not evaluate or legitimize the merits of either side's claims. Rather, it assumes the positions of both parties as a given and analyzes the reasons for their "behind-the-table" conflicts. Among Catalan secessionists, this conflict related to the role, if any, that unilateralism should play in the negotiations with Spain to organize an official referendum for independence. For those against secession, most notably the major Spanish political parties, the pressing internal conflict was the scope of negotiations that should be conducted with the Catalan government. It will be argued that these internal "behind-the-table" conflicts blocked "across-the-table" agreements, leading to a deadlock in the negotiations.

This article is structured in five parts. Following this introduction, Part II provides background information about the parties and attempts to explain why Catalans are increasingly considering statehood as a feasible solution to this extended territorial conflict.⁵ Part III analyzes the internal conflicts among supporters of Catalan

⁴ Robert H. Mnookin, Ehud Eiran & Shula Gilad, *Is Unilateralism Always Bad? Negotiation Lessons from Israel's "Unilateral" Gaza Withdrawal*, 30 *NEGOTIATION J.* 131, 156 (2014); Robert H. Mnookin, Ehud Eiran & Sreemati Mitter, *Barriers to Progress at the Negotiation Table: Internal Conflicts Among Israelis and Among Palestinians*, 6 *NEV. L.J.* 299, 366 (2005-2006); Robert H. Mnookin & Ehud Eiran, *Discord "Behind the Table": The Internal Conflict Among Israeli Jews Concerning the Future of Settlements in the West Bank and Gaza*, 2005 *J. DISP. RESOL.* (2005).

⁵ Aside from the obvious relevance to negotiation theory, this conflict raises many complex legal, political, policy, and socio-economic questions. For the latest scholarship in English on the topic, see KLAUS-JURGEN NAGEL & STEPHAN RIXEN, *CATALONIA IN SPAIN AND EUROPE. IS THERE A WAY TO INDEPENDENCE?* (1st ed. 2015); or XAVIER CUADRAS-MORATO, *CATALONIA: A NEW INDEPENDENT STATE IN EUROPE? A DEBATE ON SECESSION WITHIN THE EUROPEAN UNION* (1st ed. 2016).

independence and those against it, while arguing why it was in the best interest of both Catalans and Spaniards to determine the nature and extent of the political relationship that Catalonia desired with Spain. Part IV gives an account of the events surrounding the October 1, 2017 referendum through the lens of these internal conflicts. Finally, Part V concludes that the failure to negotiate an independence referendum for Catalonia provides valuable lessons for negotiation theorists as it reveals (i) the limits of unilateral action in the context of a supranational region like the European Union, (ii) the dynamics in negotiations where there is a sharp power imbalance between the parties, (iii) the tensions between democratic legitimacy and the rule of law, and (iv) the risks of path dependency for negotiated agreements.

This article was originally drafted to satisfy the author's LL.M. Written Work Requirement for his master's degree at Harvard Law School. It was completed under the supervision of Professor Robert H. Mnookin and submitted to the Graduate Program in April 2017. A copy of the original article can be found in the archives of the Harvard Law School Library. The article has now been edited and updated for the purposes of this publication, although events occurring after November 30, 2017 have not been taken into account. Specifically, this article does not consider the results of the December 21, 2017 elections.

II. CONTEXTUALIZING THE CATALAN-SPANISH POLITICAL CONFLICT

A. *Background*

1. *Catalonia: Population, Economy, and Language*

Catalonia is the northeastern-most region of Spain, representing 6.3% of the country's overall geographic area. Barcelona is both the capital and the largest city in the region. Bordering France and the Mediterranean Sea, Catalonia enjoys a privileged, strategic position in southern Europe that has allowed it to thrive economically and socially.

Although Catalans are a minority in Spain that account for only 16% of the Spanish population, the region is the second most populous in the country,⁶ and is the highest contributor to the Spanish GDP (18.9%). In 2016, Catalonia's GDP per capita was 19.3% higher than the Spanish average, though it was still behind Madrid, the country's

⁶ Note that 13 countries in the EU have a smaller number of inhabitants than Catalonia. See CUADRAS-MORATO, *supra* note 5 at 5.

capital, and the financially autonomous regions of the Basque Country, and Navarra.⁷

Catalonia has traditionally been composed of a very diverse population. As the country's first industrialized region, it attracted numerous immigrants from other parts of Spain during the twentieth century. Due to the economic boom in the country in the 2000s, a massive wave of immigrants flocked to Catalonia from other parts of the world, mainly from Morocco, Romania, South America, and Pakistan.⁸ The population in Catalonia grew by 20% between 2000 and 2016, whereas the total growth rate in Spain was 3.7% between 1980 and 2000.⁹ As of today, almost 15% of the Catalan population is comprised of non-Spanish nationals.¹⁰ Moreover, according to the 2011 census, as many as 36.36% of Catalans were born outside of Catalonia.¹¹ These successive waves of immigration have profoundly altered the demographic landscape in Catalonia and citizens' cultural identity, which is an important factor in determining support for independence.¹²

Among Catalonia's most distinguishing features, the one that lies at the heart of Catalan identity, is its distinctive language: Catalan.¹³

⁷ INSTITUTO NACIONAL DE ESTADÍSTICA, *Notas de Prensa: Producto Interior Bruto Regional Año 2016*, March 30, 2017, available at http://www.ine.es/prensa/cre_2016_1.pdf.

⁸ In 2000, there were 181,590 foreign nationals living in Catalonia. In 2012, reaching the historical peak, this number grew to 1,186,779 people. See INSTITUT D'ESTADÍSTICA DE CATALUNYA, available at <http://www.idescat.cat/poblacio/estrangera/?b=0>.

⁹ INSTITUT D'ESTADÍSTICA DE CATALUNYA, available at <http://www.idescat.cat/pub/?id=aec&n=245>.

¹⁰ GENERALITAT DE CATALUNYA, *The 40 Main Nationalities Present in Catalonia*, January 1, 2017, available at http://treballiaferssocials.gencat.cat/web/.content/03/ambits_tematicos/05immigracio_refugi/perfils_demografics/PERFIL_Paisos.pdf.

¹¹ Marc Guinjoan & Toni Rodon, *Catalonia at the Crossroads. Analysis of an increasing support for secession*, in CATALONIA: A NEW INDEPENDENT STATE IN EUROPE? A DEBATE ON SECESSION WITHIN THE EUROPEAN UNION 50 (Xavier Cuadras-Morato ed., 2016).

¹² According to the 2014 polls, 70% of Catalans who have their parents born in Catalonia support independence. When it is only one parent who is born in Catalonia, support to independence is still the most preferred option, but it decreases to 49%. Nevertheless, when both parents are born outside of Catalonia, 36% support the constitution of a federal state and 31% the status quo. Finally, if the citizen herself is born outside of Catalonia, the most preferred option is the status quo (43%) followed by the federal state (26%). *Id.* at 52.

¹³ As Peter A. Kraus mentions in *Language Policy and Catalan independence*, in CATALONIA IN SPAIN AND EUROPE. IS THERE A WAY TO INDEPENDENCE? 129 (Klaus-Jurgen Nagel & Stephan Rixen eds., 2015), for Enric Prat de la Riba, a leading Catalan politician of early twentieth century, it was unquestionable that "language is the most

Catalan is also currently spoken in other regions of Spain and in other countries. It is also the official language of Andorra,¹⁴ a small state perched in the Pyrenees. Approximately 10 million people speak Catalan and 13.4 million people understand it,¹⁵ which makes it the ninth-most spoken language in Europe.¹⁶ Just as there is a high correlation between the national origin of parents and support for independence, language too remains an important factor that determines the political preferences of citizens.¹⁷

Although Catalan and Spanish are now both official languages in Catalonia,¹⁸ this has not historically been the case, especially in the recent past. For instance, during the dictatorships of Primo de Rivera (1923-1930) and Francisco Franco (1939-1975), the Catalan language was prosecuted. This continues to be a traumatic memory for Catalans even today. For many, the protection and promotion of the Catalan language is the foremost reason for the desire of self-government.

Following Franco's death, democracy was restored in Spain and successive Catalan governments approved laws aimed at improving the language skills of *all* Catalans and increasing the use of Catalan in both public and private settings. This was done, among others, through linguistic immersion in public schools, making Catalan the primary language of instruction. While this policy remains largely uncontroversial inside Catalonia, it has become a highly debated topic for Spaniards.¹⁹ As a result, a new Spanish law on education was enacted in 2013²⁰ forcing the Catalan government to partially fund

genuine expression of the national spirit and the most powerful instrument of nationalization" (ENRIC PRAT DE LA RIBA, *THE CATALAN NATIONALITY* 84).

¹⁴ Article 2(1) of the Constitution of Andorra.

¹⁵ PLATAFORMA PER LA LLENGUA, *INFORME 2016: 50 DADES SOBRE LA LLENGUA CATALANA* 5.

¹⁶ GENERALITAT DE CATALUNYA, *EL CATALÀ, LLENGUA D'EUROPA* 23 (2009); or AJUNTAMENT DE PALMA DE MALLORCA, *CATALÀ: UNA LLENGUA D'EUROPA* 3 (2010).

¹⁷ According to the polls in 2014, 72% of Catalans who had Catalan as their first language supported independence. In contrast, 54% of Catalans who had Spanish as their first language preferred to maintain the status quo, followed by 27% who supported the constitution of a federal state. See Marc Guinjoan & Toni Rodon, *supra* note 11 at 50.

¹⁸ Articles 3(1) and 3(2) of the Spanish Constitution; and articles 6(1) and 6(2) of the Catalan Statute of Autonomy as interpreted by the Spanish Constitutional Court Judgement no. 31/2010, of 28 of June, and no. 137/2010, of 16 of December.

¹⁹ Peter A. Kraus, *supra* note 13 at 132 citing Juan J. Linz, *Politics in a Multilingual Society with a Dominant World Language: the Case of Spain*, in *LES ÉTATS: PROBLÈMES ET SOLUTIONS* 367 (Jean Guy Savard & Richard Vigneault eds., 1975).

²⁰ Ley Orgánica 8/2013, de 9 de diciembre, para la Mejora de la Calidad Educativa. On October 10, 2012, the Minister of Education, Jose Ignacio Wert, admitted in Congress that the Spanish government's intention with such law was "to make Catalan students

private schools for students wishing to receive a fully bilingual education.²¹ In the 2014-2015 academic year, the first to which the new law applied, only 92 Catalan students out of a total of approximately 1.3 million sought to enforce this right.²²

2. *Political Structure and the Fiscal Issue*

Since the restoration of democracy, Catalonia has been politically constituted as an *autonomous community* in Spain.²³ The region, together with the sixteen other autonomous communities in the country, has self-government powers in fields like education, healthcare, culture, social welfare, environment, and agriculture. However, not all of these powers are exclusive to the autonomous communities, as most are, in fact, either shared or concurrent powers with the central government.²⁴

This unique distribution of powers between the central government and the autonomous communities, enshrined in the Spanish Constitution and the seventeen regional statutes of autonomy,

become Spanish.” See J.A. Auni6n, *Wert Quiere “Espa6olizar” Catalu6a*, *El Pa6s* (October 10, 2012), available at http://sociedad.elpais.com/sociedad/2012/10/10/actualidad/1349859896_604912.html.

²¹ According to the Catalan law on education, students must learn Catalan, Spanish, and English in school. Catalan is also the ‘instrumental’ language to teach other courses of the curriculum (e.g., mathematics, history, philosophy, etc.). However, according to the new Spanish law on education, if parents do not want their children to follow this policy, they can request – and the Catalan government is obliged to pay– 6,000 euros to pay the fees of a private school.

²² Camilo S. Baquero, *Rigau Cifra en 17 las Familias que Piden Escolarizaci6n en Castellano*, *El Pa6s* (September 4, 2015), available at https://elpais.com/ccaa/2015/09/03/catalunya/1441306834_779147.html; and INSTITUT D’ESTADÍSTICA DE CATALUNYA, available at <https://www.idescat.cat/pub/?id=aec&n=744&lang=es> and <https://www.idescat.cat/pub/?id=aec&n=741&lang=es>.

²³ The 1978 Spanish Constitution allowed bordering provinces with “common historical, cultural, and economic characteristics” (art. 143(1)) to become autonomous communities with self-government powers delimited by statutes of autonomy (the regional law of the land). In 1979, after 40 years without self-rule, Catalonia became – together with the Basque Country– the first region to constitute itself as an autonomous community.

²⁴ On the one hand, shared powers are those that are distributed between the central government and the autonomous communities in two different ways: (i) basic legislative powers are allocated to the central government, and legislative development and executive powers to the autonomous communities (e.g., environment: article 148(1)(9) of the Spanish Constitution in connection with article 144(1) of the Catalan Statute of Autonomy); and (ii) all legislative powers to the central government, and only executive powers to the autonomous communities (e.g., antitrust: article 154(2) of the Catalan Statute of Autonomy). On the other hand, concurrent powers allow both levels of administration to simultaneously develop regulation in the field (e.g., culture: article 149(2) of the Spanish Constitution).

establishes a quasi-federal form of government. However, contrary to other federal systems like the U.S., where there are both federal and state courts, the Spanish Constitution only allows for a single-tiered judiciary. In fact, when declaring certain provisions of the Catalan Statute of Autonomy unconstitutional, the Spanish Constitutional Court stated that autonomous communities “cannot have, by any means, their own courts.”²⁵ As this article will later explain, the fact that Catalonia has not been allowed to establish its own judiciary has become a relevant factor in the current territorial conflict.

The national executive, legislative²⁶ and highest judicial authorities (the Supreme Court, Constitutional Court, and *Audiencia Nacional*) are seated in Madrid. Spain is a parliamentary monarchy, which means that (i) the head of State is the king, and (ii) citizens choose their legislative representatives every four years, who, in turn, elect the President of Government (a Prime Minister-equivalent figure). The President then chooses his ministers, and his government is held politically accountable. Spain’s current President is Mariano Rajoy, who has held office since 2011.²⁷

Catalonia is also organized as a parliamentary democracy. Catalans vote every four years to choose their legislative representatives in the Catalan Parliament (which has only one chamber), who then elect the President of the Catalan Government. The Catalan President appoints his ministers, all of whom are also politically accountable. Together with the Spanish Constitution, which

²⁵ Spanish Constitutional Court Judgement no. 31/2010, of 28 of June, at 42. For an in-depth scholarly legal analysis of the subject, see *inter alia* Ignacio Torres Muro & Ignacio Álvarez Rodríguez, *El Poder Judicial en Cataluña en la STC 31/2010, de 28 de junio*, 27 *Teoría y Realidad Constitucional* 345, 376 (2011); or José M^a Porrás Ramírez, *El Poder Judicial en Cataluña, Según el Estatut y el Tribunal Constitucional. Limitaciones y Posibilidades de Desarrollo de un Modelo*, 12 *Revista d’Estudis Autònomic i Federals* 331, 362 (2011).

²⁶ The Legislative power is made up by two different chambers: the Congress of Deputies (lower house) and the Senate (upper house). While the former represents the Spanish people, and is therefore 100% directly elected by the citizens; the latter is the chamber that represents the territories, and counts with members directly voted by citizens and members elected by the autonomous communities.

²⁷ After 8 years of socialist governments, the center-right wing Popular Party won by absolute majority the November 20, 2011 Spanish general elections. On December 20, 2015, Rajoy’s party won again the general elections but with a much shorter majority: it lost 15.76% of the popular vote and 63 representatives in Congress (it moved from 186 to 123 deputies). Since the political parties did not manage to elect a government, new general elections were held on June 26, 2016, where the Popular Party increased its majority to 137 deputies. On October 29, 2016, Rajoy was reelected as President of the government of Spain with the votes of his party, the liberal *Ciudadanos* (“Citizens”), and the abstention of the Socialist Party.

is the highest legal authority in the country, the Catalan Statute of Autonomy is the law of the land.

From a fiscal perspective, Catalonia is part of the Spanish “common” regime. The central government collects a majority of the taxes raised in Catalonia and redistributes the income to fifteen out of seventeen of the autonomous communities in accordance with a ‘needs-assessment’ equalization formula.²⁸ As experts have put it, the Spanish “common” fiscal regime is “characterized by [a] high degree of decentralization in expenditure, but a low degree in the revenues. Tax sharing and transfers are the keystones of this model.”²⁹

The provinces of the Basque Country and Navarra— two northern autonomous communities that also border France— deviate from the traditional model and benefit from a chartered or “foral” fiscal regime that allows them to *inter alia* (i) directly levy taxes in their territories, (ii) contribute a fixed sum to the general expenditures of the State, and (iii) adjust their own fiscal regime through the approval of tax laws. The different tax treatment provided to the “common” autonomous communities and “foral” provinces has been defended as a historical right, currently preserved in the First Additional Provision of the Spanish Constitution.

As it will be discussed below, the existence of, and the extent to which there is, a financial drain in Catalonia remains controversial. For now, it suffices to say that according to the Catalan government, there has been a systematic transfer of resources from Catalonia to other regions of Spain that has allegedly averaged between 6.1% and 8% of the Catalan GDP over the span of 20 years.³⁰ Although the Spanish political parties assert that it is not possible to calculate whether there a deficit even exists,³¹ the Spanish government has

²⁸ The Spanish central government levies more than 90% of the total amount of taxes raised in the country. See Elisenda Paluzie, *Fiscal Issues of Catalan Independence*, in CATALONIA IN SPAIN AND EUROPE. IS THERE A WAY TO INDEPENDENCE? 142 (Klaus-Jurgen Nagel & Stephan Rixen eds., 2015).

²⁹ *Id.* at 141–42.

³⁰ That is, the difference between the taxes levied in Catalonia and the public services received by it amount to a yearly deficit that ranges between 10,000 million euros to 17,000 million euros. *Id.* at 142–51. See also GENERALITAT DE CATALUNYA, *El dèficit fiscal de Catalunya amb l'Administració central persisteix i el 2011 es situa en el 7,7% del PIB*, November 20, 2015, available at http://economia.gencat.cat/ca/detalls/noticia/20151120_NP_BalnacesIPressupostos.

³¹ See, e.g., Luis Garicano, *El Mito Económico de la Independencia*, *El País* (September 8, 2015), available at https://elpais.com/elpais/2015/09/07/opinion/1441617574_341810.html [“there does not exist an objective and generally accepted method to calculate [the fiscal deficit]”].

offered an estimation based on different criteria (“in 2013, there was just a 4.53% fiscal deficit”).³²

B. *A Brief Perspective on the Catalan-Spanish History*

Much has been written about the history of Catalonia and Spain. Although this article will not revisit this literature in its entirety, some brief notes about the topic are necessary to further contextualize the Catalan-Spanish conflict. As in many ethnic or territorial conflicts, “the most fervent proponents claim their legitimacy within each community founded on a reading of history.”³³

After marrying in 1469, the king of the Crown of Aragon (a medieval federation of sorts to which Catalonia belonged) and the future Queen of Castile created a royal union between both kingdoms in 1475. Today, this event is still key in the Catalan-Spanish conflict as both sides differ in their reading of it. While proponents of Catalan secession explain that this marriage did not amount to a political union, opponents argue that this was the foundation of the modern Spanish state.

Indeed, the Catalan narrative emphasizes that after 1475, both kingdoms continued to have their own institutions, liberties, laws, and language, which were not partially lost until 1714, after the siege of Barcelona in the Spanish Succession War (1701-1713). The Spanish narrative, conversely, explains that after the marriage of Ferdinand of Aragon and Isabel of Castile the term “Spain” was used abroad to refer to both kingdoms, as they had a common foreign policy and shared what today we would call a tax union in conjunction with an army. Moreover, in their view, because Catalonia was never a state as recognized by the international community, it cannot legitimately claim now to reinstate a status it never held.

Pro-independence Catalans use this historical reading to legitimize their claims. According to them, the current conflict can only be understood as continued centuries of oppression by Castilian authorities that started when the Bourbon monarchy was implemented in Spain during the Succession War. As Catalans lost the war, their representative institutions and liberties were suppressed, an absolutist regime was instituted, and their language started to disappear. From

³² MINISTERIO DE HACIENDA Y ADMINISTRACIONES PÚBLICAS, *Informe sobre la Dimensión Territorial de la Actuación de las Administraciones Públicas, Ejercicio 2013* 14, July 2016, available at <http://www.minhfp.gob.es/Documentacion/Publico/CDI/Cuentas%20Territorializadas/Informe%20del%20Ministerio%20SCPT%2013vf.pdf>.

³³ Robert H. Mnookin, Ehud Eiran & Sreemati Mitter, *supra* note 4 at 302.

this perspective, however, the worst was still to come in the twentieth century, when two military dictatorships (1923-1930 and 1939-1975) actively tried to annihilate the Catalan culture and economically favored Madrid over Barcelona.

Although the Catalan language was continuously spoken during the eighteenth and nineteenth centuries, there was a slow yet continuous substitution with Spanish following the loss of Catalan's official language status, compounded with the fact that local elites stopped using it. The Spanish government's efforts to extend education across the country further aggravated the situation, as teaching was only conducted in Spanish.

As the country's first industrialized region, Barcelona developed a strong, influential bourgeoisie that soon started to advocate for a profound reform of Spain, including securing some sort of political autonomy for Catalonia. Pushed by popular cultural movements that were challenging the linguistic status quo, local elites started to embrace Catalan as a language of culture and prestige. This political and cultural movement is known as "Catalanism", and has heavily influenced Spain's twentieth century politics.

The adoption of cultural and linguistic claims by the bourgeoisie of Barcelona in the beginning of the twentieth century is a significant factor that is used by opponents of secession to explain and discredit the current political turmoil. From this perspective, linguistic and cultural claims are merely being used by Catalan economic elites to further their own political and economic agendas.³⁴

Both sides of the Catalan-Spanish conflict have very different readings of history, which they each use to legitimize their claims. These differing narratives inform the core of their respective identities,

³⁴ "Catalan nationalism has been considered, more often than not, to be just a regionalist movement striving for a Catalanization of Spain and to secure the state's governability when necessary. Controlled by elites, Catalanism, in this record, could easily be pacified by granting some competence or financial autonomy – and be denounced as blackmailing in turn. Catalanism, stemming from the 19th century language movement in favor of the Catalan language, had always been divided between left and right wing parties, and these divisions provided some clues to Spanish forces in need of support. The Catalan population, in great part stemming from Spanish migrants, was and still is in its majority linked to family members and friends living in the rest of Spain. Immigration from outside the state, eg from Latin America, North Africa, and elsewhere, also seemed to dilute ethnic identity. Catalonia's history as an independent polity had ended as early as 1714 when it became fully incorporated into the Bourbon monarchy of Spain." See KLAUS-JURGEN NAGEL & STEPHEN RIXEN, *supra* note 5 at 8.

the exaltation of which further hinder the possibility of engaging in productive negotiations.³⁵

C. *The Underlying Narratives of Both Sides of the Conflict*

As the previous section has shown, the historical relationship between Catalonia and Spain has been tense at times.³⁶ However, when it comes to identifying the narratives that underlie both sides, “international media and electoral pundits tend to stress short-term factors as casual determinants of demands for secession”.³⁷

There are competing narratives as to why the Catalan-Spanish political conflict even exists. From the secessionist perspective, there are ample reasons that justify the independence of Catalonia that range from politics (recentralization of devolved powers, fatigue over constant negotiations in Madrid to obtain minor powers, conflicts of sovereignty³⁸), to pragmatism and economy (financial drain and control of resources, attaining maximum productive capacity without a boycotting state), to culture and identity (aggressions to the Catalan language and culture, historical redress, national pride). From an ethics perspective, the secession of Catalonia has been justified under remedial theories,³⁹ adscriptivist approaches,⁴⁰ and democratic approaches.⁴¹

³⁵ For a review of the importance of identity in negotiations, albeit in a different context, please see DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *Difficult Conversations. How to Discuss What Matters Most* (2010).

³⁶ Jose Ortega y Gasset, one of the most renowned Spanish philosophers in history, said in a famous speech during the approval of the 1932 Catalan Statute of Autonomy in the Congress of Deputies that “the Catalan problem is an unsolvable problem. It can only be borne. It is a perpetual problem. It has always been there, before the peninsular unity existed and will continue to be so long Spain survives.” (May 13, 1932).

³⁷ Marc Guinjoan & Toni Rodon, *supra* note 11 at 20.

³⁸ Since 2010, when several provisions of Catalonia’s Statute of Autonomy were declared unconstitutional, the Spanish Constitutional Court has voided other 27 laws enacted by the Catalan Parliament. E.g., Law Against Energetic Poverty, Catalonia’s Consumer Code, Tax on Industrial and Commercial Airplane Emissions and Nuclear-Generated Electricity, or the Law Forbidding Fracking. See Xavier Grau, *A Collection of Catalan Laws Challenged, Suspended or Declared Null by Spain’s Constitutional Court*, Ara (October 8, 2015), available at https://www.ara.cat/en/collection-Catalan-Spains-Constitutional-Court_0_1445855499.html.

³⁹ Remedial theories consider that “secession is morally legitimate when it is the only available way to solve an unjust situation”. In the case of Catalonia, independence could be seen “as a remedy for the lack of political autonomy and recognition (internal self-determination) and the permanent problem of being a minority within Spain”, exemplified in five dimensions: “breaching of intrastate agreements, non-recognition, economic exploitation, lack of the right to internal self-determination (linked to the difficulties in reforming the Constitution) and suppression of democratic rights.” See

Yet, if the abovementioned factors have remained largely unchanged over the last decades, they do not explain why so many Catalans have recently changed their political preferences to demand independence. They also do not explain why millions of Catalans have been marching to request statehood since 2012.

Many trace the tipping point of the conflict back to 2010, when, as explained below, the Spanish Constitutional Court declared several provisions of the new 2006 Statute of Autonomy of Catalonia unconstitutional. This law, which had been approved by the Spanish legislative chambers and voted by Catalans in a referendum, contained provisions identical to the statutes of autonomy of other regions in Spain, which were not constitutionally challenged.

However, this is merely a piece of the story. As some authors indicate, the following interconnected factors may also partially explain the secessionist upsurge: (i) backlash to increased Spanish nationalism;⁴² (ii) change in the pro-independence discourse from the traditional concept of the right of self-determination of nations to a more inclusive, democratically-based “right to decide”;⁴³ and (iii) the active role played by civil society, where the two major grassroots organizations worked to increase popular support for secession.⁴⁴

In the rest of Spain, however, the explanation as to why a bloom of support for independence in Catalonia has occurred is very different. Opponents of Catalan secession argue that the dramatic economic-

Marc Sanjaume-Calvet, *The Morality of Secession. Secessionist and anti-secessionist arguments in the Catalan case*, in CATALONIA: A NEW INDEPENDENT STATE IN EUROPE? A DEBATE ON SECESSION WITHIN THE EUROPEAN UNION 83, 88 (Xavier Cuadras-Morato ed., 2016).

⁴⁰ From this perspective, there is a moral right of secession which is prima facie legitimate. In our case, “[t]he characterization of Catalonia as a minority and stateless nation has been the leading legitimization discourse of its self-government demands since the beginning of the Catalan nationalist movement in the nineteenth century and, more specifically, during the last decades.” *Id.* at 90.

⁴¹ According to democratic approaches, “those entitled to morally secede are those groups that have expressed their desire through a referendum or other democratic means.” In Catalonia, “[c]ivil society organizations and pro-sovereignty political parties have made wide use of this concept lately.” *Id.* at 91.

⁴² Vicenç Navarro, *Por Qué las Derechas y Muchas Izquierdas Españolas No Entienden o No Quieren Entender lo que Pasa en Catalunya*, Público (October 18, 2017), available at <http://blogs.publico.es/vicenc-navarro/2017/10/18/por-que-las-derechas-y-muchas-izquierdas-espanolas-no-entienden-o-no-quieren-entender-lo-que-pasa-en-catalunya/>.

⁴³ For a general overview of the ethics of secession and how they interplay with the Catalan case, see Marc Sanjaume-Calvet, *supra* note 39 at 82, 106.

⁴⁴ Marc Guinjoan & Toni Rodon, *supra* note 11 at 38.

financial crisis that shook Spain after 2008 explains the political turmoil that the country is experiencing, including the increased support for secession: loss of confidence in institutions, rise of populism and search for easy solutions, quest for new sociopolitical paradigms, etc.⁴⁵ Moreover, they argue that Catalan political parties are strategically using independentism to hide their own mismanagement (Catalan finances are deeply troubled)⁴⁶ and corruption scandals, and that their only goal is to increase their own political power.

Under this view, secessionism may not constitute a bottom-up movement - as supporters of independence claim- but rather manipulation by political elites who have used public resources (mainly, public media and public schooling) to unduly influence the population and further their own political agenda. Opponents of Catalan secession have also portrayed the political movement that supports it as nationalist in nature and economically unsupportive of other Spanish regions.⁴⁷

III. UNDERSTANDING THE INTERNAL CONFLICTS

A. *The Paradox*

This article sets out a fundamental paradox: while it was arguably in the best interest of most Catalans and Spaniards to know the nature

⁴⁵ See, however, empirical evidence on the contrary in Xavier Cuadras-Morato & Toni Rodon, *The Dog that Didn't Bark: On the Effect of the Great Recession on the Surge of Secessionism*, 968 Barcelona Graduate School of Economics Working Paper Series (2017). According to these authors, although the line of thought that suggests that the economic crisis fueled support for secession is quite ubiquitous, their findings do not support this hypothesis. The authors indicate that their research suggests that “the pro-secession tide in Catalonia might not recede when the economy gets better, unless there are also further changes in the political situation in Spain” (p. 6). Jordi Muñoz & Raul Tormos, *Economic Expectations and Support for Secession in Catalonia: Between Causality and Rationalization*, *European Political Science Review* (2014) also recognize a limited role to economic reasons for support to independence. They argue that data suggests that economic motivations are more relevant for citizens with ambivalent identity positions and for those that have no party identification, or support political parties with less clear-cut stances on the issue.

⁴⁶ According to the Bank of Spain, Catalonia closed the 2016 financial year with a public debt of € 75,098 million. See BANCO DE ESPAÑA, *Boletín Estadístico: Deuda Según el Protocolo de Déficit Excesivo (PDE) por Comunidades Autónomas (a). Importes* (2017), available at <http://www.bde.es/webbde/es/estadis/infoest/a1309.pdf>. This amounts to 35.4% of Catalonia's GDP. See BANCO DE ESPAÑA, *Boletín Estadístico: Deuda Según el Protocolo de Déficit Excesivo (PDE) por Comunidades Autónomas (a). Porcentajes del PIB pm (c)* (2017), available at <http://www.bde.es/webbde/es/estadis/infoest/a1310.pdf>. This means that Catalonia is the most indebted autonomous community in Spain, although the third in relative terms (after the Community of Valencia -42.5%- and Castile-La Mancha -37%-).

⁴⁷ Marc Guinjoan & Toni Rodon, *supra* note 11 at 42, 47.

and extent of the political relationship that Catalonia desired with Spain through a legal, mutually agreed upon referendum in October, 2017, their governments were unable to agree on the terms and conditions to govern this vote.

Nevertheless, some would argue that, although this paradox relies on democratic principles, those who oppose secession have never wished to know if a majority of Catalans want to create a new independent state. What is more, such opponents would even argue that Catalans do not have a right to decide their own political future in the first place.

However, data does not support this claim. According to the most recent polls, 82% of Catalans⁴⁸ and 57.4% of Spaniards⁴⁹ believe that the best way to solve the historic Catalan-Spanish conflict is through a legal, mutually agreed upon referendum. The ample support among Catalans and Spaniards alike to hold a referendum of this nature may reveal underlying interests that have not yet been explored by academia or political parties. This idea is reinforced by the fact that even the majority of Catalan voters of parties opposing the referendum (the conservative PP and the liberal *Ciudadanos*) support the organization of a referendum of this type.⁵⁰ Among the underlying interests that would lead Catalans and Spaniards to support the referendum, there could be democratic convictions, the desire to be heard, or to peacefully solve the political conflict “once and for all”.

The formulation of this paradox, however, does not consider whether the results from a legal, mutually agreed upon vote should be legally binding, or which specific steps should be taken to implement them. Nor are we able to ascertain which specific terms and conditions ought to have governed such a referendum (e.g., whether there should have only been a binary answer or a more complex one).⁵¹

⁴⁸ METROSCOPIA, *Sondeo sobre el Referéndum en Cataluña*, El País (September 24, 2017), available at https://elpais.com/elpais/2017/09/22/media/1506106430_606062.html.

⁴⁹ Daniel G. Sastre, *El Apoyo a la Independencia Baja Hasta el 33% en Cataluña*, El Mundo (October 30, 2017), available at <http://www.elmundo.es/cataluna/2017/10/30/59f63942468aeb755c8b4678.html>. According to this poll, 75.6% of Catalans support holding a legal, mutually-agreed vote on independence.

⁵⁰ According to the *El País* poll referred *supra* note 48, while 49% of the Catalan voters of PP and 57% of Catalan voters of *Ciudadanos* support holding a legal, mutually agreed upon referendum, 43% and 41% of them, respectively, are against it.

⁵¹ Polls suggest that support to independence in a referendum varies depending on whether the question is framed with a binary “yes/no” answer or by giving voters the

In other words, the paradox this article identifies does not propose that the October 2017 referendum satisfied the interests of Catalans and Spaniards alike, or that allowing it to go through was in the best interest of both sides of the conflict. Rather, it identifies that there were important advantages both for Catalonia *and* Spain in consulting Catalan citizens through a legal, mutually agreed upon referendum, distinct from the vote that took place in October 2017.

In doing so, this article relies on extensive literature that political science has developed in the field of public participation, deliberative civic engagement,⁵² and participatory and deliberative democracy.⁵³ Such advantages range from the intrinsic value of democracy⁵⁴ to other instrumental benefits like increased civic educational effects,⁵⁵ citizenship engagement, and credibility and legitimacy of the system. Furthermore, consulting Catalans about the nature of the political relationship they wished to have with Spain through a legal, mutually agreed upon referendum would have allowed both Catalonia and

option to choose from a broader range of answers (e.g., “yes”, “no”, and “Max devolution” of sorts).

⁵² Deliberative civic engagement has been defined as a term “that encompasses various ways of involving citizens not just in formal institutions but also in the broader process of democratic self-governance.” See Tina Nabatchi, *An Introduction to Deliberative Civic Engagement*, in DEMOCRACY IN MOTION. EVALUATING THE PRACTICE AND IMPACT OF DELIBERATIVE CIVIC ENGAGEMENT 7, 8 (Tina Nabatchi, John Gastil, Michael Weiksner & Matt Leighninger, 2012).

⁵³ For instance, one of the participatory democracy baseline assumptions is that “in a good society people participate fully, and that a society cannot be good unless that happens.” See DIMITRIOS ROUSSOPOULOS & C. GEORGE BENELLO (eds.), PARTICIPATORY DEMOCRACY. PROSPECTS FOR DEMOCRATIZING DEMOCRACY 6 (2005).

⁵⁴ “Many point to the intrinsic value of democracy and assert that deliberation and civil participation are ends in themselves and should be judged as such regardless of their other potential benefits. Numerous scholars look to the work of German social theorist Jürgen Habermas as the theoretical source of moral (i.e., “normative”) arguments for deliberation. Habermas calls for the extension of participation and inclusion in democracy through deliberation as a remedy for the power inequalities present in communication among and between decision makers and the public. In this view, deliberative civil engagement is an end that stands apart –and should be judged separately– from other benefits such processes might produce.” See Nabatchi, *supra* note 52 at 9.

⁵⁵ “This potential for citizens to learn through participation, such that participatory processes become self-reinforcing, is a core assumption for participatory democrats who draw on claims put forward by ancient and modern political theorists (such as Aristotle, Rousseau, Mill). Participatory democrats place considerable weight on deliberation as a method of citizen engagement.” See Heather Pincock, *Does Deliberation Make Better Citizens?*, in DEMOCRACY IN MOTION. EVALUATING THE PRACTICE AND IMPACT OF DELIBERATIVE CIVIC ENGAGEMENT 137 (Tina Nabatchi, John Gastil, Michael Weiksner & Matt Leighninger eds., 2012).

Spain, for at least a generation or two, to spend valuable resources and energy on other pressing social and economic issues.

The paradox set out in this article further draws upon Goodin's scholarship, which suggests that although some issues are deemed politically undiscussable,⁵⁶ political deliberations can contribute to the resolution of unsettled questions:

In the case of sensitive issues, of course, 'coming to terms' might take various different forms. 'Coming to an agreed solution' is one, of course; but that may often be more than we can reasonably hope for. Simply 'desensitizing' an issue might be a good outcome – 'resolving' the issue, after a fashion, without exactly 'solving' it. That, I shall conclude, is the larger contribution that political deliberation and discussion is likely to make, when dealing with sensitive issues in highly polarized settings.⁵⁷

It is worth posing the question of whether referenda are in fact adequate - or even effective- processes for political deliberations. Indeed, some authors have identified areas in which referenda tend to inhibit deliberation,⁵⁸ and many others have gone as far as affirming that referenda are, in representative democracies (like the Spanish), anti-democratic.⁵⁹ They reject the assumption that referenda represent an ideal model of democracy because they: can be manipulated by their organizers (the "elite control syndrome"), do not foster meaningful deliberation (the "deliberation deficit"), and consolidate majoritarian decision-making at the expense of minorities (the "majoritarian danger").⁶⁰

⁵⁶ According to Goodin, some issues are politically undiscussable either because they are pointless discussions from a pragmatic point of view, or because they are politically inadvisable. The following would be part of the former group: debates about whether to close a debate, deliberations over the impossible, irresolvable issues, undecidable issues, or radically divisive issues. In the latter, topics that generate visceral responses, tender topics, secrets, or issues that political convenience advises against discussing. See ROBERT E. GOODIN, *INNOVATING DEMOCRACY. DEMOCRATIC THEORY AND PRACTICE AFTER THE DELIBERATIVE TURN* 67, 78 (2008).

⁵⁷ *Id.* at 78.

⁵⁸ Such as the intrusion of politics, the absence of clarity, the amount and quantity of information, and the degree of participation and engagement of citizens in the process. See Lawrence LeDuc, *Referendums and Deliberative Democracy*, 38 *Electoral Studies* 139, 148 (2015).

⁵⁹ STEPHEN TIERNEY, *CONSTITUTIONAL REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION* 19 (2012).

⁶⁰ *Id.* at 22, 42.

The literature also offers equally persuasive counter-arguments, suggesting that these criticisms can also be extended to representative models of democracy.⁶¹ Some authors conclude that the relevant inquiry is whether there are “principled objections that referenda are simply not suitable for the taking of constitutional decisions.”⁶² According to them, there are “real-world models of direct democracy which can be shown, at least at the level of constitutional authorship, to facilitate proper deliberation.”⁶³

If this is so, and a legal, mutually agreed upon referendum would have facilitated a proper deliberation on this important matter, the question becomes why the Catalan and Spanish governments failed to agree on the terms and conditions of the October 2017 referendum. One possible explanation, the article argues, is that there are significant “behind-the-table” conflicts for both sides. The following two sections analyze such conflicts.

B. The Internal Catalan Conflict

A distinctive, traditional feature of the Catalan political system was that political parties were divided in two axes: the classical left-right dimension and the devolution-centralism dimension. This “bimodal” structure resulted in “the articulation of a highly pluralist and fragmented party system”.⁶⁴

According to Guinjoan and Rodon, Catalonia’s bimodal political spectrum was not very common across European democracies, where political competition is usually structured with a single left-right dimension.⁶⁵ This is certainly the case in Spain, where there have traditionally been only two major parties that have alternated in power: the conservative Popular Party and the Socialist Party.⁶⁶

⁶¹ For instance, modern representative democracy also has problems in relation to the elite control syndrome, such as the institutional imbalance (executive control of the legislative agenda), partisan control (partisan loyalty of elected representatives), and external influence (unprecedented level of scrutiny and pressure from the media, lobbyists and other interests’ groups). The same is true for the majoritarian danger, as not all electoral systems operate on a proportional representational system. *Id.* at 42.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Marc Guinjoan & Toni Rodon, *supra* note 11 at 21.

⁶⁵ *Id.* at 22.

⁶⁶ Apart for the first government of the restored democracy (1979-1982), there have only been socialist (1982-1996, 2004-2011) and Popular Party governments (1996-2004, 2011-present) in Spain.

In Catalonia, the devolution-centralism discussion had always presupposed that an agreement with the Spanish political forces was necessary because Catalonia, as an autonomous community, only has the powers it has been granted by the Spanish Constitution and the Catalan Statute of Autonomy. In other words, Catalan political parties understood that in order to obtain more devolved powers they needed to negotiate with Spain, either through power-by-power bargaining (1980-2003) or by changing the institutional framework (2003-2012).

This understanding, however, started to come apart after the 2010 Spanish Constitutional Court decision to declare several relevant and symbolic provisions of Catalonia's Statute of Autonomy unconstitutional, and became clearly obsolete in the 2012 Catalan regional elections, and again after the 2015 elections, when a third axis was added to the Catalan political spectrum. After that point, political parties were also divided between (i) those who would only support organizing an independence referendum if the Spanish government authorized it (bilateral approach), and (ii) those who argued that an agreement with the Spanish government was preferable, but who would still organize the independence referendum despite the Spanish government's opposition (unilateral approach).

The new unilateralism-bilateralism political axis coincided with the traditional devolution-centralism discussion, as political parties supporting stronger centralism would not even consider organizing a referendum on the independence of Catalonia. However, in a rather counter-intuitive manner, political parties that supported unilaterally holding the referendum if needed ranged from left to right, and were not only or necessarily progressive parties.

Against this backdrop, this section (i) explores the historical evolution of the Catalan bimodal political system into what we will call a three-dimensional one, (ii) analyzes the role that the unilateralism-bilateralism issue has had in the internal conflict among Catalans, and (iii) suggests that this growing divide inside the pro-referendum supporters (indeed, a real political fragmentation) weakened their ability to reach "across-the-table" agreements with the Spanish government, which ultimately ran contrary to their main interest (i.e., knowing what kind of political relationship Catalonia desired with Spain).

1. *The First Decades of the Restored Democracy (1980-2003): Progressive Increase of Self-Government Through Constant Bargaining*

Since democracy was restored in 1978 and until 2003, there were five main political parties and coalitions competing in the Catalan

Parliament: the center-right, Catalanist coalition of *Convergència i Unió* (CiU); the Catalan Socialist Party (PSC); the left, pro-independence *Esquerra Republicana de Catalunya* (ERC); the Spanish conservative Popular Party (PP); and the left-wing, green coalition of *Iniciativa Catalunya Verds-Esquerra Unida i Alternativa* (ICV-EUiA). These five parties can be drawn in the traditional bimodal political structure according to their relative size as follows:

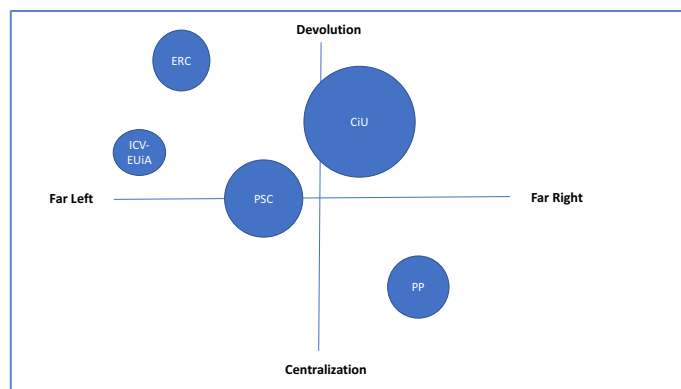


Figure 1: Political party system in Catalonia, 1980-2003.⁶⁷

During these first decades of restored self-government, the CiU coalition controlled the Catalan government and many other institutions (most notably, the city halls of major Catalan cities with the exception of Barcelona and the outskirts). Under the leadership of President Pujol, the current structures of self-government were established and new powers were incrementally obtained from the Spanish government. As Aragonès and Ponsatí explain,

During his many years as president of the Catalan government, Jordi Pujol favored a strategy of permanent bargaining with the central government in order to gradually extract small concessions to increase the capacity of self-government of the Catalan institutions and improve Catalonia's financial situation. This strategy of attaining small jurisdictional and financial gains became popularly known as the 'fish in the bag' ("peix al cove") politics. Whenever the party in government in Spain needed CiU's votes in the Spanish Parliament there was an opportunity for these types of negotiations. They were messy, lengthy and contrived,

⁶⁷ Adapted from Marc Guinjoan & Toni Rodon, *supra* note 11 at 23.

but they brought results that were generally visible for the Catalan voters.⁶⁸

The success of this strategy in obtaining new powers for Catalonia, coupled with the perception that secession was a futile option, prevented the pro-independence movement from taking off. Thus, during the first years of democracy, the secessionist movement “was mainly structured around minority extreme left-wing political parties with no representation in legislative chambers.”⁶⁹ It was not until 1989 that one of the main political parties represented in the Catalan Parliament openly advocated for independence from Spain (the ERC),⁷⁰ and even then, unilateralism was not debated in society or academia.

2. *Attempts to Redefine the Institutional Framework (2003-2012): the (partially failed) 2006 Statute of Autonomy and the (failed) Fiscal Agreement*

This power-by-power negotiation strategy changed when the left-wing coalition government of PSC, ERC, and ICV-EUiA came to power in 2003 and again in 2006. Under these coalition governments, the Catalan political forces proposed approving a new Statute of Autonomy for Catalonia to increase self-government with two main goals: improving Catalonia’s finances by obtaining more revenues and safeguarding devolved powers.⁷¹ In a way, it was a “bid for increased devolution” to try to “reform the institutional framework” because “the prospect of bringing Catalan devolution forward was totally exhausted by the systematic interference of central government laws and regulations, and self-government was severely limited by financial suffocation.”⁷²

In 2005, the new Statute of Autonomy was approved by a large majority of the Catalan Parliament (120 out of the 135 MPs voted in favor), including the Catalan Socialist Party. After lengthy and complex negotiations with the Spanish Socialist Party, then in power in Spain, a watered-down version of the original Statute of Autonomy was ultimately passed by the Spanish legislative chambers. It became

⁶⁸ Enriqueta Aragonès & Clara Ponsatí, *Negotiations and Political Strategies in the Contest for Catalan Independence*, in CATALONIA: A NEW INDEPENDENT STATE IN EUROPE? A DEBATE ON SECESSION WITHIN THE EUROPEAN UNION 63 (Xavier Cuadras-Morato ed., 2016).

⁶⁹ Marc Guinjoan & Toni Rodon, *supra* note 11 at 26.

⁷⁰ *Id.* at 57.

⁷¹ CUADRAS-MORATO, *supra* note 5 at 12.

⁷² Enriqueta Aragonès & Clara Ponsatí, *supra* note 68 at 63, 65.

law when it was approved by 74% of the Catalans who participated in a referendum held in June 2006.

In 2010, after the Popular Party and some Spanish socialist politicians challenged its legality, the Spanish Constitutional Court (i) declared several relevant provisions of the new Statute of Autonomy unconstitutional, and (ii) declared many other provisions as constitutional only if they were interpreted according to its own reading.

Many citizens and some Catalan political parties read this judicial decision as the ultimate confirmation that Spain could not be reformed,⁷³ a goal that had been shared by all Catalanist political forces since the late nineteenth century. “If Spain cannot be changed,” they said, “then Catalans only have one option: leave the country to its fate and start their own journey.”⁷⁴ This feeling was especially vivid because the Catalan political forces perceived that approval of the new Statute of Autonomy was the product of a very unique moment in history, when the socialist party was in power both in Catalonia and in Spain. If the advancement of Catalonia’s self-government was pushed back when circumstances were “ideal”, when else could Spain be effectively reformed? This event has been considered by most analysts as the beginning of the escalation of the conflict.

Both during and immediately after the lengthy negotiation over the new Statute of Autonomy, parts of Catalan civil society started to consider secession as a real alternative. The so-called “Platform for the Right to Decide” was formed, and numerous unofficial referenda for independence were organized at the local level in Catalonia. According to the polls, “between 60 and 80 per cent of the population were in favor of organizing a referendum on independence ... Ultimately, both the right to decide and independence received increasing attention by media and politicians.”⁷⁵

When the public debate about secession began, a new Spanish nationalist party called *Ciudadanos* (C’s) emerged in Catalonia. This group, allegedly liberal and somewhat ideologically similar to the Popular Party, had as its original *raison d’être* to replace the Catalanist political forces in Catalan institutions and to revert the language

⁷³ Enriqueta Aragonès & Clara Ponsatí, *supra* note 68 at 65: “The hardline rhetoric of the [Constitutional Court] ruling openly antagonized a great fraction of Catalans who felt disappointed and cheated after five years and much energy wasted in the frustrated reform.”

⁷⁴ Marc Guinjoan & Toni Rodon, *supra* note 11 at 48.

⁷⁵ Marc Guinjoan & Toni Rodon, *supra* note 11 at 32.

policies that had been put in place since the early 1980's. *Ciudadanos* obtained 3 MPs in the 2006 Catalan elections, and has continuously increased its popular support since. In fact, in the 2015 elections, *Ciudadanos* received the second highest number of votes in the Catalan Parliament.

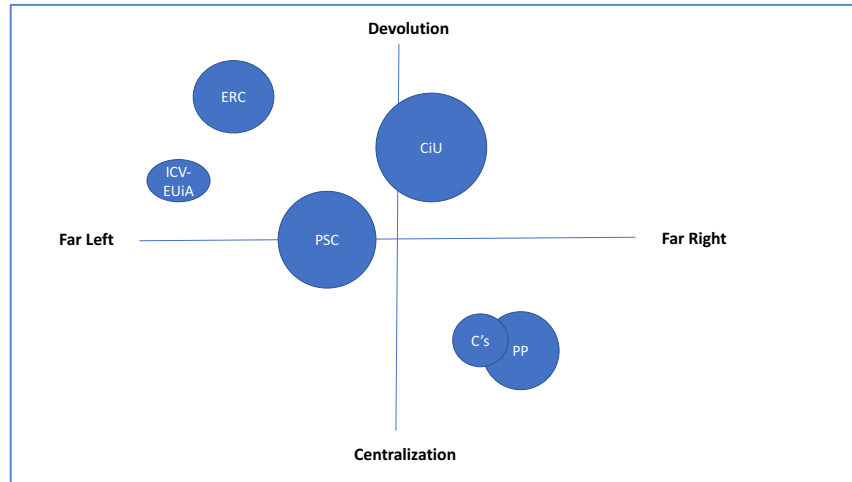


Figure 2: Political party system in Catalonia, 2003-2012.⁷⁶

The second attempt to reform the institutional framework in Spain came in 2010, when CiU won the Catalan elections with the promise to negotiate a new fiscal agreement with the Spanish government. Through this agreement, Catalonia was supposed to secure more financial resources for itself, like the Basque Country and Navarra had done.⁷⁷ Artur Mas, the leader of CiU after President Pujol left in 2003, was elected President.

As Aragonès and Ponsatí explain,

The context was grim: the Statute of Autonomy of Catalonia reform (sic) had concluded in frustration for many, the economic crisis was at its peak and debt was rampant. The government of President Mas was forced

⁷⁶ Adapted from Marc Guinjoan & Toni Rodon, *id.* at 23.

⁷⁷ According to Iván Serrano, “even though the idea of a ‘right to decide’ was one of the key elements of the electoral campaign, political parties did not fully transform this claim into a pro-independence agenda.” See Iván Serrano, *Catalonia: A Failure of Accommodation?*, in *CATALONIA IN SPAIN AND EUROPE. IS THERE A WAY TO INDEPENDENCE?* 101 (Klaus-Jurgen Nagel & Stephan Rixen eds., 2015).

into drastic budget consolidation, slashing of public employees' wages and cuts in education, health and social services. In this scenario, the demand to keep more of the Catalan taxes in Catalonia became an outcry.⁷⁸

However, as many expected, President Mas' proposal was dismissed by the government of President Rajoy. And, as many also expected, some Catalan political parties presented this as a yet another piece of evidence that (i) Spain could not be reformed, and that (ii) Spain's continuous refusal to accommodate Catalan claims legitimized taking unilateral action.⁷⁹

In fact, a week before President Rajoy formally declined President Mas' proposal to negotiate a fiscal agreement for Catalonia, a massive, unprecedented pro-independence demonstration flooded the streets of Barcelona.⁸⁰ Thus, given that the mandate of the Catalan government to negotiate said agreement had failed, and that popular support seemed to shift towards independence, President Mas called early elections in November 2012.

3. The Last Negotiating Bullet (2012-2015): the Five Legal Proceedings to Consult Catalan Citizens

The idea that Catalans had a "right to decide" their collective future gained momentum, and the 2012 snap elections gravitated around this issue. All political parties either expressly agreed with it (CiU, PSC,⁸¹ ERC, ICV-EUiA, and the new extreme left-wing anti-establishment pro-independence CUP) or rejected it (PP, *Ciudadanos*).

Albeit with some internal transferring of votes within pro-referendum parties,⁸² the results of the elections gave an absolute

⁷⁸ Enriqueta Aragonès & Clara Ponsatí, *supra* note 68 at 65.

⁷⁹ Iván Serrano, *supra* note 77 at 101.

⁸⁰ The motto of the demonstration was "Catalonia, a new State in Europe". According to the organizers, 2 M people participated in the march. However, these estimations differed according to the local police (1.5 M) or the Spanish government (0.6 M). See Àngels Piñol, *El Independentismo Catalán Logra una Histórica Exhibición de Fuerza*, *El País* (September 11, 2012), available at http://ccaa.elpais.com/ccaa/2012/09/11/catalunya/1347375808_419590.html.

⁸¹ Note that although the position of the Catalan Socialist Party has changed since then, in 2012 it supported the organization of a legal, mutually agreed upon referendum. See Pere Ríos, *El PSC Reclama el Derecho a Decidir en un Referéndum Legal*, *El País* (October 29, 2012), available at https://politica.elpais.com/politica/2012/10/28/actualidad/1351460023_870770.html.

⁸² CiU lost 12 MPs (from 62 to 50), ERC gained 11 (from 10 to 21), ICV-EUiA gained 3 (from 10 to 13), and the CUP entered for the first time into the Catalan Parliament with 3 MPs.

majority of 87 seats (out of 135) to those parties that supported the “right to decide”. The conservative CiU, which was hoping to obtain an absolute majority, lost twelve MPs and had to form a government with the parliamentary support of ERC, its long-time rival on the left.⁸³

At this point, it is important to note that in Catalan politics there was and continues to be an ideological difference between parties that support Catalonia’s independence (the pro-independence parties) and Catalonia’s sovereignty (the pro-referendum or pro-sovereignty parties). Thus, while pro-independence parties are obviously in favor of Catalonia’s secession from Spain, pro-sovereignty parties merely support Catalonia’s “right to decide” (which is based on democratic principles). Whether Spain needs to consent to the exercise of this “right to decide” remains a hot debate in Catalonia, and constitutes Catalonia’s “behind-the-table” conflict.

Regardless of this distinction, pro-independence parties are, by definition, pro-sovereignty as well. This means that, according to them, for Catalonia to become a new, independent state there needs to be a prior popular vote. And although the “pro-independence” and “pro-sovereignty” categories seem static, they are in fact quite dynamic, as political parties have been changing their positions as the political conflict escalates. By 2012, only the extreme left-wing anti-establishment CUP, and to a lesser extent ERC, were openly unilateralist.

Against this backdrop, one of the first measures that the newly-constituted Catalan Parliament took on January 23, 2013 was the approval of a resolution that declared the “beginning of the process to exercise the right to decide”.⁸⁴ The resolution did not yet contain any reference to unilateral action, although the electoral manifesto of CiU introduced “the possibility of a unilateral referendum if the state were not to accept a bilateral agreement to hold a consultation.”⁸⁵ In fact, the fourth principle that the resolution mentioned was “dialogue”, which stated that in the process of exercising the “right to decide” there would

⁸³ Thomas S. Harrington, *Catalonia’s Rocky Road to Independence*, 129 *ColdType* 44, 52 (December 2016).

⁸⁴ PARLAMENT DE CATALUNYA, *Resolució 5/X del Parlament de Catalunya, per la qual S’Aprova la Declaració de Sobirania i del Dret A Decidir del Poble de Catalunya*, January 23, 2013, available at <http://www.parlament.cat/document/intrade/7094>.

⁸⁵ Iván Serrano, *supra* note 77 at 101.

be conversations and negotiations with “the Spanish State, the European institutions, and the overall international community.”⁸⁶

The parliamentary resolution references to dialogue (principle 4th) and legality (principle 7th) led to the assessment of the various mechanisms under which Catalonia and Spain could agree on the terms and conditions of a referendum for independence. In March 2013, Carles Viver Pi-Sunyer, former Vice President of the Spanish Constitutional Court and Director of the Catalan Institute of Autonomous Studies, drafted the *Report about the Legal Proceedings through which the Citizens of Catalonia Can Be Consulted About Their Collective Political Future*.⁸⁷

This report was a response to the anti-secession argument that organizing a referendum for the independence of Catalonia was contrary to the Spanish Constitution.⁸⁸ The report laid out five different legal proceedings which, according to its author, could be used to consult the citizens of Catalonia about their collective political future.⁸⁹

However, to implement any of these measures other than moving forward with a non-binding consultation, it was necessary to achieve some sort of agreement with the Spanish government and the main Spanish political parties, who had previously declared and continue to declare today that they would not allow such a referendum to take place. Even though their negative response was predictable beforehand, the Catalan Parliament formally requested that the Spanish legislative chambers “delegate to the Catalan government the powers to call and organize a referendum on the future political status

⁸⁶ Note that the Spanish government immediately challenged the legality of this parliamentary resolution. On March 25, 2014, the Spanish Constitutional Court declared unconstitutional by unanimity that its first principle (“*The people of Catalonia has, for reasons of democratic legitimacy, the nature of a sovereign political and legal subject.*”).

⁸⁷ INSTITUT D’ESTUDIS CATALANS, *Informe sobre els Procediments Legals a Través dels quals els Ciutadans i les Ciutadanes de Catalunya Poden Ser Consultats sobre L’lur Futur Polític Col·lectiu*, March 11, 2013, available at http://presidencia.gencat.cat/web/.content/ambits_actuacio/desenvolupament_autogovern/iea/assessorament-al-govern/documents/informe_consultes_cat.pdf.

⁸⁸ For a complete legal argumentation in the matter, see PAU BOSSACOMA I BUSQUETS, JUSTÍCIA I LEGALITAT DE LA SECESSIÓ: UNA TEORIA DE L’AUTODETERMINACIÓ NACIONAL DES DE CATALUNYA (2015).

⁸⁹ Pau Bossacoma & Hèctor López Bofill, *Legal Strategies and Barriers to Secession, in CATALONIA: A NEW INDEPENDENT STATE IN EUROPE? A DEBATE ON SECESSION WITHIN THE EUROPEAN UNION* 113 (Xavier Cuadras-Morato ed., 2016).

of Catalonia.”⁹⁰ The request was rejected by 299 out of the 350 MPs of the Congress of Deputies.

Seeing that no agreement or negotiations were possible with the Spanish government, all of the pro-referendum parties of the Catalan Parliament (CiU, ERC, ICV-EUiA, CUP) and even the Catalan socialist party approved a law that provided the legal basis to organize a non-binding consultation.⁹¹ The unstated goal was to increase the pressure on the Spanish government to negotiate a legal, mutually agreed upon referendum.

As soon as the law was passed and the subsequent governmental decree approved, the Spanish government challenged their legality, and the Spanish Constitutional Court decided unanimously to suspend them as a precautionary measure.⁹² Despite that, the non-binding consultation took place on November 9, 2014 and approximately 2.3 million people (approximately 42% of the electoral list) participated in it.

The internal balances among pro-sovereignty parties led to the formulation of a multi-tiered question,⁹³ which in turn led to the following results: 80.76% of participants voted in favor of declaring a new independent state, 10.07% voted to declare a new non-independent state, and 4.54% voted against the creation of a new state.

While some would have preferred a single question with a binary “yes/no” answer, President Mas opted to satisfy the interests of those parties that supported a more nuanced question that could reflect the more specific preferences of Catalans. This is because, according to these parties, citizens should not be limited to deciding between outright independence and *status quo*, but rather should also have the chance to choose from more nuanced options (confederation, federation, or associate state).

After the 2014 non-binding consultation, the Spanish government initiated criminal proceedings against President Mas and

⁹⁰ *Id.* at 114.

⁹¹ The law was passed in the Catalan Parliament with 106 votes in favor and 28 against.

⁹² In two landmark cases (Judgement 31/2015 and 32/32015), the Spanish Constitutional Court later declared unconstitutional several provisions of the law as well as the subsequent governmental decree that formally called the consultation.

⁹³ The consultation presented a double question: “Do you want Catalonia to become a State?”, which could be answered “yes” or “no”. If the answer was “yes”, then the voter had to further answer “Do you want this State to be independent?”.

three of his ministers for disobedience and misconduct in public office. On March 13, 2017, the Superior Court of Justice of Catalonia found them guilty, imposed monetary fines, and banned them from holding public office.⁹⁴ Moreover, in an unprecedented move, the Spanish Court of Auditors notified them on September 25, 2017 that they needed to provide a 5.25 million euros' bank guarantee to secure reimbursement of the public funds that were used to organize the consultation. President Mas declared that this was a "grotesque" decision given that 3 million euros had been used to buy 7,000 computers for public schools.⁹⁵

4. *Towards a Three-Dimensional Political System: The de facto plebiscite (2015) and the Unilateral Referendum for the Independence of Catalonia (2017)*

Once it was clear that no agreement could be reached with the Spanish political parties to organize a legal, mutually agreed upon referendum for the independence of Catalonia, President Mas decided to call for early elections again in September 2015. This time, however, he claimed that they were a *de facto* plebiscite on Catalonia's independence.⁹⁶ If the government of Spain did not agree to sit and negotiate the terms and conditions of a legal, mutually agreed upon vote, then he would use his ultimate presidential power to further his party's agenda. That is, he would call for "regular" elections, but would interpret the results as a proxy for the population's opinion on the issue of independence.⁹⁷

The election results were exceptional on many different levels. First, the CiU coalition, which had been governing Catalonia for most of the preceding decades (1980-2003, 2010-2015), broke up. The coalition's success relied, among other factors, on its ambiguous stance

⁹⁴ As explained in Section II.b above, Catalonia does not have its own judiciary system as states in the United States of America do. Therefore, although the Superior Court of Justice of Catalonia is the highest judicial authority in Catalonia, it still makes part of the single-tiered Spanish judiciary.

⁹⁵ Efe, *Artur Mas Deposita en el Tribunal de Cuentas Otros 144.588 Euros de la Fianza por el 9-N*, ABC (November 23, 2017), available at http://www.abc.es/espana/abci-artur-mas-deposita-tribunal-cuentas-otros-144588-euros-fianza-201711231650_noticia.html.

⁹⁶ Roger Mateos, *Mas Convoca Oficialment les Eleccions per al 27 de Setembre*, Ara (August 3, 2015), available at http://www.ara.cat/politica/Mas-discrecio-evitar-temptacions-torpedinar-lo_0_1405659534.html.

⁹⁷ For a critical perspective of these elections, see Vera Gutiérrez Calvo, *¿Una Cataluña sin Barcelona?*, El País (September 26, 2015), available at http://politica.elpais.com/politica/2015/09/25/actualidad/1443194158_176795.html.

regarding the issue of independence. As an ideologically diverse group, it encompassed supporters of both outright pro-independence and milder devolution.⁹⁸ However, President Mas' will to consult Catalonia's citizens through an official mechanism led the coalition to an unresolvable dead-lock. As Aragonès and Ponsatí explain,

The ideological tension within CiU resolved in a rupture of the long-lasting federation of parties, and its two members decided to run as two separate parties, CDC and UDC, each one of them holding its own different position with respect to independence.⁹⁹

Second, a new pro-independence electoral coalition was formed between the center-right CDC (the major party in the defunct CiU) and its long-time rival left-wing ERC. The coalition announced that it would declare independence if it won the elections;¹⁰⁰ it was named "*Junts pel Sí*" (JxS – "Together for Yes"), and was supported by *inter alia* the main civil society pro-independence organizations. As supporters of this coalition saw it, the Spanish government's refusal to negotiate the organization of a referendum "reinforced the legitimacy to open other alternative ways to consult"¹⁰¹ the citizens of Catalonia.

Third, the elections obtained the highest participation rate in the democratic history of Catalonia (77.45%), which further reinforced the legitimacy of the results and was a clear sign that citizens perceived it as a *de facto* plebiscite or, at the very least, as important.

Fourth, the pro-independence movement strategy caught many of the Spanish elites by surprise, as they did not expect that the traditionally "bourgeois" CiU would follow through on its threat.¹⁰²

Most importantly, the September 2015 elections forced all Catalan parties to clarify their positions on the unilateralism-bilateralism axis. That is, so long as the Catalan parties shared any hope that an agreement could be reached with Spain, they remained ambiguous as to whether they would support a unilateral declaration of independence. However, as soon as it was clear that the Spanish

⁹⁸ Marc Guinjoan & Toni Rodon, *supra* note 11 at 21.

⁹⁹ Enriqueta Aragonès & Clara Ponsatí, *supra* note 68 at 78.

¹⁰⁰ JUNTS PEL SÍ, *Electoral Program* 30, available at https://juntspelsi.s3.amazonaws.com/assets/150905_Programa_electoral_v1.pdf.

¹⁰¹ INSTITUT D'ESTUDIS CATALANS, *supra* note 87 at 16.

¹⁰² For a critique of the relationship between the Catalan bourgeoisie and secession, see José Luis Álvarez, *La Lucha Final de la Burguesía Catalana*, *El País* (August 21, 2012), available at http://elpais.com/elpais/2012/07/23/opinion/1343038261_771040.html.

elites were not willing to negotiate such a referendum and elections were called, political parties were forced to clarify their positions on this issue.

The pro-independence unilateralist parties were the extreme left-wing CUP and, with certain nuances between the center-right CDC and the center-left ERC, the JxS coalition. Those clearly against secession were socialist PSC, the conservative PP, and the Spanish nationalist *Ciudadanos*. The left-wing, green ICV-EUiA organized another *sui generis* coalition with the local branch of the Spanish emerging far left party *Podemos* – “Catalunya Si Que es Pot” (CSQP, “Catalonia, Yes We can”), which supported the organization of a referendum but seemed to insist that it needed the consent of the Spanish State.¹⁰³

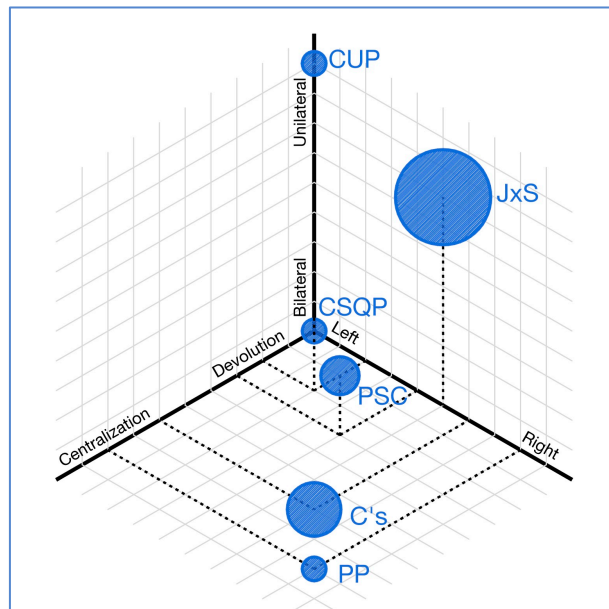


Figure 3: Political party system in Catalonia, 2015 - present

¹⁰³ See, e.g., the statements made by the CSQP leader the day after the elections were held. Ara, Lluís Rabell (CSQEP): “*Ens Situem en el Sí al Dret A Decidir i en Apostar per l’Autodeterminació de Catalunya*”, Ara (September 28, 2015), available at http://www.ara.cat/ara_mateix/LLuis_Rabell-Catalunya_Si_que_Es_Pot-eleccions_plebiscitaries-27S-independencia_0_1439256155.html.

The election gave a majority of votes (39.59%) and seats in the Catalan Parliament (62) to JxS, but the coalition did not achieve the absolute majority it was aiming for (68 out 135 seats). The second party in votes (17.90%) and seats (25) were *Ciudadanos*. Then came PSC (12.72%, 16 seats), CSQP (8.94%, 11 seats), PP (8.49%, 11 seats), and CUP (8.21%, 10 seats).

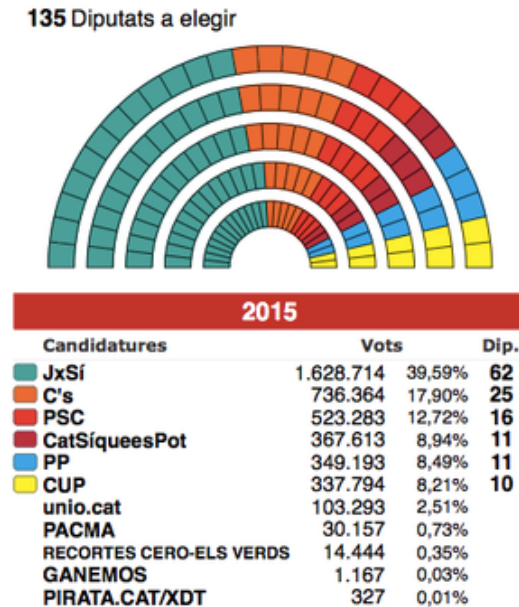


Figure 4: Results of the September 2015 elections.¹⁰⁴

The 2015 results gave rise to a complex scenario. Following electoral laws, the pro-secession unilateralist parties won the absolute majority of seats in the Catalan Parliament (72 out of 135) even though they did not overcome the 50% threshold vote by less than 80,000 votes.¹⁰⁵ This outcome led to a multiplicity of interpretations.

¹⁰⁴ Roger Tugas, *Resultats Definitius del 27-S: JxSí i la CUP Queden a Menys de 80.000 Electors de la Majoria Absoluta de Vots*, Ara (October 14, 2015), available at http://www.ara.cat/politica/Resultats-definitius-JxSi-CUP-majoria-absoluta-vots-escons-eleccions-plebiscitaries-27-S_0_1448855291.html.

¹⁰⁵ Catalonia does not have its own electoral law, so it uses the Spanish one. As in many other jurisdictions (like the U.S.), the Spanish electoral system is not proportionate. This resulted in a peculiar outcome in the September 2015 elections: the secessionist parties were 79,667 votes behind the 50% popular vote threshold (out of 4,092,349 total votes issued), but they obtained 53% of the seats in Parliament.

Pro-unity parties, which had previously denied the plebiscite nature of the election,¹⁰⁶ argued that the plebiscite was lost, as only 47.8% of the Catalans supported independence from Spain. Conversely, pro-secession unilateralist parties claimed that it was legitimate for them to further their agenda because (i) the political parties who opposed independence only obtained 39.11% of the popular vote, as CSQP's position was not clear in the matter,¹⁰⁷; and (ii) according to the electoral laws, they had won the elections and were entitled to form a government.

After months of public, hard-bargaining negotiation, JxS formed a government with the parliamentary support of the anti-establishment CUP. This was an exceptional agreement, because the only thing that united these two political forces was their pro-secession agenda: the extreme-left CUP was far from the ideology of ERC (one of the members of the JxS coalition), but even farther away from CDC (the other member of the JxS coalition). However, no other political party would agree to support the JxS coalition to form a government and further its secessionist agenda, so JxS was forced to reach an agreement with the CUP that required President Mas, despised by the CUP, to resign from office. In January 2016, the former mayor of Girona from CDC, Carles Puigdemont, became the new President of Catalonia.

Notwithstanding the appointment of the new government, there were still democratic concerns about the legitimacy of a unilateral declaration of independence by the Catalan Parliament.¹⁰⁸ Therefore, after some months of intense public debate, the Catalan government defined a new strategy. Instead of unilaterally declaring independence, it would “get the country ready” for independence (i.e., create those political and administrative structures needed to sustain a new Catalan

¹⁰⁶ See, e.g., President Rajoy's statements: “There will be elections in the Catalan Parliament, but they will not be a plebiscite as there was no referendum [in reference to the November 9, 2014, consultation]”. See El Confidencial, *Rajoy: “No Habrá Elecciones Plebiscitarias Como Tampoco Hubo Referéndum*, El Confidencial (July 31, 2015), available at http://www.elconfidencial.com/espana/2015-07-31/rajoy-no-habra-elecciones-plebiscitarias-como-tampoco-hubo-referendum_950112/. Original text in Spanish.

¹⁰⁷ Marc Colomer, *Els Vots de Catalunya Sí Que es Pot, Amb el ‘Sí’ o Amb el ‘No’?*, Ara (September 28, 2015), available at http://www.ara.cat/premium/Catalunya_Si_que_es_Pot-independencia-27S-eleccions_plebiscitaries-Lluis_Rabell_0_1439256175.html.

¹⁰⁸ See, e.g., the public statements made by the leader of the CUP the day after the elections were held. Jordi Ribalaygue, *La CUP Descarta una Declaración Unilateral de Independencia y Veta a Mas Como Presidente*, El Mundo (September 28, 2015), available at <http://www.elmundo.es/cataluna/2015/09/28/56092d11ca4741d46e8b457e.html>.

state)¹⁰⁹ and organize an official and, if necessary, unilateral referendum for independence before the end of 2017.¹¹⁰

Once the Catalan government publicly announced that it would organize a referendum on October 2017, there was a big debate in Catalonia and Spain about whether the Catalan government and the pro-independence parties would follow through their commitment to organize such a referendum, even as the Spanish government insisted that they would not allow it. This was especially because the Public Prosecutor's Office – a body ultimately dependent on the Spanish government- was inflicting increased pressure on Catalan politicians¹¹¹ and companies.¹¹²

The Catalan government repeatedly insisted that it would organize a referendum for independence in 2017.¹¹³ Its spokeswoman stated that unless the Spanish government agreed on the terms and

¹⁰⁹ See, e.g., the public statements of the Catalan Minister for Foreign Affairs. Agències, *Romeva: "El Govern Està al 100% Preparant la Independència"*, El País (April 1, 2016), available at http://cat.elpais.com/cat/2016/04/01/actualidad/1459499743_236904.html.

¹¹⁰ After another massive pro-secession demonstration in the streets of Barcelona in September 2016, President Puigdemont declared that he would much rather organize a legal, mutually agreed upon referendum with the Spanish government. However, according to him, so far "the only unilateral acts have been done by the [Spanish] State." See Luis B. García, *Puigdemont Enfria la Opción del RUI: "Si el Govern Convoca un Referéndum, Debe ser Vinculante"*, La Vanguardia (September 12, 2016), available at <http://www.lavanguardia.com/politica/20160912/41253441650/carles-puigdemont-enfria-rui-referendum-vinculante.html>.

¹¹¹ The Public Prosecutor's Office initiated twice criminal proceedings against the President of the Catalan Parliament, Ms. Carme Forcadell, and once against some members of the Bureau of the Catalan Parliament. See Jesús García, *La Fiscalía se Querrela Contra la Mesa del Parlament por el Referéndum*, El País (February 23, 2017), available at http://ccaa.elpais.com/ccaa/2017/02/23/catalunya/1487857206_349021.html.

¹¹² The Public Prosecutor's Office requested information to approximately 20 technological, consulting, and cybersecurity companies about their contracts with the Catalan government to create two "state structures", namely, the intelligence services and the tax agency. See Fernando J. Pérez, *La Fiscalía Exige Todos los Datos a las Empresas Contratadas para la Secesión*, El País (April 3, 2017), available at http://politica.elpais.com/politica/2017/04/02/actualidad/1491158143_418662.html.

¹¹³ See, for instance, the statements made by the Secretary General of the Catalan tax office, when it declared that the Catalan government would organize a referendum in 2017 even if the Spanish Constitutional Court declared unconstitutional the budgetary items necessary to organize it. Efe, *La Generalitat Organizará y Financiará el Referéndum Aunque el TC Suspenda la Partida de los Presupuestos*, ABC (November 15, 2016), available at http://www.abc.es/espana/catalunya/politica/abci-generalitat-organizar-y-financiar-referendum-aunque-suspenda-partida-presupuestos-201611151232_noticia.html.

conditions of the referendum in less than two months, the Catalan government would initiate unilateral action to organize:

We keep seeking to enter into dialogue [with the Spanish government], but doing it forever will lead to our collapse – it is incompatible with the determination and conviction that this referendum can be done and that we need to be able to organize it because that is what the majority of the citizens want.¹¹⁴

However, during the months that preceded the October 2017 vote, there was increased tension about the role that unilateralism needed to play in the organization of a referendum for the independence of Catalonia (i) inside CDC/PDeCat¹¹⁵ (the center-right party of the JxS coalition), (ii) between the two members of the JxS coalition, (iii) between the ruling JxS coalition and its left-wing anti-establishment parliamentary supporter CUP, and (iv) between the supporters of unilateralism and supporters of holding a legal, mutually agreed upon referendum.

Indeed, while some “moderates” or “skeptics” inside PDeCAT watched the Spanish government’s legal aggression with increased concern and wondered whether they should change their strategy, others –most notably, President Puigdemont- reaffirmed their commitment to consult Catalans in 2017 about their political preferences in an official referendum.¹¹⁶

As a result of this, there were increased tensions between the two members of the ruling JxS coalition, who looked at each other with suspicion and were not able to overcome their historical distrust. In turn, the significant difference in language and substance between the pro-secession strategies of JxS and its parliamentary anti-establishment ally CUP¹¹⁷ also exhausted many Catalans, who, according to certain

¹¹⁴ La Vanguardia, *El Govern Da Dos Meses al Gobierno Para Pactar el Referéndum o Empezará la Vía Unilateral*, La Vanguardia (April 13, 2017), available at <http://www.lavanguardia.com/politica/20170413/421670714025/govern-ve-el-dialogo-bloqueado-pero-se-da-dos-meses-para-pactar-referendum.html>.

¹¹⁵ In July 2016, CDC was “re-founded” and transferred its activity to a newly-constituted party called *Partit Democrata Europeu Catala* - PDeCAT (“Catalan European Democratic Party”). For the purposes of simplicity, future references in this article to CDC should be understood made to PDeCAT, and viceversa.

¹¹⁶ Oriol March, *El Referèndum Posa a Prova la Unitat del PDeCat*, Nació Digital (December 18, 2017), available at <http://www.naciodigital.cat/noticia/121884/referendum/posa/prova/unitat/pdecat>.

¹¹⁷ As soon as the legislature started, JxS and CUP made public their differences about the rhythm at which the pro-independence agenda should move forward. See, e.g.,

polls, seemed less supportive than before about organizing a unilateral referendum for independence.¹¹⁸

Finally, in the months that preceded the October 2017 vote, there was also a growing divide between supporters of a unilateral referendum and supporters of a legal, mutually agreed upon referendum, who had expressed their preference for the constitution of a Catalan Republic with shared sovereignty within a multi-national Spanish State.¹¹⁹ Needless to say, the Spanish government read these tensions as a “symptom of the failure” of the process towards independence.¹²⁰

In sum, the addition of a third axis in the Catalan political system increased the difficulties that pro-referendum supporters faced when they tried to coordinate a unified position at the negotiation table vis-à-vis the Spanish government. As a result of this discord “behind the table”, it became increasingly difficult to reach an agreement “across the table” with the Spanish government to make the October 2017 referendum a legal, mutually accepted upon vote that would have served the interests of all the parties involved in the conflict.

C. *The Internal Spanish Conflict*

In the current Spanish political system, parties are primarily divided on one single dimension. Aside from the minority regional

Marc Font, *JxSí y la CUP Airean Sus Diferencias Respecto al Ritmo del Proceso Independentista*, Público (April 1, 2016), available at <http://www.publico.es/politica/jxsi-y-cup-airean-diferencias.html>.

¹¹⁸ In the months prior to the vote, the percentage of Catalans that supported the organization of a unilateral referendum decreased from 37.3% (January 2017) to 28.8% (April 2017). See La Vanguardia, *El referendun Unilateral Pierde Apoyos Frente a la Consulta Acordada*, La Vanguardia (April 18, 2017), available at <http://www.lavanguardia.com/politica/20170416/421751405001/encuesta-convocatoria-referendum-independencia-catalunya.html>.

¹¹⁹ The Catalan political party system is in complete evolution, and has dramatically changed these last years. The parliamentary left-wing coalition of CSQP merged with another eco-socialist political and civic movements under the leadership of Ada Colau, mayor of Barcelona, and created a new, strong coalition. In its recent constitution, they declared that they support the organization of a legal, mutually agreed upon referendum, where they will advocate for the creation of a “Catalan Republic” that “shares sovereignty” with a “multi-national” Spanish state. See Efe, *Los ‘Comunes’ Asumen Como Reto Nacional “Crear una República en Cataluña”*, Expansión (April 8, 2017), available at <http://www.expansion.com/economia/politica/2017/04/08/58e8d9d7268e3e42358b459a.html>.

¹²⁰ La Vanguardia, *Santamaría Ce en la Tensión de JxSí un “Síntoma del Fracaso del ‘Proces’”*, La Vanguardia (April 18, 2017), available at <http://www.lavanguardia.com/politica/20170418/421786072935/soraya-saenz-de-santamaria-tension-junts-pel-si-sintoma-fracaso-proceso-soberanista.html>.

parties, political forces distinguish themselves on the traditional left-right axis. Moreover, since democracy was restored, all but the first government (1979-1982) have been controlled either by the socialist party (PSOE) or by the conservative Popular Party (PP). This is known as the Spanish bipartisan political system.¹²¹

Though the PP and PSOE have differing views on many matters, including education, employment, health, and immigration, they tend to agree on some very basic “affairs of state”, such as the fight against terrorism or the “territorial unity of Spain”. Although the socialist party has traditionally seemed more empathic towards Catalonia’s claims,¹²² it shares with the conservative PP the understanding that in Spain there is only one sovereign entity: Spain itself.

Just as in Catalonia, the Spanish electoral landscape is rapidly changing. In the 2015 Spanish elections, and again in 2016,¹²³ two new parties entered the scene and threatened the bipartisan status quo. *Podemos* (“We Can”), an extreme-left anti-establishment party, became the political party with the third highest number of representatives in the legislative chambers. *Ciudadanos* (“Citizens”, C’s), a Spanish nationalist, liberal party that was initially formed in Catalonia, also made it to the Congress of Deputies and Senate as the fourth most voted party. In a country where 36 million citizens were called to vote, both parties jointly obtained more than 8 million votes, and PP and PSOE lost around 5.4 million votes.¹²⁴

This electoral shift had several consequences for Spanish politics. One of them, relevant for this article’s purposes, is that it increased the pressure in the governing conservative PP to radicalize its position vis-à-vis the Catalan conflict. This is because (i) voters of PP and *Ciudadanos* largely share the same unitary view of Spain, so they competed to a certain extent for the same share of electoral vote; and (ii) the PP government, in parliamentary minority, needed the

¹²¹ From 1982 to 1996, the President of Spain was the socialist Felipe Gonzalez. From 1996 to 2004, the conservative PP Jose Maria Aznar was the President of Spain. From 2004 to 2011, the Presidency of the Spanish Government came back to the socialist party with Jose Luis Rodriguez Zapatero. In 2011 to date, Mariano Rajoy, from the conservative PP, is the President of Government.

¹²² Note, for instance, that the 2006 Statute of Autonomy of Catalonia was negotiated when the Socialist Party was controlling the Spanish government.

¹²³ After the December 2015 general elections, no government was formed because of disagreements between political parties, so new general elections were held in June 2016.

¹²⁴ Marisa Cruz, *España Tumba al Bipartidismo y Deja en el Aire el Gobierno*, *El Mundo* (December 21, 2015), available at <http://www.elmundo.es/espana/2015/12/20/5676faa222601d94038b458f.html>.

votes of *Ciudadanos* to remain in power. Therefore, the underlying electoral competition between the two parties reduced the Spanish government's capacity to approach the political and territorial conflict with Catalonia with any flexibility or creativity.

The Spanish government's refusal to engage in negotiations with the Catalan government to organize a legal, mutually agreed upon referendum over the independence of Catalonia is best encapsulated in President Rajoy's recurrent statement: "I do not want to or can organize a referendum in Catalonia".¹²⁵ This idea, repeated as a mantra as many times as the Catalan government insisted it would organize a referendum in 2017, was based on the principle that "there is no democracy outside the rule of law".¹²⁶

Indeed, the Spanish government's position, supported by many who opposed Catalan secession, was that the current Spanish legal framework disallowed a part of the country from deciding its political future on its own. Under this view, supported by their reading of the Constitution,¹²⁷ only the Spanish people are sovereign and able to decide whether Catalonia becomes a new state.

However, this interpretation of the Spanish Constitution clashed with the opinions of certain constitutional scholars, who suggested that nothing in the Constitution forbids holding a legal, *non-binding*, mutually agreed upon independence referendum in Catalonia to determine whether there is enough popular support for secession. If that were the case, the Constitution could then be changed to allow a mutually agreed upon, legally binding referendum. This perspective was defended by, among others, Francisco Rubio Llorente in a well-known article published in *El País* newspaper in 2012.¹²⁸ Rubio

¹²⁵ See, among many others, the interview President Rajoy gave to six major European newspapers in 2013. El País, "*El Estado del Bienestar es un Logro Irrenunciable en España y en la UE*", El País (December 8, 2013), available at http://politica.elpais.com/politica/2013/12/08/actualidad/1386520536_280805.html.

¹²⁶ See the manifesto that some Catalan jurists have recently published supporting this idea: LIBERTATS, *Manifiesto* (January 2017), available at <http://llibertats.cat/ca/manifest/>.

¹²⁷ Article 1(2) of the Spanish Constitution enshrines the principle that: "National sovereignty belongs to the Spanish people, from whom all State powers emanate." Article 2, in turn, state that "The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all."

¹²⁸ Francisco Rubio Llorente, *Un Referéndum para Cataluña*, El País (October 8, 2012), available at https://elpais.com/elpais/2012/10/03/opinion/1349256731_659435.html.

Llorente (1930-2016) had been Secretary General of the Congress of Deputies between 1977 and 1979 and, in that capacity, advised the Fathers of the Constitution in its drafting. He was later named Justice (1980-1989) and Vice-President (1989-1992) of the Spanish Constitutional Court, and President of the Council of State (2004-2012).

Constitutional concerns notwithstanding, the underlying electoral competition with *Ciudadanos* led the Spanish government to adopt a stringent legal strategy with the pro-secession Catalan government before the October 2017 vote. This strategy included the criminal prosecution of many Catalan political leaders and the criminal investigation of some of the Catalan government's actions.¹²⁹ While some criticized this strategy as leaving politics to the courts, others praised it as enforcing the Rule of Law.¹³⁰ At the core of this latter perspective lied the conviction that (i) whatever type of devolution was granted to Catalonia, it would not satisfy pro-secession supporters; and (ii) there was no room for negotiating, at a moral level, with those who wanted to "tear Spain apart".

While PP and *Ciudadanos* competed to show less engagement with the Catalan pro-secession government, the socialist party and *Podemos* seemed to approach the conflict differently, at least initially. Although the socialist party rejected the idea of a referendum for independence altogether,¹³¹ it advocated for deepening the federal form

¹²⁹ As explained *supra*, even before the October 2017 vote, criminal actions were already initiated against the President and three members of the Bureau of the Catalan Parliament (Jesús García, *La Fiscalía se Querrela contra la Mesa del Parlament por el Referéndum*, El País (February 23, 2017), available at http://ccaa.elpais.com/ccaa/2017/02/23/catalunya/1487857206_349021.html); President Mas and three of his ministers were convicted (Francisco Velasco, *El TSJ de Cataluña Condena a Mas a 2 Años de Inhabilitación por la Consulta del 9-N*, La Razón (March 15, 2017), available at <http://www.larazon.es/espana/la-sentencia-a-mas-ortega-y-rigau-por-el-9n-se-conoce-ra-a-las-1300-horas-IC14700594>); and the Public Prosecutor's Office was further investigating middle management officers of the Catalan government (Javier Álvarez, *La Fiscalía Ultima una Querrela por Sedición contra Cargos Intermedios de la Generalitat*, Cadena Ser (April 3, 2017), available at http://cadenaser.com/ser/2017/04/03/tribunales/1491222105_992968.html) and companies retained by the Catalan Government (Fernando J. Pérez, *La Fiscalía Exige Todos los Datos a las Empresas Contratadas para la Secesión*, El País (April 3, 2017), available at http://politica.elpais.com/politica/2017/04/02/actualidad/1491158143_418662.html).

¹³⁰ See, e.g., Francesc de Carreras, *¿Qué es Politizar la Justicia?*, El País (April 10, 2017), available at http://elpais.com/elpais/2017/04/04/opinion/1491331302_355923.html.

¹³¹ Josep Prat, *El Referèndum Torna a Topar Contra el Mur del PSOE*, El Nacional (April 18, 2016), available at http://www.elnacional.cat/ca/politica/referendum-independencia-psoe-en-comu-podem_101907_102.html.

of government through a constitutional reform and initiating conversations with the Catalan government to this effect.¹³²

Podemos was the only Spanish party that agreed to engage in negotiations with the Catalan government to determine the terms and conditions of a legal, mutually agreed upon referendum. According to *Podemos*, this referendum did not need to be strictly about independence (which, in any case, it rejected)¹³³, but about the “legal relationship” that Catalans wished to have with Spain.¹³⁴ At the same time, it saw the referendum as a necessary product of an agreement, since it rejected the idea that the Catalan government could unilaterally organize it.¹³⁵

In short, the underlying electoral competition between PP and *Ciudadanos*, and the approaches taken by PSOE and *Podemos*, demonstrate the pressing internal conflict among Spanish political parties to determine the scope, if any, of negotiating a legal, agreed upon referendum with the Catalan government. Moreover, divisions among these parties in such relevant matter have been on the rise as the consequences of the October 2017 referendum unfold. For examination of these events and consequences we turn now the next section.

IV. THE ESCALATION OF THE CONFLICT AND THE AFTERMATH OF THE OCTOBER 1, 2017 REFERENDUM

The internal conflicts in both sides of this current fight have dramatically increased right before and immediately after the October 2017 referendum. This has led the Catalan and Spanish societies alike to unprecedented levels of stress, polarization, and anxiety, and

¹³² See the socialist party’s proposal to reform the Constitution: “A new Territorial Agreement for a Diverse Society”. PARTIDO SOCIALISTA OBRERO ESPAÑOL, *Un Nuevo Pacto Territorial para una Sociedad Plural*, available at <http://www.psoe.es/propuestas/reforma-constitucional/nuevo-pacto-territorial/>.

¹³³ See, e.g., Europa Press, *Pablo Iglesias Convocará un Referéndum en Catalunya en Un Año Como Máximo Si Es Presidente*, Público (December 9, 2015), available at <http://www.publico.es/politica/pablo-iglesias-convocaria-referendum-catalunya.html>.

¹³⁴ Europa Press, *Pablo Iglesias: “No Hay que Hablar de Referendum ‘ de Independencia’ en Catalunya”*, La Vanguardia (April 17, 2017), available at <http://www.lavanguardia.com/politica/20170417/421768645906/pablo-iglesias-referendum-independencia.html>.

¹³⁵ Europa Press, *Podemos Rechaza el Referéndum Unilateral en Cataluña: “Tiene que Estar Basado en el Acuerdo”*, El Mundo (January 8, 2017), available at <http://www.elmundo.es/espana/2017/01/08/5872253b46163fe0748b4637.html>.

represents Spain's most profound constitutional crisis since democracy was restored in 1978.

The internal conflicts on the Catalan secessionist side became especially obvious when, between September 6 and 8, 2017, the Catalan Parliament passed with the sole votes of the JxS coalition and the CUP the bills that allegedly provided legal cover to the unilateral referendum on independence amid fierce criticisms of overriding the parliamentary rights of the minority political parties. These were Law 19/2017, of September 6, on the Referendum of Self-Determination of Catalonia, which allowed the Catalan government to call for a referendum on October 2017; and Law 20/2017, of September 8, on Legal Transition and Foundation of the Republic, which established the transitory legal regime that would apply in Catalonia if the "yes" vote won in the referendum until a new Catalan Republic was founded. The Spanish Constitutional Court immediately suspended both laws.

The approval of these laws triggered another public disagreement between JxS and CUP, since they had different perspectives on whether it was necessary to (i) set specific deadlines to implement independence if that were the winning option in the referendum; and (ii) even approve the Law on Legal Transition and Foundation of the Republic before the results of the referendum were known, especially given that all legal experts had warned them about the criminal liability that could follow if they approved those laws.¹³⁶

The left-wing CSQP coalition, the product of delicate balances between the Catalan branch of *Podemos* and the ecosocialist ICV-EUiA, abstained in the vote of the Law on the Referendum of Self-Determination but voted against the Law on Legal Transition and Foundation of the Republic. Tensions within the coalition led to 4 out of 11 of its MPs to abandon the legislative chamber on September 6 in disagreement with the decision of the coalition leader not to vote in favor of holding a unilateral referendum in October.¹³⁷ These tensions have increased to a point now where, with the occasion of the call to new elections in 2017 that will be explained below, (i) the CSQP coalition no longer exists, (ii) the leader of the Catalan branch of

¹³⁶ Fidel Masreal & Xabi Barrena, *Esquerra y CUP Fuerzan al PDeCat a Aprobar la Ley de Ruptura Antes del 1-O*, *El Periódico* (August 29, 2017), available at <http://www.elperiodico.com/es/politica/20170828/junts-pel-si-cup-presentan-ley-transitoriedad-juridica-6249982>.

¹³⁷ Jaume Pi, *Sí que Es Pot Se Parte en Pleno Debate de la Ley del Referéndum*, *La Vanguardia* (September 7, 2017), available at <http://www.lavanguardia.com/politica/20170906/431095300685/si-que-es-pot-parte-pleno-debate-ley-referendum.html>.

Podemos resigned in disagreement with the leaders of his party at a Spanish level following his support of the October referendum,¹³⁸ and (iii) a new left-wing coalition with strong electoral prospects has been formed around the charisma of Ms. Ada Colau, a former activist and the current mayor of Barcelona. This new coalition is called “*Catalunya En Comú-Podem*” (“Catalonia in Common – We can”).

After the approval of these two laws, the political and social tensions in Catalonia and Spain rapidly accelerated and culminated on October 1 and in the days that followed. Prior to that, the Spanish government’s underlying electoral battle with *Ciudadanos*, and to a lesser degree with PSOE, further complicated the possibility of any understanding “across the table” with the Catalan government by influencing them to take a strong stance against the call for a referendum in October.

On September 8, the Public Prosecutor’s Office filed criminal actions against President Puigdemont and all his ministers for disobedience, misconduct in public office, and misappropriation of public funds. On September 12, it commanded the Spanish security forces and the Catalan police to seize ballot boxes and any materials intended to be used in the referendum. And on September 13, it ordained that the 712 Catalan mayors who had expressed support in the organization of the October referendum be criminally investigated. Note, in this respect, that Catalonia has 948 mayors.

On September 20, following judicial orders to prevent the organization of the referendum, Spanish security forces detained fourteen Catalan senior government officials, raided forty-one government and private offices, and seized sensitive materials and documents. Additionally, the Spanish Minister on Finance took direct control of Catalan public finances. These events led President Puigdemont to declare that Catalan self-government, enshrined in the Constitution, had been *de facto* suspended.¹³⁹ Both PSOE and *Ciudadanos* immediately backed the judicial decision.

¹³⁸ Raúl Montilla & Iñaki Pardo Torregrosa, *Alberto Dante Fachín Dimite como Secretario General de Podem*, *La Vanguardia* (November 6, 2017), available at <http://www.lavanguardia.com/politica/20171106/432675867349/albano-dante-fachin-dimite-podem.html>.

¹³⁹ Hannah Strange & James Badcock, *Anger in Barcelona after Spanish Police Arrest Catalan Minister and 12 Officials in Raids over Referendum*, *The Telegraph* (September 20, 2017), available at <http://www.telegraph.co.uk/news/2017/09/20/spanish-police-arrest-catalan-junior-economy-minister-morning/>.

On the day the Spanish security forces entered several Catalan government offices, thousands of citizens summoned by the two major pro-independence grassroots organizations began to gather at their doors and protest. Notably, some 40,000 people encircled the building of the Catalan Ministry of Economy, trapping members of the Spanish security forces there until the following day.¹⁴⁰ These events, described by some as “peaceful” and by others as a “siege”, led Justice Carmen Lamela from the Madrid *Audiencia Nacional* to send the leaders of these two civil society organizations to jail without the option of bail.¹⁴¹ They were accused of a crime of sedition, for which they could face prison sentences of up to fifteen years.¹⁴² At the time of drafting this article, they remain in jail.

Despite the efforts of the Spanish government and the judiciary to prevent it, Catalans went to vote on October 1, massively and peacefully in 6,000 ballot boxes that were never found by the Spanish police forces as a result of the coordination and secret efforts of civil society.¹⁴³ Families and individuals defied judicial orders and spent the whole weekend “protecting” polling stations (predominantly public schools), so that they would not be sealed off as had been ordered by the courts.

Following judicial orders disallowing the referendum, Spanish security forces and the Catalan police began to shut down some polling stations early in the morning on Sunday, October 1. Although there were some accusations of inaction against the Catalan police, it later became known that they had peacefully shut down as many as 227 polling stations, while Spanish police forces only successfully closed 92.¹⁴⁴ Interestingly, the only images circulated were of the Spanish

¹⁴⁰ See https://elpais.com/elpais/2017/09/21/inenglish/1505979136_443391.html.

¹⁴¹ As in many jurisdictions, Spanish criminal law contains a presumption of innocence. However, in exceptional circumstances, courts can send defendants to jail pending investigation (i.e., prior to a judgment on the merits). The aim of this precautionary measure is to avoid the flight risk; concealment, alteration or destruction of evidence; and recidivism.

¹⁴² Alasdair Fotheringham, *Catalonia: Spanish Judge Jails Two Independence Leaders for Possible Sedition*, Independent (October 16, 2017), available at <http://www.independent.co.uk/news/world/europe/catalonia-independence-leaders-jailed-spain-judge-sedition-jordi-sanchez-jordi-cuixart-latest-news-a8004001.html>.

¹⁴³ For an account of how the ballot boxes entered Catalonia without the Spanish government realizing, see Patricia Ortega Dolz & Óscar López-Fonseca, *Cientos de Activistas Escondieron las Urnas para Burlar los Controles*, El País (October 2, 2017), available at https://politica.elpais.com/politica/2017/10/01/actualidad/1506874037_797419.html.

¹⁴⁴ Fernando J. Pérez, Óscar López-Fonseca & Rebeca Carranco, *La Clausura de los Colegios Deriva en Fricciones entre los Mossos y la Policía y la Guardia Civil*, El País

police forces firing rubber bullets, using batons, and beating citizens in an attempt to stop them voting.

The aftermath of the referendum became very complex for both sides of the dispute. On the one hand, the Catalan government was pressured to take action after 42% of the electoral list (almost 2.3 million people) decided to vote under extreme conditions, 90% of whom allegedly in favor of secession, 8% against it, and 2% with a blank or void vote. On the other, the Spanish government, which had been publicly discredited after failing to prevent the vote, faced unparalleled international pressure for the violence its agents had used. King Philip VI himself addressed Spaniards on October 3 in a television-broadcasted speech using unusually aggressive to some, assertive to others, language accusing President Puigdemont of eroding harmony and co-existence within Catalan society.¹⁴⁵

The economic and social consequences soon followed, with thousands of companies leaving Catalonia in the face of political uncertainty and fear of an immediate exit of the European Union,¹⁴⁶ tourism slumping to 4.7%,¹⁴⁷ and Spanish consumers boycotting Catalan products.¹⁴⁸ At the same time, just as pro-secession supporters had been massively demonstrating every September 11 after 2012 on Catalonia's national day,¹⁴⁹ hundreds of thousands of Catalans who did

(October 2, 2017), available at https://politica.elpais.com/politica/2017/10/01/actualidad/1506860451_291577.html. Note that judicial orders required that police should prevent the referendum “without affecting the ordinary citizen coexistence.”

¹⁴⁵ Sam Jones, *King Felipe: Catalonia's Authorities Have 'Scorned' All Spaniards with Referendum*, The Guardian (October 4, 2017), available at <https://www.theguardian.com/world/2017/oct/03/king-felipe-catalan-authorities-have-scorned-all-spaniards-with-referendum>.

¹⁴⁶ Silvia Amaro, *The Companies Leaving Catalonia in the Face of Political Uncertainty*, CNBC (October 9, 2017), available at <https://www.cnbc.com/2017/10/09/the-companies-leaving-catalonia-in-the-face-of-political-uncertainty.html>.

¹⁴⁷ La Vanguardia, *La Llegada de Turistas a Catalunya Cae un 47% y Lastra al Conjunto de España*, La Vanguardia (November 30, 2017), available at <http://www.lavanguardia.com/vida/20171130/433313991859/la-llegada-de-turistas-a-cataluna-cae-un-47-y-lastra-al-conjunto-de-espana.html>.

¹⁴⁸ See, e.g., the boycott to Catalan cava: Alberto Caparrós, *El Boicot a los Productos Catalanes*, ABC (November 26, 2017), available at http://www.abc.es/espana/comunidad-valenciana/abci-boicot-productos-catalanes-201711261737_noticia.html.

¹⁴⁹ On September 11, 2012, there were 2 million people marching in the streets of Barcelona according to the organizers, 1.5 million according to the local police, and 0.6 million according to the Spanish government.

On September 11, 2013, 1.6 million people formed a human chain that crossed the 400km Catalan coastal line (from the norther border with France to the southern border with the Valencian Community) according to the organizers. The Spanish government decreased the number to 0.6 million people.

not want to separate from Spain flooded the streets of Barcelona with two massive demonstrations in October.¹⁵⁰

On October 10, in a rather odd fashion, President Puigdemont signed Catalonia's declaration of independence. However, he immediately suspended it for a few weeks so that his repeated calls to international mediation could take effect.¹⁵¹ This was, again, another balancing exercise between those in Catalonia who pushed for an immediate, unilateral declaration of independence and those who favored dialogue to resolve the negotiation deadlock. Supporters of each position could no longer be identified with one particular political party, as hardliners could be found in the anti-establishment CUP as well as in the JxS coalition (both the left-wing ERC and center-right PDeCAT).

Meanwhile, President Rajoy and the Spanish political parties were facing their own internal tensions: while *Ciudadanos* and the right-wing within the conservative PP advocated for harsh measures in reaction to Catalonia's suspended declaration of independence, the socialist party argued that a legalistic reaction would only aggravate an already difficult situation. Only *Podemos* still backed the idea of organizing a legal and mutually agreed upon referendum.

Just as President Puigdemont had done with the suspended declaration of independence, President Rajoy balanced his party's internal tensions by sending a letter requesting clarification as to whether Catalonia had declared independence to President Puigdemont, under threat that if it had indeed done so, the Spanish government would immediately apply article 155 of the Spanish constitution. This provision, never applied in Spain's democratic history, allows the central government to take control of an autonomous community if it "does not fulfill the obligations imposed

On September 11, 2014, 1.8 million people marched the streets of Barcelona according to the local police. The Spanish government calculated 0.5 million people approximately.

Similar numbers have been repeated in the 2015-2017 demonstrations.

¹⁵⁰ According to the organizers, there were a million citizens in the October 8 demonstration and 1.1 million citizens in the October 29 march. However, police reports reduced these figures to 350,000 and 300,000 people, respectively. See James Badcock, *Catalonia's 'Silent Majority' Stage Huge Backlash Against Independence*, The Telegraph (October 8, 2017), available at <http://www.telegraph.co.uk/news/2017/10/08/catalonias-silent-majority-stage-huge-backlash-against-independence/>.

¹⁵¹ Sam Jones, *Catalonia's Suspended Declaration of Independence: What Happens Next?*, The Guardian (October 13, 2017), available at <https://www.theguardian.com/world/2017/oct/11/catalonias-suspended-declaration-of-independence-what-happens-next>.

upon by it by the constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain.”

It is not yet known with precision what happened behind the curtains those key days, but accounts of those critical hours state that President Urkullu of the Basque Country (another autonomous community in Spain with a strong sense of national identity) initiated an informal mediation of sorts between President Rajoy and President Puigdemont to deescalate the political tension.¹⁵² Communications were never direct between both governments, as trust had been completely destroyed, but rather through President Urkullu himself. He was uniquely well placed to understand the position of both sides as both a Basque nationalist, who would likely understand Catalonia’s claims, and a pragmatic politician, who also understands that the fiscal autonomy that the Basque Country enjoys depends on periodical agreements with the Spanish political parties.

According to anonymous informants, there was a point between October 25 and 26 where both presidents reached an informal, oral understanding through President Urkullu that would consist of the following: (i) President Puigdemont would call for early ordinary elections in Catalonia, which would have been understood as a withdrawal from the unilateral route; and (ii) President Rajoy would not impose direct rule over Catalonia through article 155 of the Spanish constitution, even though the Spanish Senate was going to vote in favor of it on October 27.¹⁵³

However, President Puigdemont was once again subject to great pressure from ERC, the left-wing party of his electoral coalition, and other prominent personalities, even some from his own party, who advised him not to call for early elections. The arguments they used were numerous and of different natures, but accounts say the primary argument was, in essence, that given that they could not trust the Spanish government not to apply article 155 of the Spanish constitution, he would be a “traitor” to the Catalan cause if they had gone so far for nothing.¹⁵⁴ ERC, the left-wing member of the JxS

¹⁵² Xavier Vidal-Folch, *Los Tres Días que Conmocionaron Cataluña*, El País (November 27, 2017), available at https://politica.elpais.com/politica/2017/11/25/actualidad/1511634052_767273.html.

¹⁵³ Enric Juliana, *Las Alcaldías, Clave del 26 de Octubre*, La Vanguardia (November 29, 2017), available at <http://www.lavanguardia.com/politica/20171129/433279889194/las-alcaldias-clave-del-26-de-octubre.html>.

¹⁵⁴ Enric Juliana, *155 Monedas de Plata*, La Vanguardia (November 12, 2017), available at <http://www.lavanguardia.com/opinion/20171112/432819117000/155-monedas-de-plata.html>.

coalition who made Puigdemont president, was planning to make its ministers resign to demonstrate disagreement with the President's decision.¹⁵⁵ Minutes before he was expected to address the media, he deviated from the plans and decided not to call for early elections. Instead, the pro-secession parties would declare independence the following day in the Catalan Parliament.

On October 27, 2017, while the Spanish Senate was approving for the first time in democratic history to apply direct rule over an autonomous community, the Catalan Parliament made a declaration of unilateral independence. The rest is history, with the subsequent weeks punctuated by events such as the imprisonment without bail of eight Catalan ministers accused of violent crimes (rebellion and sedition), misappropriation of public funds, disobedience and misconduct in public office; the escape or "exile" of President Puigdemont and four of his ministers to Brussels; the initiation of criminal proceedings against the President of the Catalan Parliament and members of its Bureau; and the call to elections in Catalonia by President Rajoy for December 21.

V. CONCLUSION

The failed negotiations between the governments of Catalonia and Spain to organize a legal, mutually agreed upon referendum for the independence of Catalonia on October 1, 2017 provides important lessons for negotiation theorists. Although both parties to this conflict would have been better off if they had reached an agreement, their internal conflicts hindered their ability to relate to each other across the table.

Understanding the complexities of these internal conflicts is a necessary step towards avoiding the dynamics that reinforce them. In the Catalan-Spanish political conflict, the unprecedented televised speech that King Philip VI gave on October 3, 2017 could constitute a clear example of the foregoing. By only speaking to those who supported the unity of Spain, the King failed to realize that he was (i) legitimizing the claim of Catalan pro-secession supporters that Spain would never be reformed to accommodate their needs, and thus reinforcing the urge to take unilateral action; and (ii) paving the way for an intensified electoral battle between PP, PSOE and *Ciudadanos* to obtain votes outside Catalonia at the expense of an agreement with the Catalan government. At the same time, the King's aggressive or

¹⁵⁵ Xavier Vidal-Folch, *supra* note 152.

assertive language against Catalonia's government set on fire one of the very few remaining bridges between both sides of the conflict.

A second lesson for negotiation theorists is that although pre-commitment tactics may work in some instances, it is very dangerous to use them where there are significant power imbalances between the parties of a conflict. Indeed, during the months that preceded the October 2017 referendum, the Catalan and Spanish governments engaged in what game theorists would call the game of the chicken. In this model of conflict, players are typically described as heading toward each other, where each has the power to either swerve or continue on the same path. If neither party swerves, they both clash and die in the accident. So, while it is in both parties' best interest that one of them swerves, each party also has an incentive to avoid being the one to actually do so, because they would be considered the "chicken".

In this context, both the Catalan and Spanish governments used the same pre-commitment tactic: by publicly repeating that they would not change their positions, they aimed to signal their intentions to the other party to compel it to swerve. In Catalonia and Spain, this was known as the "clash of trains", where neither party could swerve because they would lose face in front of their constituencies.

However, the Catalan government should have realized even prior to entering this game that it was in fact neither a "chicken" nor a "train" when compared to Spain. A more apt comparison would be a truck and a cyclist, with Spain as the truck and Catalonia the cyclist. While the truck could swerve to avoid the accident, it did not have the incentives to do so because it knew that, in the clash, the weaker cyclist would die. In Catalonia's case, death has meant losing its self-government, imprisonment with no bail of its government and civil society leaders for violent crimes they allegedly committed, and the risk of higher centralization following an upsurge in Spanish nationalism.

Given that this was a sequential game where players needed to anticipate the movements of their opponents with backward induction logic, Catalonia's government should have better measured its relative strength vis-à-vis the Spanish government. Catalonia does not have, as Spain does, the power of a state, the connections of a member of the European Union, the force of the law, a favorable and powerful media and, more importantly, the benefit of the status quo. Nor was there a clear majority of Catalans who support independence from Spain, as the 2015-plebiscitary elections revealed. Therefore, given how ambitious the Catalan government's goal was, it should have anticipated that the Spanish government's reaction would be forceful. This game was not about legitimacy, but about power.

This connects to the third lesson for negotiation theory, which is the importance of understanding the incentives of the parties at stake before designing and implementing a strategy to achieve a certain goal. Here, the Catalan government seems to have directed its strategy and all its efforts into putting pressure on the Spanish government and the European Union to accept an international mediation between both governments. Evidence of this is (i) President Puigdemont's suspension of the declaration of independence of Catalonia on October 10, 2017 to call - again- for an international mediation, and (ii) the Catalan government's inaction to implement the October 27, 2017 parliamentary declaration of independence, reinforcing the idea that it was merely a political declaration.

Although the European Union constantly called for peaceful negotiations, it insisted that they should be done "within the rule of law" and was not ready to back the Catalan government's proposal for an international mediation. This was because the European Union feared that, by accepting Catalonia's proposal, it would set a negative precedent for other European regions with strong national identities (such as the Basque Country in Spain, Flandes in Belgium, or Scotland in the United Kingdom). Under this view, the risk of contagion was too high and the potential domino effect too dangerous. According to the Spanish government and the European Union, even the act of being seated at a negotiating table with a regional government in the first place would legitimize this region's claims, something neither of them were willing to accept.

Moreover, by allowing its electoral competition with *Ciudadanos* to supplant the possibility of negotiations with the Catalan government, the Spanish government may be incentivizing supporters of Catalonia's independence to achieve their goal through illegitimate means. Catalans may have been led to believe that if their peaceful political protests were not an appropriate mechanism to change the status quo, other non-peaceful means should be explored. Note, in this respect, that during the twentieth century 150 countries were formed through different secession processes, but very few of them through peaceful democratic mechanisms.¹⁵⁶

The aggressive stance that the Spanish Public Prosecutor's Office is taking against the Catalan political and civic leaders with the Spanish government's acquiescence further alienates these leaders from Spain and continues to incentivize unilateral action, which in turn hinders "across-the-table" agreements. This is because, as scholarship

¹⁵⁶ Marc Sanjaume-Calvet, *supra* note 39 at 82.

suggests, political parties are intermediary agents which, in situations where the consequences of secession are uncertain, play an important role in determining attitudes towards independence.¹⁵⁷ In this respect, it may seem as if the Spanish government has preferred to obtain a short-term landslide win over a long-term strategic victory.

The last lesson for negotiation theory relates to the risks that path dependency creates in internal conflicts and, by extension, in “across-the-table” agreements. Here, the left-wing ERC and the right-wing PDeCAT, who had traditionally been competing for the Catalanist vote, formed the JxS electoral coalition for the 2015 Catalan plebiscitary elections. Given the historical mistrust between them, they only agreed to do so under the condition that their parliamentary term in office would last 18 months, so that they would be free to compete against each other once the Catalan Republic was eventually constituted. This short-term commitment was also intended to signal that those were extraordinary elections and to persuade pro-secession supporters to vote for them as an alternative to the extreme-left, anti-establishment CUP.

However, the results of the 2015 elections had mixed results: while pro-secession parties obtained more votes than parties opposing secession, they did not have more than 50% of the electoral list by 80,000 votes. And yet, because JxS had participated in the elections with the promise that it would get Catalonia ready for independence in 18 months, it needed the parliamentary support of the CUP to form a government and fulfill its campaign pledge. Given the CUP’s conviction that the Spanish government would never agree to hold a legal, mutually agreed upon referendum, and the Spanish government’s own inaction, the JxS and CUP alliance fueled internal conflicts regarding unilateral action.

On the other side of the conflict, path dependency did not allow the conservative PP government to approach this unprecedented constitutional crisis with any flexibility or creativity. Long before 2017, it had already begun using hardline rhetoric against greater devolution to Catalonia, which eventually led the party to challenge the constitutionality of the Statute of Autonomy of Catalonia in 2006. In recent years, when the Catalan political parties requested that the Catalan or the Spanish government hold a legal, mutually agreed upon referendum for the independence of Catalonia, the Spanish government was trapped in its own narrative and unable to separate itself from the electoral competition with *Ciudadanos*.

¹⁵⁷ Jordi Muñoz & Raul Tormos, *supra* note 45 at 5.

There is no doubt that the Catalan and the Spanish government's inability to negotiate the organization of a legal, mutually agreed upon referendum for the independence of Catalonia will become a case study for negotiation experts and game theorists in the future, as well as for public international lawyers and policymakers. It demonstrates that although certain agreements are in the best interest of both parties, their internal conflicts hinder understandings "across the table". It also speaks to the limits of unilateral action in the context of a supranational region like the European Union, the dynamics in negotiations where there is a sharp power imbalance between the parties, the tensions between democratic legitimacy and the rule of law, and the risks of path dependency.