A Holy Alliance between the Catholic Church and Constitution-Makers?
The Diffusion of the Clause of Cooperation in Third Wave Democracies

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Abstract: What explains the adoption of the regime of cooperation between church and the state in the democratic constitutions of Spain and Poland, while Portugal maintained a regime of strict separation in the United States and French tradition? The explanation could be that a consensual constitution-making process resulted in a constitutional formula accommodating religion and guaranteeing religious freedoms. Alternatively, the constitutional regime of cooperation could result from the diffusion of international norms to national constitutions, in this case, the cosmopolitan law of the church. The article process-traces the constitution drafting processes and finds that the emergence of a constitutional consensus among secularist and constitutional drafters in Spain and Poland was based on the Vatican Council II doctrine and facilitated by the intervention of the Catholic hierarchies. In Portugal, the violent context of the revolution excluded the church, and the constitutional regime of strict separation between church and state was adopted.

1. INTRODUCTION

This article aims to explain the influence and contribution of the Catholic Church on the constitution-making process in Catholic-majority countries transitioning to democracy, using the cases of Spain, Poland, and Portugal. Despite the fact that scholars also speak of the Third Wave of Democracy...
as “The Catholic Wave” (Huntington 1996, 76; Philpott 2004), no systematic studies explain how this processes contributed to resolving conflicts that hinder the consolidation of democracy. The subject has increased in relevance in the last decade. In Europe, questions have re-opened on the role that constitutions should play in redefining religion-state relations both at the European Union-level (Mancini 2010; McCrea 2009) and in national constitutions (Sajó 2008; Rosenfeld 2010). Around the world, tensions over religion-state relations gained salience in several constitution-making processes (Bali and Lerner 2017; Lerner 2013).

The analysis of constitution drafting explains why Spain and Poland adopted the regime of cooperation between church and the state, while Portugal maintained a regime of separation. The conclusion states that the adoption of the regime of cooperation in these two countries resulted from the diffusion of the Vatican Council II doctrine, when both religious and moderate secularist constitution drafters adopted it as a compromise formula. This conclusion rests on a comparative study of the constitution-making processes in Poland, Spain, and Portugal. In all three cases, the tensions between religious forces and secularists echoed historical conflicts and threatened to derail the adoption of the constitution and democratic consolidation. In Portugal and Spain, the right-authoritarian regimes granted privileges that the Catholic Church aimed at preserving in the new democracies. In Poland, the demise of communism was seen by the ecclesiastical authorities as an opportunity to see its role formally recognized by the state. In both the Southern and the Central and Eastern European cases, the recognition of the churches was opposed by secularists within left and liberal parties. The conflicts between the secularist and the religious camps threatened to polarize political forces, especially in Poland and Spain, bringing them into a standoff that endangered the constitutional process. Finding a consensual formula for the regulation of church-state relations was thus an important dimension of the process of democratic consolidation.

The article will test two alternative explanations. The first explanation considers that if constitution-making follows a consensual rather than a confrontational procedure, a compromise solution that appeases conflicts and allows the accommodation of demands for the recognition of religion by the state will be adopted (Bali and Lerner 2017, 12; Gunther and Blough 1981, 380–385). Constitution drafters deliberating through a consensual and inclusive process will privilege the adoption of the regime of cooperation. An alternative explanation sees the regime of cooperation in Spain and Poland as cases of transnational norm diffusion, in which
national constitutions adopted the Vatican Council II formula to regulate relations with the churches.

This article explores these two explanations by comparing the process of writing the clauses regulating the formal relations between the church and the state in the constitutional texts of Portugal (1975–1976), Spain (1977–1978), and Poland (1994–1997). In each case, we assess whether the adoption of the cooperation model can be attributed to the process of constitution drafting (majoritarian or consensual) or if this outcome results rather from the migration of Catholic doctrine helped by the national hierarchies’ intervention in the constitution-making process. It traces the constitution writing processes to evaluate the impact of the two factors on the clauses adopted.

The conclusion is that the intervention of the Catholic Church hierarchies in Poland and Spain resulted in the diffusion of the Vatican Council II doctrine of church-state cooperation (1965). The doctrine concerning the relations between the church and the state was spelled in the Declaration on Religious Freedom (1965), Dignitatis Humanae and in the Pastoral Constitution on the Church in the Modern World (1965), Gaudium et Spes. The documents offer a new doctrine on church-state relations which maintains that: (1) The state respects and upholds freedom of religion, (2) the church and state are autonomous and independent, and (3) that the church and the state may nevertheless cooperate for the common good.

The Vatican Council II doctrine, in particular the principle of cooperation (at Gaudium et Spes), was made part of national legal systems through the post-conciliar concordats and international agreements the Catholic Church concluded with national states (Ferrari 1997, 387; Petkoff 2014, 45). However, until the clause of cooperation was adopted in the Spanish constitution of 1978, it was uncertain whether the conciliar formula would be adopted as national law, in alternative to the regimes of strict separation (proposed by secularists) or the regime of establishment (proposed by conservative clerics). As the analysis of the constitutional negotiations show, the doctrine was also adopted by constitution-makers in both Poland and Spain.

The constitutional recognition of religion and churches as public institutions partnering the state can be considered part of the “second-best” arrangements in terms of the standards established by liberal constitutionalism (Bali and Lerner 2017). Increasingly, scholars of secularism (see, Rosenfeld 2014; Habermas 2006; Madeley 2003; McCrea 2009) look at tools and solutions that, while being sub-optimal from the point of view
of liberal constitutionalism, may be considered ideal from the point of view of conflict-resolution. Also, among theorists of democracy, a growing number of scholars considers that regimes accommodating the church’s demands but respectful of the “twin tolerations” are more appropriate paths to mitigate the conflicts over the status of religion (Künkler and Leininger 2009; Stepan 2000).

The article proceeds as following. The second section outlines the hypothesis, presents the method, and explains the selection of cases. The third section outlines the outcome, i.e., the principles regulating church-state relations adopted in the constitutional articles and, when relevant, the wording adopted in the Preamble, focusing on the clause of cooperation and other forms of specific recognition of religion, such as the constitutional acknowledgement of the Concordat as the basis for the regulation of relations of the state with the Catholic Church. The fourth, empirical section, traces the process of negotiation, including the debates on the principles of church-state relations, as well as the intervention of the Catholic Church in the process. In the fifth section, the focus is on identifying whether the conciliar Catholic doctrine pre-constituted the basis of a constitutional consensus on autonomy of church and state on the one hand, and cooperation, on the other.

2. PATHS OF EXPLANATION, CASE SELECTION AND METHODOLOGY

The different paths followed by constitution-makers in the three countries resulted in the adoption of regimes of church-state relations: while the Polish and the Spanish drafters explicitly recognized religion by adopting the clause of cooperation, the Portuguese constitution maintained a strict separation with no direct or implicit recognition of religion. The clause of cooperation is an explicit recognition of religion in which the constitution, while respecting the separation between the two spheres, acknowledges religions and churches and discriminates positively in their favor, eventually granting them the status of public institutions. The explicit constitutional recognition of religion differs from clauses in which the state recognizes religion implicitly, such as when the pledges are confined to one policy area, like in the constitutional guarantee of support to religious schools, or when the constitutional preamble mentions God in a non-specific way (McCrea 2009, 10).

The first explanatory path for the adoption of the clause of cooperation is procedural. Although the link between constitution-making procedures
and constitutional outcome is under-explored (Ginsburg, Elkins, and Blount 2009), the literature suggests that representative and consensual procedures could lead to solutions that accommodate the recognition of religion with religious freedom in constitutional processes (Bali and Lerner 2017; Gunther and Blough 1981, 380–381). However, this article concludes that constitutional procedures do not explain the adoption of the cooperation model. Despite a consensual and inclusive constitutional drafting process, the Portuguese constitution included the separation model. In contrast, in Poland, the drafting process followed a majoritarian procedure but the drafters espoused the model of cooperation between church and state. The conclusion is that while procedural factors are important contextual factors, they do not explain the adoption of the clause of cooperation.

The second explanation follows the path laid by scholars arguing that transnational influence or diffusion of international norms has a strong impact on constitution drafting processes (see, Choudhry 2006; Rosenfeld 2010; Law and Versteeg 2011; Goderis and Versteeg 2014; Ginsburg, Elkins, and Blount 2009). Here, it is not the influence of international law on national constitutions — as in the case of the evolution of international law and national constitutions in all post-World War II constitutions (Thornhill 2013) — but that of the cosmopolitan doctrine of the Church. In particular, the Vatican Council II doctrine spelled in the Pastoral Constitution *Gaudium et Spes* became the basic doctrine that finally enabled a constitutional consensus on the regulation of religion to emerge. The hypothesis is that these religious norms were both pushed by the national Catholic hierarchies as “specific constitutional arrangements” (Goderis and Versteeg 2014, 2–4) and internalized by constitution makers (see, Krook and True 2012; Finnemore and Sikkink 1998). The empirical analysis thus traces both the intervention of national Catholic hierarchies, and the appropriation of church doctrine by constitution drafters, both leading to the emergence of a constitutional consensus of autonomy of church and state, on the one hand, and cooperation, on the other.

This second hypothesis fits in as an example of the long-term interaction between the cosmopolitan religious laws of the Catholic Church and the Western legal system, a theme explored in Harold Berman’s (1983) seminal book *Law and Revolution*. Berman also points to the structural role of religious principles for the development of the international law of human rights. On that long tradition, the Vatican Council II (1962–1965) is a crucial step, not only for maintaining a strong interaction between the two levels, but also due to its assimilation of canon law to
international law, with the human rights principle of religious freedom as the basis of the church’s aggiornamento with liberal democracy (Perreau-Saussine 2012). This created a consensus among the three levels: national, international (profane), and the Catholic law on human freedom. Another level of strong influence (albeit declining) of the Catholic doctrine over national legislation is in the area of private and family law issues, in particular over policies like reproduction and marriage (see, Christians 2006; Minkenberg 2003; Knill 2013; Grzymala-Busse 2015).

National Catholic hierarchies’ intervention may be direct — such as the Polish hierarchy’s negotiations with constitution drafters. But church intervention may equally take an indirect form, when the hierarchy conveys its preferences through other actors, for example, when a national hierarchy uses its institutional links to political parties or to constitution drafters to intervene in the constitutional process (Meyer, Resende, and Hennig 2015, 153). Direct intervention grants the church a wider leeway in the negotiation process, while in the cases of indirect intervention the church may be constrained by the parties’ own interests and negotiation practices (Grzymala-Busse 2015).

The article process-traces the three constitutional processes and focuses on three aspects. First, it analyses the textual debates over the provisions that are ultimately included or excluded in the final text. These debates offer an understanding of the divergences between constitution drafters, and how these divergences were surmounted. Second, it traces the intervention of the church, and how this intervention helped to overcome the conflicts and shape the outcomes of the constitutional exercises. Third, it analyses whether the secularist constitution drafters appropriated Catholic norms by including them in their argumentation or in their draft proposals, thus considering whether the Vatican doctrine pre-shaped constitution making in Poland and Spain.

The three cases selected show variance in the two explanatory variables, i.e., the degree of church intervention in constitution drafting processes and in the procedure of constitution writing (consensual vs. majoritarian). Also, the cases chosen are comparable: in all cases the national Catholic Church was politically prominent during the transition and allied with pro-democracy coalitions. Moreover, the three constitutions were drafted by directly elected assemblies (see, Elster 2006). In the same measure, the article rules out that the constitutional formulas on church-state relations in previous constitutions determine the formulas of the new constitutions, as only in Portugal did the 1976 constitution keep the same regulating principle as the Salazar constitution of 1933.
3. THE CONSTITUTIONAL RECOGNITION OF RELIGION AND THE PROCESSES OF DEMOCRATIZATION

There are multiple scales to classify and measure regimes of church-state relations (see, for example, Fox 2008; Portier 2012; Minkenberg 2003). For the purpose of this article, we adopt the specific classification of constitutional regimes of church and state proposed by Silvio Ferrari (2008) in Constitutions and Religions, where the author distinguishes between three constitutional regimes: establishment, cooperation and separation. This article proposes that the fundamental difference between these regimes is the degree of recognition of religion by the state: while in the regime of establishment the state recognizes a church or religion as deeply connected through institutional and symbolic links, and in the separation model the state is blind to religion, the regime of cooperation is hybrid: although belonging to a separate sphere, the state recognizes religious institutions as potential partners, and grants them favorable arrangements compared to other social organizations. We will thus identify the principles regulating church and state relations in the democratic constitutions of Poland, Spain and Portugal.

3.1. Poland

The Polish 1997 Constitution regulates church-state relations in a five-section article (Article 25) which explicitly recognizes religion as a partner of the state through a clause of cooperation: “The relationship between the state and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the common good.” Equally, Section 4 of the same article issues a specific recognition of the special status of the Catholic Church in a clause constitutionalizing the Concordat between the state and the Holy See. To counterbalance this broad and general recognition of religion, Section 2 includes a broad statement on state neutrality, stating that “public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical.” The preamble also recognizes religion implicitly and indirectly as part of the influences underpinning the constitutional order through a reference to God. “We, the Polish Nation — all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources” (Konstytucja Rzeczypospolitej Polskiej 1997).
3.2. Spain

Article 16 of the 1978 Spanish constitution is composed of three sections. The first two sections enunciate the principles of individual freedom of religion and the institutional guarantee of autonomy of the churches. In the third section, dedicated to the regulation of church-state relations, the constitution includes a clause of cooperation, and explicitly recognizes the Catholic Church as a privileged subject of relations with the state. “The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate relations of cooperation with the Catholic Church and other confessions.” The clause uses a negative formulation to describe the relations between church and state, when it states that “No religion shall have a state character.” The Spanish constitution also implicitly recognizes religion in the clause where the state pledges to support private schools (Article 27) (Constitución Española 1978).

3.3. Portugal

Article 41 of the Portuguese constitution of 1976 on Freedom of conscience, of religion and worship, although establishing safeguards for the institutional autonomy of the church, provides an unqualified separation between church and state. Article 41.4 states that “Churches and other religious communities are separate from the state.” The constitution holds no indirect recognition of religion nor does it include provisions that are explicitly supportive of religion, unlike other Western democracies (except France and the United States) (Fox 2008, 138). Moreover, in Article 51.3 the Portuguese constitution professes a limitation on parties’ use “of names that contain expressions which are directly related to any religion or church, or emblems that can be confused with national or religious symbols” (Constituição da República Portuguesa 1976).

4. THE CATHOLIC HIERARCHIES’ STRATEGIES OF INTERVENTION IN THE CONSTITUTION MAKING PROCESSES

This section process-traces the negotiations and debates of the provisions on church and state relations, focusing on the intervention of church hierarchies and their effects on the clauses adopted.
4.1. Poland

The constitution-making process (1994–1997), that took place in the 54-member constitutional committee of the Polish Parliament, was characterized by the exclusion of important parts of the right-wing linked with conservative Catholicism, because these parties were defeated in the 1993 elections (Osiatynski 1994, 33). By mid-1996, as the right-wing forces reassembled in the Electoral Action Solidarity and started challenging the legitimacy of the draft being produced in the parliament, the governmental parties — the Democratic Left Alliance (SLD) and the Polish Peasant Party, together with the small Union of Workers and the liberal Union for Democracy, formalized an alliance to fend off the attacks of the extra-parliamentary right, who threatened to campaign for a rejection of the constitution in the referendum (Garlicki and Garlicka 2010, 407).

The drafting process was a majoritarian and contentious process (Spiewak 1997, 89–96).

Although the church was a major force for democratization and a crucial negotiator during the Round Table talks (Ziemer 2009, 83) it was not allied with any party in parliament at the time of the constitutional process. The church’s only ties were informal links with the constitutional drafters, a few Catholic leaders of the liberal Union for Democracy (UD), in particular one of its leaders, the former Prime Minister Tadeusz Mazowiecki. While some prelates had brokered the Round Table negotiations between Solidarity and the Communist Party, on the whole the relations of the church with the government, the SLD, became very strained due to the conflict over the ratification of the Concordat with the Holy See. The Concordat had been signed in June 1993 by a caretaker right-wing government. After being elected in October 1993, the new SLD government refused to ratify it (Bingen 1996).

There was a high potential for conflict at the outset of the constitutional negotiations over the clause on the regulation of church-state relations. The negotiations between the church hierarchy and the leadership of the SLD were long, and particularly intense between February and mid-March 1995. The conflict was between, on the one hand, the SLD and the Union of Workers secularists, who defended the adoption of a strict regime of separation between church and state, and, on the other hand, the National Catholic right-wing Members of Parliament and Senators defending a robust recognition of religion, preferably through the establishment of the Catholic faith as the state’s religion, the inclusion of an
**Invocatio Dei** in the Preamble and the constitutionalization of the abortion law (Borecki 2003). In the attempt to find a compromise solution bridging the conflict between the two camps, the constitution drafters, conscious that they needed the church’s support, or at least its friendly neutrality to win the ratification referendum, gave the church direct access to the constitutional process (Holmes 1995, 18).

The church first indirect intervention took place after the meetings of the sub-committee on Fundamental Rights proved inconclusive in choosing a draft to be submitted to the constitutional committee. After these failed negotiations in December 1994, the president of the constitutional committee and future president of Poland, Aleksander Kwaśniewski, ignored the drafts presented in the sub-committee and invited all members to submit new drafts to the full constitutional committee. A compromise draft was then tabled by the leader of the liberal party, Tadeusz Mazowiecki. The Mazowiecki draft included a transcription of the *Gaudium et Spes* formula: “Relations between the state and churches and religious organizations shall be based on the principles of mutual respect for the autonomy and independence of each in its own sphere, as well as on cooperation for the common good” (Borecki 2003). Mazowiecki’s draft also included provisions constitutionalizing the Concordat and safeguarding the neutrality of public authorities toward matters of philosophical orientation and religious beliefs (Constitutional Commission of the Parliament of Poland 1995).

Although the Mazowiecki’s draft was not accepted in the constitutional committee (January 27, 1995), it essentially became the basis for the negotiations between the church and the secularists in the subsequent two-month informal negotiations held between the Episcopal Conference’s plenipotentiary, Bishop Tadeusz Pieronek, and Aleksander Kwaśniewski. The result of this process was included first in a draft article by the latter. The Kwaśniewski draft article outlined the political agreement reached after the negotiations with the church and included the clause on church-state cooperation, the formula on the autonomy and mutual independence of church and state, as well as the constitutionalization of the Concordat. The article thus signaled the conversion of the left-wing secularists to the principle of cooperation (Borecki 2003).

After the left’s acceptance of the clause of cooperation, conservative bishops — who had vied for church establishment — continued to express discontent with the limited degree of recognition of religion granted in the draft constitution. According to Borecki (2003) the conflict between progressive and conservative bishops came to a head in a plenary
meeting of the Episcopal Conference in mid-March 1995. The controversy between the bishops was so heated that, unusually, a vote was taken regarding the conclusions to be written in the report “Catholics on the Constitution” (Polish Bishops Conference 1995a, 74). Albeit divided, with conservative bishops opposing the constitution’s “axiomatic neutrality” (Polish Bishops Conference 1995b), the official position of the Episcopate was to endorse the final draft of Article 25.

Kwaśniewski scheduled a new meeting of the constitutional commission in early April 1995. After final consultations with the Episcopate, Mazowiecki prepared a new draft for the constitutional committee’s meeting. The draft broadly followed his first proposal and maintained the conciliar formula on church-state relations (Borecki 2003). The wording of this section was slightly altered in later March 1995, from “mutual autonomy and independence of church and state” to “autonomy and mutual independence of church and state.” Other minor changes to the text were made to address concerns of the church, for example, when Mazowiecki replaced the word neutrality — which the church opposed — with “state impartiality towards religious and philosophical worldviews.” The expression “state impartiality” was perceived by the church as implying less distance between the state and religious entities (Borecki 2003). Mazowiecki also limited the application of the principle of impartiality to state institutions rather than to public authorities. Equally, the provision (in Kwaśniewski’s draft) prohibiting the participation of the churches in the exercise of public authority was withdrawn. On April 4, 1995, the Constitutional Commission approved the Mazowiecki draft by a majority in the constitutional assembly. Eight Members of Parliament from the SLD and the Polish Peasant Party abstained (Constitutional Commission of the Parliament of Poland 1995, 6).

The approval of Article 25 by the constitutional committee on April 4, 1995 did not end the controversy. On the contrary, the Episcopate and the extra-parliamentary right-wing forces continued to try to change the result (Polish Bishops Conference 1995b). The extra-parliamentary right demanded that the “Citizen’s Draft” tabled by the Solidarity Trade Union, which had obtained close to a million signatures, be put to referendum along with the constitutional committee’s constitutional text (Holmes 1995, 18). One of the main points of attack of the right-wing forces on the parliament’s draft constitution was its weak recognition of the church (Garlicki and Garlicka 2010, 399).

The Church intervention in the constitution-making was not over yet. In October 1996, as conservative bishops condemned the first full
constitution draft adopted in June (Holmes 1996, 19), the drafters tasked
Tadeusz Mazowiecki to draft a Preamble mentioning God. The
Mazowiecki’s preamble, which was adopted, bridged competing perspec-
tives regarding the regime of church-state relations by implicitly recogniz-
ing religion as part of the influences underpinning the constitution, but
avoiding formulas giving grounds to be interpreted as the establishment
of the Catholic Church as a constitutional body. The preamble reads:
“We, the Polish Nation — all citizens of the Republic — both those
who believe in God as the source of truth, justice, good and beauty, as
well as those not sharing such faith but respecting those universal
values as arising from other sources…” (Konstytucja Rzeczypospolitej
Polskiej 1997).

Nevertheless, two days after the approval by the parliament of the new
constitution on March 22, 1997, the now President of Poland, Aleksander
Kwaśniewski (elected in December 1995), used his presidential preroga-
tive to introduce an amendment to Article 25.4, that widened the scope
of application of the principle of impartiality of state institutions, from
state to public authorities (Garlicki and Garlicka 2010). During the consti-
tutional referendum campaign, held in May 1997, the Episcopate showed
friendly neutrality regarding the constitution (Polish Bishops Conference
1997, 54–56), and the church abstained from campaigning in the referen-
dum (Spiewak 1997, 2–3). The constitution was narrowly approved on
May 25, 1997, with only 53.5% voting in favor.

4.2. Spain

The Spanish constitution-making process (1977–1978) took place in the
parliament as the last step of a pacted transition to democracy. The constit-
tution-making process was both inclusive and consensus-driven, with all
relevant political forces represented in parliament accepting compromises.
The drafting took place primarily at a restrictive 7-member committee, the
Ponencia, with parties attempting to overcome conflicts over the most
divisive issues, which included the redrawing of church-state relations
(Gunther and Blough 1981). The constitutional text was approved in
Parliament by a large majority, and ratified through a referendum on
December 6, 1978. The referendum results (88% in favor) showed that
a large public consensus was attained.

Despite the consensual procedures followed during the constitutional
exercise, the potential for a conflict flaring up over the regulation of
church-state relations was significant at the outset of the negotiations, as both secularists and pro-religious forces had veto power over the outcome of the negotiations (Gunther and Blough 1981). Although the Spanish Catholic hierarchy, led by Archbishop Tarancón, accepted the disestablishment of the Church, the hierarchy was also eager for the constitution to recognize Catholicism’s social and political role. The most staunchly pro-secular force — willing to fight for the disestablishment of the Church — was the Spanish Socialist Workers’ Party (PSOE), and the party opposed any formulas it found as unduly privileging the Catholic Church (Gunther and Blough 1981, 386–399). The Spanish Communist Party, still unsure of whether it would be legalized and allowed to run in the upcoming legislative elections, supported the recognition of the Catholic Church during the constitutional process.

The Catholic Church, although not represented by a confessional party nor supporting explicitly any political force, had strong links to both the Union of Democratic Centre (UCD) and the Popular Alliance (Meyer Resende 2015; Bermeo 1987). The Spanish national hierarchy thus intervened indirectly in the constitutional drafting process. This intervention was concentrated in the early phase by the restricted committee, the Ponencia, which was tasked to produce the first draft of the constitution. Because the center-right and the right-wing parties held a majority within the Ponencia, they were able to add the clause of cooperation in the article defining the regime of church-state relations.

The process of drafting Article 16 started with a debate on the definition of church-state relations in the summer of 1977. Although the Church had clearly stated its agreement with the Church disestablishment (Linz 1991), the debate brought to light the implicit conflict between a church used to extensive privileges granted by the Francoist regime and a strong anti-clerical left (Galeote 2011). In the logic of conflict avoidance, the drafters settled in September 1977 on a negative formula that evaded the controversy between the model of church establishment and a clause stating church-state separation (Gunther and Blough 1981, 400–402). Article 16.3 thus starts with the sentence “No church will have an established character.”

The inclusion of the principle of cooperation was negotiated between the PSOE and the UCD drafters between November and December 1977, after the hierarchy complained about the absence of recognition of its role in the constitution draft (Gunther and Blough 1981, 371–372). As justification for the regime of cooperation, the UCD framers referred explicitly to the *Gaudium et Spes* doctrine, and followed the
Council’s argumentation by invoking the social importance of the Church as justification for the regime of cooperation (Parliament of Spain 1978b, 2477). “The Church has changed, Catholics have changed (...) and we now follow the doctrinal teachings of the Vatican Council II and its constitution Gaudium et Spes” (Parliament of Spain 1978b, 2481). In the first draft of the constitution, published on January 5, 1978, Article 16.3 reads: “The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate relations of cooperation” (Parliament of Spain 1978a).

In the phase of amendments in January–February 1978, the Popular Alliance Members of Parliament, with the support of the UCD, added a specific recognition of the role of the Catholic hierarchy in the constitutional text. The final form of the Article 16.3 adopted by the Ponencia thus stated that “public authorities (...) shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions” (Parliament of Spain 1978d, 1531). The PSOE denounced the constitution’s privilege of the Catholic Church, stating that it went against the agreement established in October 1977. In protest against this and other impositions of the right-wing majority, Peces Barba withdrew from the works of the Ponencia on March 6, 1978, never to come back until the conclusion of the Ponencia’s mandate on April 17, 1978 (Parliament of Spain 1978b, 2470). In his words: “For the Socialist group in the Congress there is a privilege of mention in art. 16.3, and this leads to a hidden confessionality of the state that will raise a set of problems in the future” (Parliament of Spain 1978c, 2475). The crisis provoked by Peces Barba withdrawal was solved on May 22, 1978, in an informal meeting between the UCD and the PSOE at a Madrid restaurant (Gunther and Blough 1981) where the parties agreed to maintain the clause of cooperation and the reference to the Catholic Church. However, the specific mention of the Catholic Church in the constitutional text remained contentious until the end of the process, with 112 of the Members of Parliament abstaining during the July 7, 1978 plenary vote on Article 16 (Galeote 2011, 163).

4.3. Portugal

The new Portuguese constitution was drafted by a Constitutional Assembly elected on April 25, 1975, and ratified in April 1976. From late June to November 25, 1975, constitution drafters worked in the
midst of a deep rift between the left-wing revolutionary forces and the pro-
democracy parties (Maxwell 1995, 12–14). However, despite the attempts
of the revolutionary forces to diminish its authority, the Constitutional
Assembly largely followed a consensual and inclusive method of deliber-
ation, and undertook parallel negotiations with the Council of the
Revolution (Rezola 2012). After November 25, 1975 all major political
forces, from the extreme-left to the right, were ready to settle for less-
than-optimal results in exchange of reaching a consensual text. The con-
stitution-making thus followed inclusive and consensual procedures.

The clauses on religion were negotiated in the summer of 1975, as left-
wing revolutionary elements of the Movement of the Armed Forces and
the extreme left attacked the Catholic Church’s authority. The anti-clerical
actions of the revolutionary forces included the campaign of “cultural
dynamization” led by the Armed Forces General Staff (EMGFA)’s 5th divi-
sion — and peaked in the attacks on churches in the center and north of
the country and the occupation of the Catholic Radio station Renascença
(Salgado Matos 2001). The revolutionary violence against the Church led
to a religious backlash, with the Church mobilizing on the side of the dem-
ocratic parties and forming an alliance with the Socialist Party, a develop-
ment that contributed greatly to the moderate outcome of the transition.

The Portuguese Episcopate issued a communiqué on April 12, 1975, appeal-
ing Christians to vote and countering the Movement of the Armed Forces
(MFA) campaign urging the electorate to abstain or cast a null ballot. The
bishops stated that “there are different valuable options” and Christians
should only exclude parties that are “incompatible with the Christian con-
ception of men and its life in society” (Portuguese Bishops Conference
1978, 302–303). The bishops thus converged with the position defended
by the democratic parties — the center-right Social Democratic Party
(PSD), the right-wing Democratic and Social Center (CDS), and the
Socialist Party (PS) — thus contributing to the strong support for democratic
parties and the defeat of the extreme left (Clímaco Leitão 2013, 130–131). In
the following months, Church-backed resistance — including attacks to the
Portuguese Communist Party headquarters — to the leftist process forced a
turning point on the “revolutionary process,” exactly when the constitutional
drafters deliberated on church-state relations (late July–September 1975).

The Church’s concerns for survival resulted in its abstention from the
constitution-making exercise. The Episcopate’s only comment on the
process was expressed in very general terms, and came two weeks after
the June 2, 1975 inauguration of the works of the Constitutional
Assembly. In the Pastoral Note “On the Present Time” the bishops
raised concerns about the possible elimination of religious freedoms if the
country would follow a communist path, but included no specific demands
on the adoption of church-state cooperation in the constitution (Portuguese
Bishops Conference 1978, 192–198). The only explicit objection raised by
the church on the text being adopted in the constitutional assembly was the
“Pastoral Note on Free Teaching,” issued on October 10, 1975, which
expressed concerns regarding the preservation of the rights of private reli-
gious schools (Clímaco Leitão 2013, 137–141).

The Article 41 On freedom of conscience, religion and cult came to
largely reflect the positioning of the PS on the matters of relations
between religion and the state. The article was speedily drafted and
approved by the Commission on Fundamental Rights and Duties, com-
posed by 11 Members of Parliament, between July 29, and August 12,
1975. The PS, holding 116 of the 250 seats at the Constitutional
Assembly, was the dominant party, although it disputed the primacy
with the MFA. However, in issues in which the MFA did not take an
explicit stance, such as in the articles on the regulation of religion, the
PS was the prime actor. The protagonism and engagement of the PS
on matters of religion was visible from February 1975, when the
Minister of Foreign Affairs, Mário Soares, and the Minister of Justice,
Salgado Zenha, both socialists, re-negotiated with the Vatican the clause
forbidding divorce standing in the 1940 Concordat. The constitutional
commission on Fundamental Rights adopted the PS draft article (tabled
on July 24, 1975) without changes and no major debates during the
session (Constitutional Assembly of Portugal 1975a, 695). In line with
the stance taken by the PS leader Mário Soares (since 1974), that the
Socialists would do all efforts to assure the institutional protection of
the Catholic Church’s status in the new democracy (Avillez 1996), the
PS draft article included not only an individual protection of freedom of
religion (Article 27), but also a defense of the institutional freedom of
the churches, a protection that was not extended to all other non-public
institutions, as the constitution foresaw “the nationalization of the means
of production.” However, the moderate left was unwilling to recognize
the church as a partner of the state, as the Catholic Church had been
closely associated with the Salazar regime. Article 27.2 of the PS draft
constitution thus pledged a strict separation: “The churches and the reli-
gious communities are separate from the state and are free in the exercise
of their religious functions and its cult” (Constitutional Assembly of
Portugal 1975a, 695).
The fast adoption by the constitutional commission of the PS’s draft article shows that neither the center-right PSD nor the right-wing CDS, which included some important politicians of the authoritarian Salazar regime, were invested in including the recognition of religion in the constitutional text. The PSD, albeit divided between a pro-recognition force (represented by Member of Parliament Pedro Roseta) and strict secularists (represented by Member of Parliament Jorge Miranda), did not promote the recognition of religion (Constitutional Assembly of Portugal 1975a, 710). The CDS included the clause of cooperation and the constitutionalization of the Concordat in Article 57 of its draft constitution (idem, 647). However, during the constitutional negotiations, the party did not attempt to include the formula on the article.

Although the Portuguese Communist Party was not invested in promoting a harder stance about religion in the constitutional text, during the debate and the vote in the plenary of the Constitutional Assembly on September 3–4, 1975, the Portuguese Communist Party proposed two amendments aiming at limiting religious freedom (Constitutional Assembly of Portugal 1975b, 357–358). The first amendment proposed by the communists was a clause forbidding “to use religion, its buildings, institutions or religious ceremonies for partisan politics or anti-constitutional aims.” The second amendment stated that religious freedom should be “limited by democratic ends” (Constituição da República Portuguesa 1976).

Both amendments were defeated by the pro-democracy parties (the PS, the PSD and the CDS). However, the PSD and the PS agreed to transform the communist amendment on the prohibition of the use of religion for political ends into a clause instituting a constitutional prohibition on the use of religious names and symbols to name political parties (Article 51.3) (Constitutional Assembly of Portugal 1975c, 1180–1185). This clause was adopted with support of all parties (except for the abstention of the CDS).

5. THE VATICAN COUNCIL II DOCTRINE AS THE BASIS OF THE CONSTITUTIONAL CONSENSUS

In this section, we will look at the explicit appropriation of the conciliar doctrine by constitution drafters on both sides of the secularist/Catholic divide, as a sign that the cosmopolitan canon law pre-constituted and shaped constitution-making in Poland and Spain. Portugal was different
because the secularists succeeded to impose a strict independence of church and state as in the United States and French constitutional tradition. The efficacy of church intervention, and thus the diffusion of the transnational norm of cooperation, was built upon a consensus among political forces on the Vatican Council II doctrine.

The analysis of the Polish debates provides a vivid illustration of the adoption of the conciliar doctrine by the secularists of the left (the ex-communist SLD) and the liberal party (UD) during the constitution-making process. The Polish church’s intervention in the constitutional process took place in a context of strong polarization, but it was the leader of the liberal party (UD), Tadeusz Mazowiecki, who, in January 1995, first inserted, word-by-word, the conciliar formula into his proposed draft article. Although it was initially rejected by the constitutional committee, the Mazowiecki’s draft article became the basis for future negotiations between the church and the constitution drafters. Two month later, after lengthy consultations with the church, the ex-communist SLD secularists came to adopt the conciliar formula of cooperation between the church and the state. In late March 1995, the SLD leader Aleksander Kwaśniewski’s issued his own version of draft Article 25, which included the conciliar formula. The minutiae of textual debates over the wording of the provisions held in the Polish Parliament reveals that the 5-section article which was adopted in the 1997 Constitution resulted from the fine-tuning of the conciliar formula, but essentially in its maintenance.

When defending the Vatican Council formula from the attacks of the extra-parliamentary right, secularists from liberal and ex-communist persuasion portrayed the conciliar doctrine as a form of guaranteeing the protection of religious freedom. In the words of Tadeusz Mazowiecki: “The Article 25 not only satisfies the church, but also helps to guarantee several key elements of freedom of religion. Today we can be confident that the constitution holds sufficient safeguards that will prevent attempts to establish any church or religion” (Przeciszewski 2013).

In Spain, the consensus between left-wing secularists and the center-right over the cooperation doctrine held in Gaudium et Spes can also be inferred from an analysis of the debates in the Spanish Cortes. Socialist and the Communist Members of Parliament used the debates in the specialized committee (May 18, 1978) and in the plenary (July 7, 1978) to issue a qualified support to Article 16, and often took resource in the Pastoral Constitution Gaudium et Spes to justify their position. The Socialist Member of Parliament Henrique Baron Crespo quoted the Catholic doctrine as the foundation of the PSOE agreement with the
UCD: “The Gaudium et Spes is the basis of art. 16.” Equally, Gregorio Peces Barba, who had walked out of the restricted drafting commission (the Ponencia) in protest against the specific recognition of the Catholic Church in Article 16, based the acceptance of the regime of cooperation on the Vatican Council II doctrine (Parliament of Spain 1978b, 2487). Even the Communist Party supported Article 16, including the clause of cooperation and the specific recognition of the Catholic Church, also by taking resource in the conciliar doctrine. During the plenary debates, Santiago Carrillo, the communist leader, justified support for the political settlement by referring that “the Vatican Council II recognizes the right to religious freedoms; article 16 guarantees many, or even all, of these religious freedoms” (Parliament of Spain 1978c, 3994). Praising the efforts of the Socialist to “find consensual formulas” UCD constitution drafter Alzaga Villamil declared that “the historical ‘religious question’ is on the way to be permanently solved” (Parliament of Spain 1978c, 3990).

In Portugal, the exclusion of the Catholic Church from the constitution-making process in the context of a left-wing revolution resulted in the adoption of a constitutional regime of strict separation between the church and the state. This context explains both the non-intervention of the Church, and it is consistent with the swift process of adoption of a constitutional regime of strict church-state separation. With no Church intervention in favor of the regime of cooperation, the Portuguese pro-Church parties (PSD and CDS) were too weak to promote the conciliar doctrine. Both the PSD and the CDS were silent regarding the recognition of religion, and neither them nor the PS invoked the Vatican Council II doctrine during the short negotiation and debates on Article 41.3 Although the CDS’s draft constitution included the clause of cooperation, the party representatives never brought up the issue during the negotiations and accepted the strict secularism inscribed in the draft proposed by the PS.

6. CONCLUSION

The article concludes that the adoption of the regime of cooperation in the constitutional articles in Spain and Poland resulted from the emergence of a constitutional consensus among constitutional drafters, based on the church’s cosmopolitan Vatican Council II doctrine and facilitated by the intervention of the Catholic hierarchies in the constitution-making exercise. In both countries, the negotiated transitions to democracy were conducive to the adoption of the regime of cooperation between church and
state. In Poland, direct intervention of the church also resulted in the constitutionalization of the Concordat and in a preamble mentioning God. In Spain, the church intervened indirectly through political parties resulting in the adoption of the principle of cooperation, as well as in the insertion of a specific recognition of the Catholic Church. In contrast, in Portugal the Church was absent from the constitutional process and a strict separation between church and state in the United States and French tradition was espoused.

The adoption of the regime of cooperation by the Spanish and the Polish constitutional orders was the affirmation of a Catholic perspective on the desirable principles guiding church-state relations. Such regime was based on the Catholic view that although church and state are autonomous from each other, they may collaborate to further the common good. Although this constitutional formula may be considered sub-optimal from the point of view of liberal constitutionalism, it had advantages both to religious actors and to moderate secularists. For religious forces, it amounts to a general recognition by the state of its positive and central role in society. Moderate secularists embraced the principle of cooperation as a model able to accommodate the demand for the symbolic and practical recognition of the role of religion in society and the guarantee of religious freedoms. The article thus concludes that the intervention of the Catholic Church in the constitutional processes was beneficial for the consolidation of democracy in Poland and Spain. Informed by a doctrine that aimed at reconciling the recognition of religion with the guarantee of freedom(s) of religion, national Catholic hierarchies played a constructive role in the resolution of conflicts over different value commitments regarding the recognition of religion, typical of democratization in Catholic-majority countries.

NOTES

1. The regime of cooperation had been adopted, prior to the Vatican Council II, by the German (1949) and Italian (1948) constitutions.
2. The regulation of religion is not referred in the reports of the meetings of the Council of Revolution.
3. The only invocation of the Constitution Gaudium et Spes was by Member of Parliament Pedro Roseta in support of the clause limiting the use of religious names by parties (Constitutional Assembly of Portugal 1975b, 1185).

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