'Constitutional Design for Divided Societies: The Role of the Constitution in Shaping the Democratic Path of Society'

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Abstract

Considering that democracy is necessarily accompanied by political cleavages, and if such divisions can be so deep as to disturb the development of the state as a whole; then it is of the essence to analyze and compare diverse models for tackling such issue. After a brief analysis about the important role played by democracy in fostering human development, and, achieving the goals of the millennium; I will analyse a question that is of central importance for legal comparative studies: *What is the function of a Constitution in a divided society?* In order to provide an answer to this question I will theorize that the gap between political studies and Comparative Constitutional research can be achieved through a historical dimension. This thesis will include a brief analysis of two case studies in order to reach a conclusion that allows me to bridge a gap between both disciplines.

Introduction

The dawn of the new Millennium was accompanied by a collective plea for, global, human development. During the first week of September 2000, the leaders of 189 members of the United Nations General Assembly got together at the U.N. headquarters in New York City to reaffirm their commitment with the Organization. Moreover, the leaders of the General Assembly made a promise to free people from multiple deprivations –such as: extreme poverty, lack of education, malnourishment, etc. This pledge became a resolution that is known as the Millennium Development Goals, which were set to be achieved by the year 2015 (less than three years from now).[1]

This resolution, known as the Millennium Development Goals, provides a framework for coherence to steer the efforts of the United Nations system as a whole. In fact, according to the United Nations Development Program (hereinafter UNDP): 'The Millennium Development Goals (MDGs) are the most broadly supported, comprehensive and specific development goals the world has ever agreed upon.'[2]

This resolution includes eight goals, and strategies, aimed to eradicate: poverty and hunger, lack of education, gender inequality, environmental degradation, maternal and child mortality, inadequate shelter, and –ultimately- the commitment for global partnership aimed to achieve those goals as a team. Whether or not we will achieve worldwide welfare by then, is not a matter of this thesis; but, I do have to admit that, from a divided third world country perspective –such as Mexico, the time frame seems far fledged.[3]

The MDGs are a big global effort to foster human sustainable development, which, the U.N. –as a whole- understands, as group of economic, social, and cultural advances that all nations aspire to achieve –as set forth by a 2003 UNESCO report team, led by Boutros Boutros-Ghali.[4] This is a multidimensional definition of human development; as opposed to the age-old strictly financial concept. The U.N. understands, thus, that in order to achieve full human development in any given society, it is not just the economic system that matters, but there are also cultural and social aspects to it. Hence, in order for this concept of development to be complete we must take into account not only the economic development of a nation, for it must include all of the aspects needed for the full realization of a human life. In other words, the economic dimension is not enough to fully apprehend the situation. This means that, the process of social development is a dynamic one, and, if we are to foster development in this sense it is necessary to fulfil those needs that are not necessarily and directly linked to survival (i.e. nurture, health care, adequate shelter, etc.).

This concept of development **also** assumes the collective effort to participate in –and influence- all the decisions that affect individuals in a society. That is how **democracy**, social justice, and sustainability are also part of the concept of development –as understood by the U.N. (by the members of the General Assembly) and its organs. In this sense, democracy and development are interrelated and they complement each other; the link between them is stronger as it emanates from the aspirations of the individuals, the nations, and the recognition and respect for human rights. [5]

A core issue that is inextricably linked to democracy is: pluralism; and pluralism is equal to social division. If constitutions are the backbone a democratic system, then pluralism and political divisions are the heart of a democracy. But, if the political divisions are not in balance, then, such divisions become a central challenge; or, a heart-attack to the system. This is especially so, when social divisions, that respond to ethno-cultural cleavages, are politically salient in such a way that they can endanger the very existence of the democratic system suffering the upheaval. Hence, social cleavages can enhance democratic institutions, but they can also hinder progress. *How to respond to them?* In a democracy, the answer is sort of straight-forward: if the constitution is the backbone, the spine of the system, thus the answer for managing social divisions also lies in the specifics of constitutional design.

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[1] United Nations Millennium Declaration , hereinafter Millennium Development Goals
[2] United Nations Development Program, 'Poverty Reduction' (*United Nations*, 2012)
<www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_mdg_strategies/>
accessed May 19th, 2012
[3] Millennium Development Goals (n 1)
[4] Boutros Boutros-Ghali, *The Interaction Between Democracy and Development* (2003)
[5] ibid

Considering that democracy is necessarily accompanied by political cleavages, and if such divisions can be so deep as to disturb the development of the state as a whole; then it is of the essence to analyze and compare diverse models for tackling such issue. After this brief analysis, about the important role played by democracy in fostering human development, and, achieving the goals of the millennium; I reach a question that is of central importance for legal comparative studies: *What is the function of a Constitution in a divided society?*

In order to answer this question, the present thesis will develop as follows: the first part of the thesis will deal with a general conception of democracy and social cleavages with political saliency; the second part of the thesis will deal with a general framework of constitutional design for divided societies from a realist and a normative perspective, this will bring to light the main constitutional mechanisms designed to cope with the issues posed by deeply divided societies. The third section of the thesis will portray two case studies of divided societies from the perspective of their constitutionalization process. And, finally the fourth section will provide a comparative analysis of both jurisdictions, which will allow me to illustrate the argument built throughout the thesis.

Democracy and Divided Societies

Why democracy?

Democracy is a system by which a given society can participate, as a whole, in each and every step of the governing process; at the same time, society also acts as the auditing body of the governing cabinet and House of Representatives.
It is society, and each of its members, whom ultimately give away its sovereignty to a governing body entrusted to achieve the development of that nation; and, such governing body shall ultimately be responsible towards the members of the society where it rules. Each of the governing branches shall be accountable for their actions.

Democracy started enjoying wide acceptance after the mid 1900's dictatorships and tyrannies fell. Throughout the second half of the 20th Century the world witnessed an extraordinary political turmoil. All of the alternatives to democracy were either abruptly, or slowly, shut down; and those which weren't, were transformed into exotic residues of resilient systems (i.e. Cuba, China, and, a more recent example: Singapore). Furthermore, all of the alternate routes have already, either lost legitimacy in the eyes of the global community; or disappeared amongst the ruins left by World War II.
Even the Latin American dictatorships collapsed (so far away from the rampage in Europe and Japan); and those which managed to survive, adopted a pseudo-democratic façade.[6]

The proximate roots of this shift, by which the non-governing members of democratic nations have been empowered, are primordially grounded to the lessons learnt after the holocaust, and, the myriad of tyrants and massive violations of human rights framing the picture until the mid 1990s. The reason behind this shift responds to: a **higher regard of the importance of individuals as essential parts** of any society. And, the more a society regards the essential value of individuals, the more evolved that society is. If not, *Why, then, have we replicated democratic systems?* In fact, a fundamental part of constitutional design in new democracies is a bill of rights paired up with a mechanism for judicial review; a mechanism that highlights the importance of the individuals.

Democratic systems tend to promote the protection of several fundamental rights of individuals and associations; this alone is not possible in autocratic governments, if dictatorships regarded even some of the rights protected by any western bill of rights, they would not be a dictatorship in the first place. For example, the right to vote, freely and informed for your representatives, is an essential right that allows us to consider individuals as important; as well as the right to freedom of expression. Both rights simply antagonise with any form of dictatorship[7] I can think of. This protection of essential rights, such as voting and speaking your mind, serves the purpose of protecting people's own fundamental interests, something more achievable in a democratic system where the tendency is towards cooperation.

Democratic governments are supposed to regard individuals –with only a few legal exceptions- as free-willed, rational beings who come to an **informed** decision after a profound process of reflection; whether it is reflecting about which representative to vote for, or, which association I want to belong to, is not the issue; it is the information we need to inform our decisions. The *ratio legis* is our unconstrained will of acting according to our unveiled conclusions reached after apprehending certain topic. In short, democracy requires governments to treat everyone with equal concern equal concern and respect, because ultimately that is what his or her moral standing demands.

Because of this regard of individuals as free rational beings we can also, <u>legitimately</u> hold those individuals responsible for any misdeed (be it a petty theft or a murder). Robert Dahl accurately highlights the fact that, being morally responsible is equal to being autonomous in the matters of moral decision making.
It makes me wonder, *how could we possibly be responsible of decisions that we cannot control?* Moreover, if we cannot influence the conduct of the governing body because we don't have access

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[6] Robert Dahl, *On democracy* (Yale Univesity Press 1998)
[7] It is interesting to note that in Mexico we also use the term "dictatorsoft (*dictablanda)*" when we describe the uninterrupted ruling of one single political party for over half a century. Which, to the eyes of some, including myself and the persons closest to me, has had the same outcome of a dictatorship; for it is a cross-dressed dictatorship: it very much resembles a democracy, but it is not quite one.

to accurate information of the proceedings*, how could we, as members of a nation, be responsible for their actions*?[8]

Robert Dahl's classical approach to democracy is embedded with the ideal of equal and universal participation; one of the criterions of a democratic government –according to Dahl's theory- is effective participation of its integrants. An ideal democratic state is one where all of its members enjoy equal opportunities to share their perspective on how politics should be handled; and, where all integrants have accurate information of political decision-making. All of the integrants in such a democratic regime should be able to provide informed decisions (i.e. a true rational exercise that leads me to choose candidate A over candidate B during electoral campaigns); this means that everybody should enjoy equal opportunities to learn about political decision-making, alternative policies, and, the consequences of pursuing each of the possible decisions.[9]

Narrowing the focus: divided societies

With the sketch of democracy painted thus far, it is reasonable to contend that this is the best known democratic model to foster human development –as understood by the U.N. Our experience from recent history has shown us that prosperity is not bound to be just for aristocracies and monarchies; especially the period that goes between 1950 and 2012 has shown us that democracies are also prosperous, as opposed to undemocratic regimes; which, have largely lagged behind (with a few exceptions, of course, the exceptions that confirm the rule). According to Robert Dahl, the explanation to this phenomenon, partly, lies on the affinity between a democracy and: the free market model, fair competition and freedom of movement of persons and goods. Throughout the last couple of centuries, market economies have, indeed, been more prosperous than any other of the alternatives.[10]

Throughout the previous paragraphs, I have portrayed a picture of democracy framed in terms of association and cooperation between the empowered individuals who belong to a given nation and decide to create a State,

> *The fundamental problem of social organization can be characterized as a prisoner's dilemma game, in which the dominant strategy is non-cooperative behaviour in the absence of any kind of agreement or coordination among the players[11]*

But, as we deepen in our analysis of democracy, several other issues come to light. In fact, a core issue that is inextricably linked to democracy is: pluralism; and pluralism is equal to social division. If constitutions are the backbone a democratic system, then pluralism and political divisions are the heart of a democracy; in other words,

> *All societies are divided to one extent or another. Yet since the ending of the cold war, the number of societies classed as deeply divided has risen sharply. The term "deeply divided society" typically describes a society marked by ethnic divisions severe enough to threaten the very existence or nature of the state.[12]*

If the political divisions are not in balance, then, such divisions become a central challenge; or, a heart-attack to the system. This is especially so, when social divisions, that respond to ethno-cultural cleavages, are politically salient in such a way that they can endanger the very existence of the democratic system suffering the upheaval. Hence, social cleavages can enhance democratic institutions, but they can also hinder progress. *How to respond to them?* In a democracy, the answer is sort of straight-forward: if the constitution is the backbone, the spine of the system, thus the answer for managing social divisions also lies in the specifics of constitutional design.

For the purpose of the present study, the following depiction will be my standard definition of what both, Horowitz and Lijphart, understand by the concept of divided societies.

Donald Horowitz depicts a very clear ideal scenario that best describes his version of a divided society; his description provides an appropriate vantage point from where to gain good perspective:

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[8] Dahl (n 8) 67
[9] ibid 49 (n 8)
[10] ibid 70
[11] A.D. Lowenberg, Yu, B.T., 'Efficient Constitution Formation and Maintenance -The Role of "Exit"' (1992) 3 Constitutional Political Economy 51
[12] Ian O'Flynn, 'Democratic Theory and Practice in Deeple Divided Societies' (2010) 46 Representation 281

Suppose a society contains two ascriptive (birth-derived) groups: the As with 60 percent of the population, and the Bs, with 40 percent. The groups have the same age structures and rates of natural increase; their proportions are not vulnerable to change through immigration; they vote at the same rates; and they vote for ascriptively defined political parties, the A party and the B party. Under virtually every form of fair majoritarian political arrangement and every electoral system, the As will dominate government and Bs will be in opposition for perpetuity.[13]

Lijphart, by contrast, defined a divided society by stating what it is not; for that purpose drew a difference between:
1. Culturally homogenous political communities; and,
2. Plural societies, which are beset by political division.

Both authors part from the same starting point and pretty much agree on all counts of what constitutes a divided society; that is: a society which presents ethno-cultural divisions that are politically salient, that are mobilized forces, and, which threaten both, the stability of the Constitutional State, and, the coexistence of the different groups within one nation.

Their mistake is to conflate diversity with political division; a divided society isn't merely one which is ethno-culturally diverse. 'Rather, <u>what makes a divided society is that those differences are politically salient</u> –that is, they are persistent markers of political identity and bases for political mobilization'.[14] Hence, **a divided society is one in which its ethno-cultural diversities have such a political weigh that can take the constitutional stability out of balance; and, the way in which societies respond to that challenge is of practical importance**. However,

The ethnic composition of a society need not itself be problematic from a political perspective; the critical issue us the extent to which ethnic differences are translated into political divisions and the ease with which these divisions may be accommodated by existing political structure.[15]

The previous depiction of divided societies brings to light two questions that beg to be answered, and, which have ironically remained unanswered:
a) *Which one is the best configuration of institutions to adopt?* The "what" question, has been left unanswered ´because there is a dispute among scholars and practitioners between two opposing views of appropriate institutions to mitigate ethnic conflict´: the consociational model, and the centripetal democratic system.[16]
b) *What process is the most apt for producing such a configuration?* The "how" question remains unanswered as well, but this one is due to the fact that most of the times such processes are chosen in a ´haphazard fashion´ disregarding their suitability for targeting the problems to be addressed.[17]

The HDR 2004 'highlights how societies should respond to opportunities and challenges raised by <u>ethno-cultural divisions</u> –and in doing so promote democracy, social justice, peace, and stability.[18] Democratic systems have been the optimal model in the western world; democratic systems are grounded on a constitution which provides for civil liberties and lays the foundations for electoral mechanisms to be implemented. But, why is the constitution so important?

In order to answer this question, the following sections will discuss the constitutional approaches from two perspectives: the one offered by comparative constitutional studies, and, on the other hand, the perspective offered by comparative political science.

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[13] Donald L. Horowitz, 'Conciliatory Institutions and Constitutional Processes in Post-Conflict States' (2008) 49 William and Mary Law Review 1213
[14] Choudry Sujit (ed), *Constitutional Design for Divided Societies* (Oxford University Press 2009) 5
[15] John Coakley, 'Ethnic Conflict Resolution: Routes Towards Settlements ' (2009) 15 Nationalism and Ethnic Politics 462
[16] Horowitz
[17] ibid
[18] Sujit (ed) 2

Tension in Constitutional Design

The perspective of democracy presented in this thesis entails a dualism: the milestone of modern democracy is legitimacy, and it is provided by both: the idea of "rule of law" and "popular sovereignty".[19] The modern conception of democracy is inextricably linked to a positive, compulsory and individualistic type of law. 'According to the liberal view, the democratic self-determination of citizens can be realized only through the medium of such law'.[20] Positive law is measured in terms of constitutional legality, which is the main principle for a democracy to exist.
This dimension refers to the private autonomy of citizens which, by being unchangeable in its content, 'guarantees the anonymous rule of law'.[21]

This marks the difference between the classic and modern conceptions of democracy. According to the latter, laws are legitimate if they issue from democratic will-formation, thus, the democratic lawgiver may decide in a sovereign manner and can set up 'any constitution it wants, as the case may be violate its own basic law'; which, would impair the idea of constitutional state.[22] The modern conception of democracy –in other words, constitutional exercise of power- sets limits to the people's right to self-determination; 'the rule of law requires human rights that have been positively enacted as human rights'.[23] Both conceptions of democracy are in tension, and, the middle ground is the constitution, through which all mechanisms are enacted.

This duality implies a relationship between democratic principle and constitutionalism: the constitutional exercise of power; which, appears to set limits on the people's sovereign self-determination. This means, that the democratic will formation portrayed by Dahl has to be in light with the human rights positively enacted.
Both sources of the legitimacy of the constitution are at odds and they compete with each other. Should either of them come first? That is, civil liberties or the right of democratic citizens to political participation. Individual and political autonomy are thus at odds.

Intuitively, it seems that if the normative justification of constitutional democracy is to be consistent, we must rank both principles; what comes first: respect for individual or public autonomy? What is the number one source of legitimacy: "rule of law" or "popular sovereignty and will formation"? The ranking exercise however, leaves the concept of "rule of law" standing on a slippery slope, because it'd mean that human rights and civil liberties are either: imposed on the sovereign law-giver as a limitation; or, merely are instrumentalized as a functional requisite for democratic and legislative purposes.[24]

However, a democratic model must both, be legitimate, and enjoy the allegiance of a large number of people in order for it to work. Legitimacy of the exercise of public power must meet the conditions of rights and institutions that are found in typical liberal societies, through what Frank Michelman has termed "a contractarian constitutional justification"; the starting point for cooperation is that citizens are assumed free and equal.

Reflecting on the functions and character of constitutions, we can ask what sort of content its norms should have in order to achieve the state-of-law where justice reins. Two schools of thought can be distinguished. On the one hand legal theorists contend that constitutional norms should be embedded with ideals that aim high; and on the other hand there are political scientists who assert that constitutions must consist of realistic principles that can be measured in terms of results. Bellow you will find the main features of the prime arguments at both sides of the debate:

1. Legal Theorists: Idealism and paradigms (aspiration). Their approach is normative; they refer to the underlying content of the norm, and the principles that provide it with legitimacy and validity.
   Legal Theorist Jeff King is a good example of the proponents of ambitious aspirations encoded in constitutions. According to King, lack of ambitious norms can obstruct good policy. He founds his claims on cases in which aspirational norms are realized by judges when interpreting constitutional norms in litigation; where the underlying principles of the norm are put to the

[19] Robert Dahl's approach is just one side of the story.
[20] Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 Political Theory 766
[21] ibid, 767
[22] ibid, 766
[23] ibid
[24] ibid

test. In other words, statutory interpretation is the way in which aspirational norms are realized. [25] Normative systems communicate a set of standards –of abstract values- to which the society has to conform. Those norms might leave a scope for discretion so that the citizens can decide how to and apply the standards set forth.

The United Nations' Human Development Report 2004 (hereinafter HDR 2004) is an important document that shows the relevance of comparative constitutional law for tackling one of the central challenges of our time: cultural diversity.[26] It is regarded as a central challenge because of what has been described above. If democracy is the most optimal models for securing human development, and, political divisions are inextricably linked to it; then, managing such cleavages are central for local and global human development.

The HDR 2004 posits that, Comparative Constitutional Law is a key factor to take into consideration when designing constitutional frameworks for divided societies. In a nutshell, the proposal of the HDR 2004 is: 1) to counteract denial of cultural liberty, 2) which is set forth by a constitutional bill of rights, that is backed by judicial review; and, 3) through implementation of policies that explicitly recognize cultural differences; a task for which constitutional law takes centre stage. Nevertheless, the field of comparative constitutional theory has been rather disconnected.

*How is the field disconnected from the academic debates surrounding constitutional design for divided societies? Th*e "rights revolution" and rights-based constitutionalism:[27]
For over two decades the focus of comparative constitutional debates has circled around 'comparative approaches to the protection of universal human rights within a liberal constitutional order'.[28] The transition to democracy of many countries has been accompanied by the resurgence of comparative constitutional law; such transition has usually been accompanied by: the implementation of a rights based constitution, and, the establishment of judicial review of that bill of rights. The latter is a step forward generally found in well established democracies. This process was usually informed by comparative studies, and, as a consequence of this focus, the field has concentrated the study to a limited set of cases; mainly: the U.K., Germany, South Africa, the United States, and to some extent India.

'Comparative constitutional law as a scholarly discipline has been largely missing in action' –i.e. out of the 22 scholars who participated preparing the HDR 2004 report, not one is a legal academic.[29] In spite of the fact that research in comparative law has been increasingly sophisticated, there is a disconnection between the field of constitutional design and the academic debates

Limitations of rights-based constitutionalism as the principal response to ethno-cultural conflict:

a) It translates to *ex-post* control, can only be enforced after delay and financial costs; moreover, remedies might not adequately redress the violation.
b) Bills of rights raise questions of under-enforcement: there is a gap between abstract constitutional texts and the doctrinal tests set forth by the courts to implement and enforce the guarantees.
c) 'Bills of rights are based on the liberal precept of neutrality as the appropriate strategy to prevent ethno-cultural cleavages'; the problem is that, although states can remain neutral in a number of issues, they cannot be neutral on every type of ascriptive identity.
d) Rights can be undermined in divided societies because they depend on independence and impartiality by the judiciary; which, might be compromised in divided societies. 'Disregard and disrespect for the orders of a court render a bill of rights of little practical value'.[30]

It is urgent to reframe the study of comparative approaches to rights protection, to link it to the actual constitutional agenda motivating the adoption of bills of rights. We must comprehend what functions bills of rights fulfil in divided societies; and, we must be aware of

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[25] For Example,
Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OJLS 409
[26] Sakiko Fukuda-Parr, *Human Development Report: Cultural Liberty in Today's Diverse World* (2004)
[27] Coined by,
MIchael Ignatieff, *The Rights Revolution* (Anasi 2000)
[28] Sujit (ed)
[29] ibid 7
[30] ibid 11

the fact that bills of rights are but one of many other tools available for constitutional designers.[31]

The problem of focusing solely on bills of rights is that, it is difficult to understand the constitutional politics of rights protection without taking into account other aspects of constitutional design, aspects with which it may be in tension. Moreover, we have to be aware that there might be a necessary trade-off between peace and justice; as shown by the Dayton Accords.[32] The response to tension between the Dayton Accords and the E.U. Treaty, was that the ethnic power-sharing arrangements were what made peace possible in Boznia-Herzegovina; hence the trade-off. Whilst conflicting with basic E.U. law, ethnic power-sharing has achieved the goal of consolidating a society that was profoundly divided.

It is recommendable to situate rights-based constitutionalism within the context of other constitutional provisions and practices; this activity will sharpen the understanding of how these mechanisms operate, fosters the creation of standards for internal constitutional critique, and provides a holistic perspective for constitutional reform. For the time being, the lack of comparative studies on other aspects of constitutional design –besides bills- of rights makes us have to look elsewhere for academic models of comparative constitutional design.

o   *Why is this topic relevant for comparative legal studies?*
Notwithstanding the value of constitutions alone, comparative studies are also very important because they can enhance the reaction to the challenge posed by a divided society. They provide a perspective from other societies as models to be implemented; as a way to avoid dangers from lessons already learnt. This paves the way for comparative constitutional law to be in the spotlight of constitutional design.

From the previous account we could have a glimpse of the important role that is played by constitutions in divided societies; constitutions matter centrally in response to this challenge. And democracies seem to be essential for human development.

2. <u>Political scientists: Realistic norms.</u> They assess the function of norms in terms of workability and credibility within a society. Russel Hardin is a good example of one of the proponents of the idea that norms should be a realistic relation between making promises through a constitution and living up to the standards set forth by it. In his article 'Why a Constitution?' Hardin sustains that Conventions[33] are an appealing device for social regulation, because they 'need not be constrained by mistaken ideal conceptions'.[34] For Hardin, "aspirational" norms turn Constitutions into fixed creations that find it hard to cope with the reality of societal change. Hardin bases his thesis on the fact that, when a convention is effective, its *ex-post* assessment will cause society to support the norm (as opposed to an "ideal" norm set *ex-ante,* and which we don't know whether it will work). Moreover, if the norm is in line with "socially accepted conventions", social support won't have to wait until the *ex-post* effectiveness-assessment is completed. If, however, one sets forth norms, which achievability is not easy to believe will be met; they will undercut the very legitimacy, credibility and, validity of the Constitution.

Comparative studies of political theory have an extensive body of research regarding constitutional design for divided societies. Dominating the debate are Arend Lijphart and Donald Horowitz. Both of them theorize against the backdrop of the American pluralist account of democratic politics (i.e. Seymour Lipset) and have been engaged in scholarly exchange of the topic for over three decades. [35]

In the following paragraphs I will frame the three models that have been identified for constitutional design from a perspective of political science.

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[31] ibid
[32] The electoral system of Boznia-Herzegovina is in conflict with article 1 of Protocol No. 12 of the European Convention, which guarantees the right to equal enjoyment of any right protected by law; more generally, the European Convention and its Protocols embody a vision of community based on the civic principle and representation of citizens (as opposed to ethnic representation, as stated by the Dayton Accords).
[33] Instead of contracts
[34] Russel Hardin, 'Why a Constitution?' in Bernard Grofman, and Wittman, Donald (ed), *The Federalist Papers* (Agathon Press 1989), 100 – 120
[35] Seymour Lipset, *Political Man: The Bases of Politics* (Doubleday 1960)

I. The Westminster Model

It was mentioned above that both models were devised with the American account in the background. The pluralist –American- theory is grounded on the concept of "crosscutting cleavages"; this roughly means that individuals belong to a number of interests and outlooks, and that is why the minorities don't act to undermine the system. The outcome is two-fold:

 a) Membership in multiple social groups: multiplicity and complexity of interests tend to moderate their political attitude.
 b) Blunt partisan division (centripetal democracy): 'in the absence of sharp partisan divisions among individuals, political elites will likewise be subject to the pressure to moderate their political positions'.[36]

Both Horowitz and Lijphart start their analyses on the common ground of a political pathology behind the Westminster model. This model is majoritarian, its elections are on a first past the post (FPTP) basis, or, single plurality voting; equally, cabinets are formed on a "winner-take-all" basis and the governing party usually commands the majority in the legislature. The assumption behind the Westminster model is that 'since there is no permanent exclusion of any segment of society from political power, the losers under a regime of competitive politics accept their loss in the hope that they will win another day'.[37] This is called the competitive paradigm of democratic politics, and works under the umbrella of two assumptions: 1) opposition parties will eventually share power; and, 2) because of the shifting nature of majority coalition, the governing parties will not abuse their power.

Notwithstanding, Lijphart has already sustained that both assumptions will not hold for divided societies. At the heart of Lijphart's claim lies the following argument: social cleavages are expected to be "crosscutting" in the paradigmatic model, which will in turn generate political moderation. However, these cleavagaes –claims Lijphart- are not "crosscutting" in divided societies; instead, they are segmental.

Donald Horowitz identifies the Westminster model with the Anglo-American democrats; that is, a majority rule with strong minority rights. ´But´, he claims, ´it is instantly obvious that for the 60-40 A-B problem –and in considerable measure, for all of its more complex and more common variants- the prospect of perennial exclusion from governmental power makes this an unsatisfying model, both practically and theoretically':

 1. It is practically unsatisfying because, if minorities do not share power (and not even at least the threat to share power exists), then those minority rights are likely to whither.
 2. It is theoretically unsatisfying ´because democratic theory sees politics as a matter of choice, rather than birth, and does not conceive ascriptive majority rule to be what is meant by majority rule at all´.[38]

Furthermore, both Lijphart and Horowitz dismiss, as naïve, the possibility that ethnic political division can disappear once it's been mobilized. '[They] both take the durability of political mobilization on the basis of ethnic identities to be a given, and construct their theories of constitutional design around them´.[39] They both agree that a major reason for failure of democratization of most divided societies is rooted in ethnic conflict; as expressed also by the HDR 2004 report.

Although Lijphart and Horowitz agree thus far, they both provide two very different models for tackling the constitutional challenges posed by divided societies. In a nutshell, Lijphart proposes a model of "consociational democracy", and, Horowitz proposes electoral mechanisms (vote transfers xacross ethnic groups) that create the political incentive toward ethnic moderation: "alternative voting" (AV). This debate is not strictly academic, in fact, 'they have set out competing proposals for constitutional design for divided societies with a view toward contemporary, real-time application'.[40]

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[36] Sujit (ed) 16
[37] ibid 17
[38] Horowitz, 1215
[39] Sujit (ed) 26
[40] ibid 22

II. Lijphart's Proposal: consociational democracy

The basic impulse of his idea is to share, divide, decentralize, limit and separate power; the nature of this model is that of a fragmented representation:
The fragmentation of political representation through proportional representation allows for legislative representation of territorially dispersed minorities who may be outvoted under FPTP in single member districts.[41]
This fragmented nature provides an incentive across ethnic groups to cooperate with each other. The leaders of those minorities can then leverage their legislative power in order to secure executive power-sharing.

According to Lijphart, there is wide agreement on the fact that there are two key elements for establishing a successful democracy: [42]

> i. **Power sharing**. 'Denotes participation of representatives of <u>all</u> significant communal groups in political decision making, especially at the executive level.'[43] Not only have a host of scholars agreed that that power sharing is a model that should be adopted by divided societies; but this same conclusion has also been reached by empirical research that was not inspired on the "consociational" model (i.e., Ted Robert Gurr, 'Minorities at Risk: A Global View of Ethno-political conflicts'; he maintains that divided societies should combine power sharing and autonomy of communal groups).[44]
>> a. <u>Criticism:</u> Donald Horowitz labels the power-sharing model as a **"one size fit all"**.[45] Only two alternatives have been proposed instead of power sharing: <u>"Cooperation without cooptation"</u> (by Brian Barry) and <u>"Alternative vote"</u> (by Donald Horowitz). Both of these models strive for moderation between minorities and majority.
>> b. <u>Support:</u>
>>> 1. Scholars.[46]
>>> 2. Empirical Research.
>>> 3. Historical attempts to establish a power-sharing system prior to 1960 (when the scholarly study of this model began).
>>> 4. Finally, Lijphart's own claim: '[p]ower sharing has proven to be the only democratic model that appears to have much chance of being [successfully] adapted in divided societies'.[47]
> ii. **Autonomy of communal groups**. To achieve group autonomy means that communal groups 'have authority to run their own internal affairs, especially in the areas of education and culture'.[48]

<u>Power-sharing,</u> combined with <u>autonomy of communal groups,</u> are the two most important features of a democratic model that has been called: "Consotiational" democracy; or, in other words, proportional representation (hereinafter, PR).

Drawing inspiration from Horowitz's "one size fit all" criticism, Lijphart tries to devise an optimal (universal) power sharing model: 'While the power-sharing model should be adapted according to the particular features of the country at hand, it is not true that everything depends on these individual characteristics'.[49] Lijphart drew a set of 9 universal guidelines that ought to work despite the individual characteristics of the country at hand: the simplicity criterion, choosing the appropriate format of the governing cabinet (parliamentarism, presidentialism, or semi-presidentialism), implementation a method for securing power-sharing in the executive, mechanisms for cabinet stability, election of the head of state (in parliamentary systems), federalism and decentralization, non-territorial autonomy, and securing power-sharing beyond the cabinet and legislative.[50]

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[41] ibid 19
[42] Arend Lijphart, 'Constitutional Design for Divided Societies' (2004) 15 Journal of Democracy 96.
[43] ibid, 97
[44] Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflicts* (Institute of Peace Press 1993)
[45] Donald L. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (University of California Press 1991)
[46] The most important work of scholars (until 1985) whom support power-sharing, is concentrated in:
Arend Lijphart, *Power Sharing in South Africa* (Institute of International Studies, University of California 1985)
[47] Lijphart, 'Constitutional Design for Divided Societies', 99
[48] ibid, 97
[49] Lijphart, 'Constitutional Design for Divided Societies', 99
[50] Arend Lijphart, 'Constitutional Design for Divided Societies' (2004) 15 Journal of Democracy 96

Lijphart presents 9 constitutional areas that are part of an optimal "one size" power sharing model that has to work for all divided societies, despite their individual characteristics and circumstances:

1. <u>Legislative electoral systems.</u> The first step is to narrow down the option for a working legislative electoral system. The main options presented are:
    a. Majoritarian systems: there is scholarly consensus against its implementation in divided societies.
    b. Intermediate category:
        i. Semi-proportional systems. This one may be able to yield minority representation; but Lijphart claims it would never do so as accurately as PR.
        ii. "Mixed" systems. They have become popular since 1990; in mixed systems, like Germany and New Zealand, PR overrides the plurality component; hence they should ultimately be considered PR.
        iii. Proportional Representation. Lijphart holds that '[f]or divided societies, ensuring the election of a broadly representative legislature should be the crucial consideration, and <u>PR is undoubtedly the optimal way to do so.</u>'[51]
2. <u>Guidelines within PR: "The Simplicity Criterion".</u> The guidelines devised by Lijphart are:
    a. Simplicity criterion. New democracies shall design a model that is simple to understand and to operate.
    b. Proportionality: a high degree is necessary, although it doesn't have to be perfect.
    c. Small multimember districts: in order to avoid creating distance between voters and representatives.
    d. Lists PR: enlisting the individual candidates.
    e. Closed or almost closed lists: 'in which voters mainly choose parties instead of individual candidates within the list. Lists PR and closed lists can encourage the formation and maintenance of strong cohesive political parties'.[52]

The point of the simplicity system is to guarantee that all groups are proportionally represented. In Denmark, although they departed from the "simplicity" criterion, they managed to secure representation by introducing 40 "compensatory" seats 'that are apportioned to parties (with a minimum of 2 percent of the national vote) in a way that aims to maximize overall national proportionality'.[53]

3. <u>Parliamentary or presidential government.</u> This decision will be driven by the potential of the different groups to share power in the executive. Three main systems to choose:
    a. Presidential system. Presidential elections are majoritarian in nature; presidential systems introduce a strong element of zero-sum game into democratic politics, whereby the rules tend toward a "winner-take-all" outcome. Disadvantages of presidentialism:
        i. Encourage personality politics that overshadow the political parties; political parties provide the link between voters and representatives.
        ii. Executive-legislative stalemates. These happen because both can claim the legitimacy of being popularly elected.
        iii. Rigidity of presidential terms of office; they cannot be extended and, they cannot be shortened if the president turns out to be incompetent.
    b. Semi-presidential system. This is an improvement over pure presidentialism which offers certain degree of power sharing between: the president, prime minister, and cabinet. In spite of the power sharing model offered by semi-presidentialism, history shows that in these sorts of systems the president can become even more powerful than in a purely presidential system (i.e. "hyperpresidentialism" in France during two distinct periods: 1962-74 and 1981-86). The (executive-legislative) stalemate problem is solved by making it possible to shift from a mainly presidential to a mainly parliamentary mode if the president looses support of his party or governing legislature.
    c. Parliamentary system. Lijphart insists that a 'parliamentary government should be the general guideline for constitution writers in divided societies'.[54] Parliamentary systems are the optimal setting for a broad power-sharing executive; moreover there is no need for presidential elections and, the disadvantages of the presidential are avoided. In Latin American countries, constitutional reformers are

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[51] ibid, 100
[52] ibid, 101
[53] ibid
* Nevertheless, compensatory seats don't make sense in societies where nationwide parties haven't been developed.
[54] ibid, 102

mainly proponents of "mixed" systems, because the leap from purely presidential systems to parliamentary is too big in societies with a deeply rooted presidential tradition.

- **i. Disadvantage**:
    1. **Cabinets depend on parliament support**
    2. **No confidence vote**

4. <u>Power Sharing in the Executive.</u> Although the parliamentary system seems to be regarded as the most adequate for divided societies, this will not guarantee power sharing by itself; the two models devised by Lijphart depend on whether there are fundamental ethnic differences or not. If there aren't any, then the Belgian example is the best (power sharing determined by linguistic factors); however, when there are fundamental differences, it is the South African model the most suitable (power sharing mandated in terms of political parties).

5. <u>Cabinet stability.</u> The solution to avoid the drawbacks shown by the parliamentary systems is to strengthen the position of the cabinet *vis-á-vis* with the parliament. Lijphart suggests us to use a **constructive** vote of no confidence that can be constitutionally designed.
    a. <u>The Flaw:</u> this model could create the same stalemate plaguing the presidential systems. It could create a cabinet with full support from the House of Representatives, but with no support by the senate; thus, the cabinet wouldn't be able to pass its legislative plan.
    b. <u>Solution:</u> the model designed by the French Fifth Republic in 1958; whereby '[t]he cabinet has the right to make its legislative proposals matters of confidence, and such proposals are adopted automatically unless an absolute majority of the legislature votes to dismiss the cabinet'.[55]

6. <u>Selecting the head of state.</u> Usually, in a parliamentary system the head of government and the head of state are two different figures. The former is the Prime Minister and the latter is regularly a ceremonial figure, like a monarch. However, when such ceremonial figure is not available (i.e., in Mexico, where all nobility titles are banned), a president has to be chosen. Lijphart highlights a two-fold recommendation when this is the case:
    a. The president must not be elected by popular vote; preferably by the parliament.
    b. The presidential figure ought to be a purely ceremonial one, with no political influence.

However, Lijphart suggests that it is best to avoid a head of state separate from the figure of the prime minister altogether.

7. <u>Federalism and Decentralization.</u> Undoubtedly, the parliamentary model is Lijphart's preferred system in a deeply divided society; where ethnic groups are geographically concentrated. Lijphart's recommendation is devised specifically for the second chamber; he posits that 'two legislative chambers with equal, or substantially equal, powers and different compositions is <u>not</u> a workable arrangement;'[56] this might derive on a problem that he calls "smaller unit overrepresentation" (drawing from the American federation, where tiny Wyoming has an equal number of representatives as massive California), which violates the principle: "one person one vote". The federation must be decentralized and arranged in small districts; this increases homogeneity and helps avoid dominance by larger states at the federal level.

8. <u>Non-territorial autonomy.</u> This particular aspect of Lijphart's theory is focused to states with communal groups that are not geographically concentrated; such as is the case of countries with deep religious divisions. Nevertheless, I think that this particular issue does not correspond to a universal theory. In fact, Lijphart's effort could be subdivided in two distinct power sharing models for divided societies: one for those which division is geographically concentrated and one for those whose division is not geographically concentrated.

9. <u>Power sharing beyond the cabinet and parliament</u>. The model ends with a recommendation to guarantee that broad representation goes beyond the parliament and the cabinet; civil servants, the judiciary, police and the military are some other branches where proportional representation has to be guaranteed.

Power sharing is a key concept in Lijphart's model because it 'gives all parties a stake in the survival of the constitutional system, in contrast to a situation where minorities are perpetual outsiders'.[57] Lijphart's institutional model is appealing because it can be tailored according to the particular circumstances of each society (hence Horowitz's criticism of the consociative model being

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[55] ibid, 104
[56] ibid, 105
[57] Sujit (ed)

a "one-size-fit-all"). However, the malleability of the consociative model begs to ask *how rigid are Lijphart's institutional criteria?*

Now, because all the institutional requirements can be tailored according to the specific time and circumstances of each society, Lijphart's model can either be <u>formally spelled on a legal text</u>, **or,** it can constitute a series of <u>unwritten rules of political practise</u>. Minorities have to be proportionally represented, and it does not really matter if they happen to be overrepresented. In order to secure the inclusion of minorities in government, it is possible to choose between: predetermination on the one hand; or self-determination, on the other. Whereas the former means that, the power sharing requirement is expressly stated to be on an ethnic basis and, it ensures the inclusion of ethnic minorities in government; self determination, on the other hand, allows for individuals to voluntarily associate with other ethnic or non-ethnic parties, in which case power sharing is framed on the basis of ethnically neutral criteria.

Consociation seeks to avoid the majority rule altogether by securing proportional representation of all politically salient groups; its main mechanism is a post-election grand coalition whereby all groups share power at –and beyond- the executive and legislative spheres. 'Consensual democracy replaces majoritarian democracy, and opposition is necessarily located in the government'.[58] The consociative model assumes that political parties and affinities, in severely divided societies, respond to ethnic identification and, 'ethnic extremists are to be represented proportionately along with moderates'.[59]

Consociational arrangements are visible, for example, in Belgium, Spain, Bosnia-Herzegovina and Belgium, where the allocations of parliamentary or cabinet seats are reserved for parties that represent the main contending ethnic groups.

<u>Criticisms to the consociative model</u>

Although the consociative model has received wide attention and a wide array of criticisms by a number of scholars, Donald Horowitz is the only one who has come up with constructive criticism by devising a workable alternative (as opposed to just proffering destructive criticism);[60] hence, the highlights by Horowitz are the ones that are centrally important for this study.

The main criticism of Horowitz has been already mentioned: he labels the consociative model as a "one-size-fit-all" solution. Furthermore, the consociative model –Horowitz claims- is "motivationally inadequate", for it 'does not offer a coherent account of why leaders of ethnic groups would have an incentive to cooperate and enter into a power-sharing arrangement in the first place'.[61] The arrangements needed, in order for the consociative model to succeed, are unstable because they are not supported by motivations of self-interest.

The outcome of the criticisms directed towards the consociative model is that PR would facilitate intra-ethnic competition; which will, in turn, cause moderate parties to be under constant siege by extremists. As a consequence of this, moderate parties will respond to the extremes and moderation would then be achieved by imposing penalties (as opposed to achievement of moderation by incentives). 'Given these electoral dynamics, Horowitz suggests that successful consociations are the result of crosscutting cleavages or resolved ethnic conflict, as opposed to successful solutions to ethnic strife'.[62] This is due to the fact that whenever there is a clash between statesmanship and electoral self-interests, no matter what, the latter will always prevail – which is, in fact, a core assumption behind Horowitz's criticisms: *why would majorities want to share power in the first place?*[63] The major shortcoming that Horowitz highlights is a certain degree of motivational inadequacy; and I say "certain degree" because although it is not clear why would majority leaders be motivated to share power, the incentives for minority leaders to cooperate are clear nevertheless.

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[58] Horowitz, 'Conciliatory Institutions and Constitutional Processes in Post-Conflict States', 1216
[59] ibid
[60] Lijphart, 'Constitutional Design for Divided Societies'
[61] Sujit (ed) 21
[62] ibid
[63] ibid

III. Horowitz's incentive method for moderation: "vote pooling"

This model suggests that in a severely divided society it is paramount to encourage compromise and accommodation; which moderates are more likely to achieve than extremists. Whereas the consociative model seeks to guarantee that all politically relevant groups (ethnic or otherwise) are represented in the executive, the legislative, and beyond (civil service, police forces, military, public finance and expenditure); the "incentives model", on the other hand, 'seeks to support moderates against extremists'.[64] Because of the support to moderate middle that this model fosters, it is also referred to as: the centripetal approach. Although this model does not abandon the majoritarian scheme, it does aim towards moderate majorities which are cross-ethnic; and, it supports 'governments formed by moderate interethnic coalitions'.[65]

The key concept behind Horowitz's theory is: "to make moderation pay". The fundamental idea is that, if a society is deeply divided, there has to be an <u>incentive for moderation</u> to nuance the self-interest behind social cleavages. Horowitz put his theory forward by claiming that whereas the consociational model lacks the incentives needed to make moderation pay (for example, Lijphart doesn't explain why are leaders of different groups willing to share power at all); Horowitz posits that moderation will pay by rewarding groups who are willing to go beyond their group of belonging. In Horowitz's model, ethnic parties are to be rewarded electorally when they –actually- cross ethnic lines.

The system of rewards envisaged by Horowitz is achieved through vote transfer across ethnic lines (hereinafter "vote pooling"); and, ethnic moderation depends on such transfers. The engine of this theory is the mechanism called: Alternative Vote (AV); which requires 'winning candidates to secure a majority of the votes cast'.[66] This is an electoral system whereby the candidates are to be ranked by the voters in order of preference. The successful candidate is the one who is ranked first by the majority of voters; if, however, there is no successful candidate after counting the first set of preferences, then the candidate who came last (meaning the candidate who was ranked last by the majority of voters –as opposed to the candidate who was ranked first by the minority of voters) will be dropped from the ballot. The votes cast for the "dropped" candidate shall then be re-distributed according to second preferences; and this iteration is repeated until one of the candidates secures an absolute majority.

This system is referred to as the "incentives system", because: "vote pooling" will 'create the incentive for parties representing a majority ethnic group to appeal across ethnic boundaries in order to secure an absolute majority through second preferences'.[67] This possibility of vote transfers creates the incentive for ethnic groups to appeal for support across ethnic lines, thus fostering moderation and protecting the middle from the extremes.

Salient differences between the consociative model and the incentives model

Four salient differences between the approaches offered by both –Lijphart and Horowitz- have been identified; the differences between them models are summarized as follows:
1. Differences in electoral systems:
    i. Lijphart's proposal essentially consists of pooling seats in post-electoral coalitions.
    ii. Although Lijphart admits presidential and semi-presidential regimes to be modalities of the consociative model, he shows a strong bias towards a parliamentary structure.
    iii. By contrast, Horowitz's model offers direct appeal by ethnic parties to voters outside their constituency during election campaigns.
    iv. The incentives model also shifts power away from the political elites, and towards voters; whose role is more important for achieving moderation than in the consociative model.
    v. Finally, Horowitz shows a strong bias towards presidentialism.
2. Differing assessments about the adoption of the models by divided societies: as it was mentioned earlier, this debate, although abstract in contents, is mainly focused towards real-time application; hence, it is mostly focused on case studies, the most famous one being the South-African case.

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[64] Horowitz, 'Conciliatory Institutions and Constitutional Processes in Post-Conflict States', 1217
[65] ibid
[66] Sujit (ed)
[67] ibid

3. There is also a fundamental disagreement over the mechanisms of interethnic cooperation: in a sense, political minorities are constraint to choose between two theories of representation:
   i. Consociation, whereby:
      o Minorities protect their interests by holding public offices.
      o Minorities will have seats in the legislative and the executive.
      o Representation of minorities is guaranteed beyond the legislative and the governing cabinet/president; they must be represented at least in the civil service, the military, the police forces, and in the judiciary.
      o Representation by members of the same ethnic group (such as in Boznia-Herzegovina).
   ii. The incentives approach, whereby:
      o 'Representation is conceived of in terms of electoral influence'.[68]
      o Contrary to the consociative model, Horowitz envisages representation of an ethnic group by members of another ethnic group through the formation of smart coalitions which are formed to secure majority votes.

There is a necessary trade-off when opting for one of the theories presented: '[i]f ethnic moderation is more likely under "vote pooling", then it comes at the cost of descriptive representation'.[69]

4. At the heart of the debate lie disagreements regarding the costs of interethnic and intra-ethnic political cooperation: ´The question in each case will be the balance between the votes lost from intra-ethnic competition and interethnic political cooperation'; which, according to Benjamin Reilly, is dependent on the existence of heterogeneous constituencies.[70] 'The larger the number of ethnic groups and the greater the degree to which ethnic groups are dispersed, the greater the potential for vote pooling'.[71]

It is very important to understand that, in order for societies to effectively reach the goals of the millennium, it is of the utmost importance to analyze the possible democratic mechanisms available for divided societies –which pose a great challenge. Electoral mechanisms for divided societies in the shape of proportional representation or alternative vote are effective, but they seem to play a transitional role –as it will be shown later by a review of the Spanish and Belgian models, where a resilient consociational model could deepen social cleavages. However, it is an essential task to bridge political and legal perspectives while analyzing constitutional designs for divided societies. I claim that through a broader perspective of the functions that constitutions fulfil is how we can expand the approaches to the debate and combine both disciplines. In other words, abstraction will provide a vantage point.

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[68] ibid 25
[69] ibid
[70] ibid
[71] ibid

The disconnection in constitutional engineering

As it has been shown, empirical political science can give us a great prospect for democracy and constitutional design in deeply divided societies,

> *Yet, those societies need more than sound practical advice: they also need clear normative guidance. To flourish, a democratic society must have some sense of the larger goals and purposes it will pursue. But it must also have some appreciation of why those goals and purposes are worth pursuing. Otherwise, it may easily lose its way, with all the danger that this brings.[72]*

The debate of constitutional design has been jammed on isolation in two particular aspects of this constitutional design: electoral systems and judicial review of civil liberties; nevertheless, these are only two specific aspects of instrumental law, when constitutional analysis brings up more issues to light: as much as civil liberties (aspirations, standards) have to pair up with a judicial review for effectiveness, so political standards (like pluralism) have to be paired up with a specific mechanism. In a sense, the instrumental function of the constitution is to lay the common grounds where political science and constitutional studies meet.

It was mentioned at the beginning of this section that, this duality implies a relationship between democratic principle and constitutionalism which, is called: the constitutional exercise of power; in principle this perspective, appears to set limits on the people's sovereign self-determination, to the mechanisms designed for the distribution of attributes and representation. This means that, the democratic will formation portrayed by Dahl has to be in light with a positively enacted bill of rights.
Both sources of the legitimacy of the constitution are at odds and they compete with each other. Should either of them come first? That is, civil liberties or the right of democratic citizens to political participation. Individual and political autonomy are thus at odds.

Intuitively, it seems that if the normative justification of constitutional democracy is to be consistent, we must rank both approaches; what comes first: respect for individual or public autonomy? What is the number one source of legitimacy: "rule of law" or "popular sovereignty and will formation"? The ranking exercise however, leaves the concept of "rule of law" standing on a slippery slope, because it'd mean that human rights and civil liberties are either: imposed on the sovereign law-giver as a limitation; or, merely are instrumentalized as a functional requisite for democratic and legislative purposes.[73]

Nevertheless, throughout the remaining sections of this thesis, I will contend that the intuitive ranking between the liberty of the moderns (rule-of-law) and public autonomy (or the liberty of the ancients) translates in the isolation of each of the mechanisms designed for constitutional democracies. Moreover, that the intuitive ranking of both principles as the source of legitimacy of the constitution implies a contradiction to the notion of co-relation; which entails that, in a way, both principles are equally original and important. Jürgen Habermas has called this "intuition of co-originality"; he posits that it is intuitive to think that both private and public autonomy require each other: 'one is not possible without the other, but neither sets limits on the other'.[74] The implication of this is that interdependence becomes the main characteristic.

Legitimacy of the exercise of public power must meet the conditions of rights and institutions that are found in typical liberal societies, through what Frank Michelman has termed "a contractarian constitutional justification"; the starting point for cooperation is that citizens are assumed free and equal,

> *The fundamental problem of social organization can be characterized as a prisoner's dilemma game, in which the dominant strategy is non-cooperative behaviour in the absence of any kind of agreement or coordination among the players.[75]*

And, citizens will only make an appropriate use of their public autonomy when they are sufficiently independent by virtue of an equally protected private autonomy in their life conduct; inversely,

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[72] O'Flynn, 281 (n 11)
[73] Habermas, (n 18) 766
[74] ibid
[75] Lowenberg

citizens will only enjoy equal private autonomy when they make appropriate use of their public autonomy. In other words, the level of protection of the private autonomy (bills of rights and judicial review) is directly related to the instrumentalization of public autonomy (the mechanisms that will allow a democratic government to secure pluralism through electoral systems and allocation of resources).

As much as institutions are needed for a democracy to function, liberal basic rights (freedom of speech, freedom of association, property rights) have an intrinsic value of their own and cannot be reduced 'to the instrumental function they can have for the exercise of political rights of citizens'.[76] No dimension is or should be interpreted as being above or downgraded by the other; instead, they should be seen as a dynamic process internal to a system. The relationship between the aspirational and realistic approaches to constitutional design is regarded –in accord with Habermas- as a connection that develops 'only in the dimension of time –as a self-correcting historical process'.[77]

If a democracy is to flourish overtime, the institutions chosen must be designed thinking of the present and the issues that need to be solved, but we shall also keep an eye on the future. In other words, the democratic institutions designed need to be suitable for the conditions of the times when they where designed, but it is equally important to keep in mind the long term standards of evaluation that normative approaches to constitutional design tend bring forth.

Such different approaches are conducive to the logical question asking: are these models *viable for divided societies? What function do they fulfil?* The following section will portray a case study with the objective to understand how the constitutional design of the chosen nation state has –and has been- influenced –by- the impact of the linguistic and ethnic cleavages that are most relevant in each territory; the nation-states subject of the present study are: Spain and Belgium; which have implemented their own approach to the consociative model to a different extent.

However, the intention goes further than to prove or disprove the suitability of this model; the correct question is not whether constitutions solve the problems of divided societies, nor whether consociation is better suited than the model proposed by Horowitz; but, whether they civilize the interaction of the political actors by paving the way for compromise through the democratic design imprinted in a constitution. The analysis aims to find other perspectives of the function of a constitution, other than electoral systems and bills of rights.

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[76] Habermas, (n 18)
[77] ibid, 768

Spain, a State of Autonomies: The Spanish Path to a Pluri-National Democracy

The roots of "nationalism" and "separatism" are rather old, and, they have played an important role in Spain's transition to democracy; where ethno-cultural cleavages take centre stage,

> *Regional and national cleavages are an enduring feature of Spanish history, but their modern significance dates from the late nineteenth century, when a profound crisis erupted in the context of industrialization, the collapse of the empire and new social conflicts.*[78]

The importance of the role played by the different ethnicities, that constitute the Spanish territory, becomes evident by the sole reading of the Spanish constitution; and, it invites to a much deeper analysis of the background and constitutional mechanisms behind a country called: the "State of Autonomies".

Modern political unification of Spain took place, in 1469, by means of a dynastic union under the "Catholic Kings", which brought together the larger kingdoms of Castile and Aragon. Before the two kingdoms merged, the unification of Leon and Castile had already been achieved, as well as the incorporation of three Basque Provinces: Gipuzoka, Araba, and Biscay. A first contrast between the concept of Spanish Nation and ethnic bonds is visible at this point in time. The three Basque Provinces, located in the north of Spain, preserved their local rights (*fueros*) before and after they were incorporated to the Castilian Crown; the Basque would only recognize a Lord or King with a prior, solemn, pledge for honouring their *fueros*.[79]

The unification of the Crowns of Castile and Aragon, in the mid 15th Century, laid the basis for the Spanish Empire and modern Spain, and, for the unification of the different ethnicities within the territory; this is a first outburst of national unity among the different ethnicities within the Iberian territory. Between the late 15th Century and, until the end of the 18th Century Spain flourished as a vast empire. [80]

The short French invasion of Spain in 1795, which caused –among other things- the loss of all the Spanish colonial territories overseas, and, the devastation of the economy of the Kingdom; left the country deeply divided and prone to political instability. By the last decade of the 19th Century Spain had already lost its last two overseas colonial bastions (the Philippines and Cuba); moreover, two major civil wars erupted between 1830 and 1875. It is at this point that the modern relevance of regional and national cleavages became visible: in the context of industrialization, the collapse of the empire and new social conflicts. By the beginning of the 20th century, most of the historic Basque *fueros* had been abolished, and 'territorial political movements emerged in Catalonia and the Basque provinces' as a consequence of their lost autonomous traditions. [81]

The Political instability within the Spanish territory endured throughout the first half of the 20th Century. The period between 1923 and 1929 was characterised by an authoritarian rule of Law under Miguel Primo de Rivera. The instauration of the Second Republic in 1931 brought this regime to a halt, and was the first Spanish attempt to formally forge a democratic regime seeking for pluralism and autonomy for the constituent peoples of Spain.

The Spanish Constitution of 1931 was a progressist document, one which granted important civil liberties (such as freedom of expression) and political pluralism. This was the first Spanish Constitution that recognized the historical value of each of the territories of Spain, and, the different "nationalities" that comprise the Spanish State. The Constitution of 1931 recognised, thus, the right of autonomy as a pre-constitutional right of all regional territories within the Nation; during the second Republic there was a further diffusion of regionalism, with autonomy-orientated movements springing up.[82]

The road to pluralism was blocked during the three year civil strife, led by Franco's forces; a conflict that contributed to further impoverish the country, and, deepened the political and cultural divisions. The civil war ended with Franco taking over the central government (supported by the

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[78] M. Keating, Pallarés, F., 'Multi-Level Electoral Competition -Regional Elections and Party Systems in Spain' (2003) 10 European Urban and Regional Studies 239, 241

[79] Francesc Pi i Margall, *Las Nacionalidades* (1977 ed, 4th edn, Librería de los Sucesores de Hernando 1977)

[80] Salvador de Madariaga, *España: Ensayo de Historia Contemporánea* (14th edn, Espasa-Calpe 1979)

[81] Keating

[82] ibid

Nazi regime and the government of Mussolini, but remaining largely neutral during WWII). The regime was characterised by 'rigid centralization and suppression', these attitudes contributed to 'consolidate nationalist feelings in Catalonia and the Basque country' (both territories that had already enjoyed certain degree of self-rule under the Second Republic).[83] Franco's dictatorial centralist regime endured 36 years, until General Franco died in 1975.

The Spanish Transition to Democracy

The Spanish transition to democracy, can thus be said, began after Franco's death (20 November 1975) but has been shaped throughout the centuries; and, the democratic path to be followed was consolidated with the enactment of the constitution on December 1978. The restoration of autonomous governments became a priority for granting the different communities within Spain with a certain degree of autonomy; the 1978 Constitution was mainly a compromise between centralist and regionalist demands, providing for the establishment of "Autonomous Communities"; a mechanism that had been envisaged before and which raised the fear of strong separatist movements had it not been taken into account.[84]

The first article of the contemporary Spanish Constitution expresses the acknowledgement –by the constituent assembly- of the important role played by the different ethnic groups that constitute the Spanish nation. The very first article of the Constitution is explicit: Spain is constituted as a socio-democratic state, under the form of a Parliamentary Democracy governed by the rule of law; and it regards the values of freedom, justice, equality, and **political pluralism,** as the superior values of the Spanish State.[85]

The constitution of 1978 is a compromise between regional and centralist demands; this compromise provided for the establishment of the autonomous communities. The different communities gained their autonomy by appealing either to an "ordinary" status, or, to a historically relevant status (such as the Basque country, Catalonia, Galicia, and Andalusia). The distinction has produced an asymmetrical system when contrasting the historically important communities, with those communities that are autonomous under an "ordinary" status. Moreover, this asymmetrical system also shows asymmetrical political attitudes (i.e. the stringent Basque separatism is asymmetric with the Catalan nationalism seeking for home rule within a reconstituted Spain).[86]

The Spanish constitution is expressive -as it is common in systems that belong to the French legal tradition- and instrumental –in the sense that it lays down the grounds for political compromises (i.e. establishing electoral systems, and, granting authority and attributes to the three branches of the government). It is expressive because it sets forth ideals, as the measuring stick to which the Nation has to live up. A clear and relevant example of this expressiveness lies on the articles that make political pluralism an explicit right for the citizenry and the communities. Articles 1, 2, 3, 4, and 6, state that Spain is a pluralist democracy that is to be expressed through the official political parties; which are regarded to be a fundamental instrument for the political expression of the popular will. On several articles, explicit recognition is granted to the peoples that constitute the Spanish nation and to the importance of their cultural heritage and languages; which the state ought to protect and endorse (i.e., articles 1, 2, and 46).

Nevertheless, the Spanish constitution goes further on the matters of political pluralism, than showing it as a mere aspiration. An entire section sets forth a constitutional mechanism by which the relevant communities can acquire autonomic status. Since autonomy is not recognized as a pre-constitutional right of the communities, the granting of the autonomic character is not automatic. According to the mechanism, the region interested in obtaining autonomous recognition by the central government has to design an initiative which has then to be approved by the

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[83] ibid

[84] ibid

[85] Constitución Española Article 1
Translated into English by the author of this thesis

[86] Currently, Spain is politically and geographically divided in 17 Autonomous Communities, and 2 autonomous cities (Ceuta and Melilla). Out of the 17 autonomous communities, there are four which are at the core of ethno-cultural cleavages: Basque Country, Galicia, Catalonia, Navarra (which is a city with *fueros* and could join Basque community at will; but has not been given the recognition of autonomous community). These four communities are those that claim historical right to an autonomous government. Until more recently, Andalusia, the Community of Valencia, and the Canary Islands began to claim for recognition of their status as a "nation". Elsewhere in Spain, the degree of regionalism is of varying strength; and 'large parts of the Country are without significant regionalist sentiments'.
Keating, 241

Parliament. Thus, demands for autonomy spread rapidly; by the mid 1980s there were already 17 communities with autonomic character.

The central government takes the form of a Parliamentary monarchy, much like the consociational model advocated by Lijphart. The representatives are elected in a direct manner, and, each province represents an electoral district (also the cities of Ceuta and Melilla, which have one representative each). The elections have to be verified in each of the electoral districts (the provinces) in a manner as to fulfil Proportional Representation criterions; so is stated in article 68 of the Spanish Constitution.[87] And, the relationship between the governing body and the legislative is clear cut (as stated in articles 99, 100, and 112 of the Constitution): in order for a government to be established, the King has to recommend a candidate for the presidency, whom has to gain a vote of "confidence" from the legislative body; the candidate has to express his or her political plan of action, and, the vote of "confidence" is granted by simple majority of the voting deputies. This procedure can be repeated by the president with respect to a political declaration or a particular aspect of the political program.

The right for autonomy is not a mere aspirational value contained in the constitution; on the contrary, the constitutive assembly of 1978 proceeded to add an instrumental section into the design of the Spanish democracy. This led the way for two major outcomes: More communities – than expected- claimed for autonomy and, the evolution of the electoral system that was envisaged has been highly influenced by regionalism.

The history of the Spanish national party system has observed gradual evolution since the transition to democracy, showing a persistent territorial element –particularly in the Basque country and Catalonia; it has 'fostered regional identities and helped focus the idea of a regional interest, which has since become a prominent factor in national politics'.[88]

The instauration of the autonomous communities has paved the ground for new fora and arenas for competition, as well as the allocation of resources for new political leaders who are not bound by the central leadership in Madrid. The aforementioned, has created a balanced interaction between fragmentation and nationalism. While these measures have encouraged fragmentation (due to the rise of regional political parties), the electoral system and political parties have also played an important role in the political integration of regions into national politics.[89]

Pluralism is first integrated in the Spanish constitution as a value, fulfilling an expressive function; nevertheless, in order to bring this value into the political life of the country, it was necessary to consider this value as part of the instrumental resources created in the constitution for the activating the democratic life of the State. In this sense, the evolution of Spanish pluralist democracy has been largely shaped by compromises. The main steps in the Spanish "devolution" (of autonomy) process 'have taken place as a result either of pacts between the main Spanish parties or of deals with the nationalist parties for support at the centre'. [90]

Michael Keating suggests that, besides the formal mechanisms for accommodating minority nationalism employed in the Spanish constitution; there is also a range of informal mechanisms for the same purpose, which might be equally [or more] important than the formal mechanisms. The underlying claim is that, too much attention paid to formal mechanisms has blurred the perspective of the informal mechanisms. The Spanish case has been characterized here as a state formed through compromises, where political parties and statutes have played an important role in shaping the accommodation of the autonomous provinces (the most salient cases: Basque country and Catalonia).[91]

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[87] Article 68
  1. El Congreso se compone de un mínimo de 300 y un máximo de 400 diputados, elegidos por sufragio universal, libre, igual, directo y secreto, en los términos que establezca la ley.
  2. La circunscripción electoral es la provincia. Las poblaciones de Ceuta y Melilla estarán representadas cada una por un diputado. La ley distribuirá el número total de diputados, asignando una representación mínima inicial a cada circunscripción y distribuyendo los demás en proporción a la población.
  3. La elección se verificará en cada circunscripción atendiendo criterios de **representación proporcional**…

[88] Keating, 240 (n 65)
[89] ibid
[90] ibid, 242
[91] Sujit (ed)

The primordial Spanish mechanism to effectively engage pluralism –integrating into the real political life of the country- was the constitutional grant of autonomic statutes for the different communities comprised by the Spanish state. The statute of autonomy proposed by the autonomous community, if approved, would become –according to article 147 of the Spanish Constitution- the ground norm of that territory (the local constitution); which has to be in light with the federal constitution. Electoral rules are laid out in the Spanish constitution (and the specifics are regulated national electoral law), and in the statute of autonomy and local laws in each community. Elections take place nationwide, but, territorially at two different levels: each community votes for the representatives they want to elect to take part in the Parliament and, the provinces in the autonomous communities perform local elections for electing their governing bodies and representatives in local assemblies. The electoral mechanisms are devised in the constitution and in the electoral law, and, according to the organic electoral Spanish law; such law has been envisaged as a mechanism that will engage the value of pluralism in the real political life of the Spanish state (as stated in the preamble for the law).

Such mechanism has fostered the creation of political parties that are relevant at a national level (currently it has been reduced to two major parties: the right-winged Popular Party, and the centre-left represented by the Socialist Worker's Party), and, also a model of territorial politics. Regionalization of politics due to the electoral system, has affected the tactics, performance and configuration of the Spanish political parties; for example, although at a statewide level, both national parties have committed to a unitary vision of the Spanish state, at a regional level this attitude tends to fade –such is the case of the Popular Party in Catalonia and Basque country, where it has strong anti-nationalist expressions. 'At the local level, each municipality is a constituency with a similar system of proportional representation and a number of seats in each that make it exceptionally proportional'.[92]
Elections within the Autonomous communities 'have been a fundamental aspect of the territorialization of the party system, acting as the basis for regional political activity'.[93] It can thus be said that in Spain hold two electoral levels: first-level elections (state-wide), and second-order elections (that take place within the autonomous communities). Keating has found that second-order elections show a tendency to reflect nationwide events; nevertheless, territorial political parties have influenced the reach of nation-wide political parties: '[a]utonomous elections have certainly served to shape the distribution of political resources at both levels'.[94] While the national level parties are important, they are rather conditioned by the territorial politics.

In the beginning of the 21st Century, the Basque Provinces presented the Parliament with the "Ibarretxe Plan", by which they were claiming the right to self determination; furthermore, the Plan stated that, if approved, the Basque country would change their status from autonomous community, to a nation freely associated with the Spanish state.[95] This Plan forms part of a global broader effort to transform old understandings of sovereignty, a trend that shows how sovereignty can be shared and divided;[96] however, the cause of its failure lies in the context in which the plan was presented and instrumentalized. And not because of its intrinsic content![97]

The Ibarretxe Plan was rejected by the Parliament on several points and its analysis is out of the scope of this study. Nevertheless, the importance of mentioning this, lies on the fact that, although the Spanish pluralist model has not resolved (or dissolved) ethnocultural cleavages (as for what I can see it even contributed for the blossoming of further divisions), it has certainly been useful for proper allocation of political resources. In a way, facilitating the transition to what Michael Keating has called the "plurinational" state; a characteristic trend in the western European democracies.

One strong critique that Donald Horowitz brings forward is the problem that in the long run proportional representation systems –such as the one envisaged in the Spanish constitution- will lead to stronger regional "nationalistic" feelings (such as the Basque) and fuel up political divisions. In Spain, however, the proportionate model of devolution 'has contributed to the consolidation of
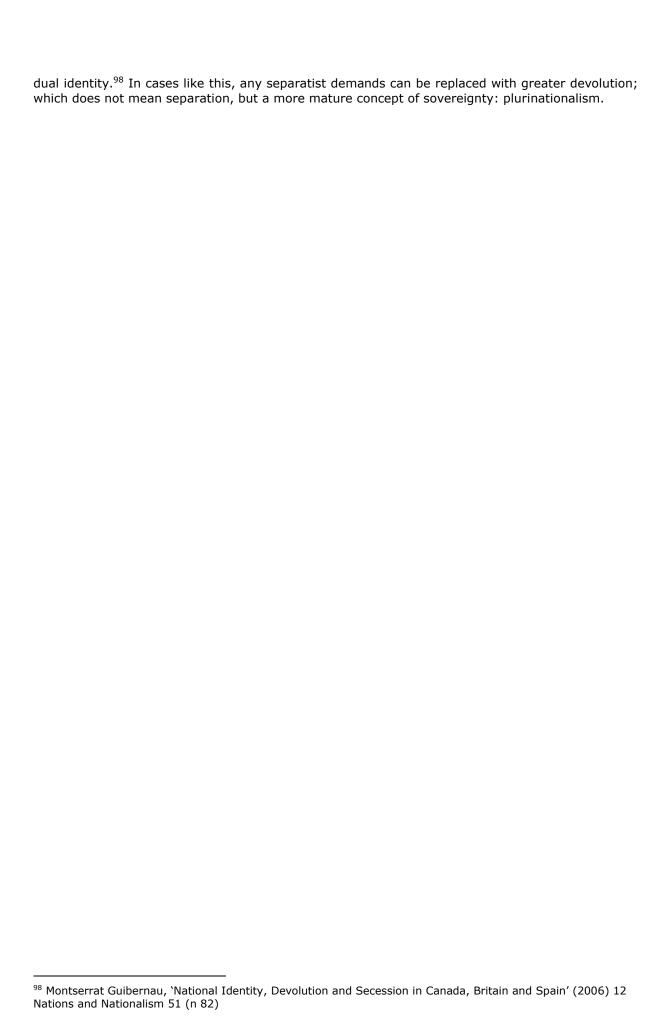
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[92] Keating
[93] ibid, 243
[94] ibid, 252
[95] M. Keating, Bray, Z., 'Renegotiating Sovereignty: Basque Nationalism and the Rise and Fall of the Ibarretxe Plan' (2006) 5 Ethnopolitics 347
[96] ibid
[97] ibid

dual identity.[98] In cases like this, any separatist demands can be replaced with greater devolution; which does not mean separation, but a more mature concept of sovereignty: plurinationalism.

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[98] Montserrat Guibernau, 'National Identity, Devolution and Secession in Canada, Britain and Spain' (2006) 12 Nations and Nationalism 51 (n 82)

Belgium: A textbook case of the consociative model

Belgium has been categorized among the deeply divided societies threatening democratic development in Europe. The contemporary roots of the Belgian political divide can be traced back to 1830 –the foundation of the Belgian State. Belgium became a unitary state after gaining independence from the Netherlands, when the Belgian territory became a unitary state by establishing a Belgian "identity" that would aloe them to reject Dutch domination.

Although by 1830 there were sharp cleavages between the liberal and catholic elites, they became unwilling allies to fight the common enemy and gain their independence. This alliance can be seen as the Belgian foundation for political elite accommodation and devolution: the most characteristic features of Belgian politics.[99]

The alliance between liberal and catholic elites derived on ideological and religious segmentation, situation which generated cleavages that cut across ethnic and linguistic divisions. The fact that ideological differences translated in ethnical cross-cutting cleavages enhanced the stability of the Belgian State up until the late 19th Century; politics were dominated until then by the French speaking ethnicity.

However, by the last decade of the 19th Century universal suffrage had been introduced; and, with it, the Flemish majority was empowered face-off the dominating Franco-phones. By 1932, not only had Flemish became the sole official language in Flanders, but this fact also ended the domination of the Walloon elites who had overstocked the public service. Moreover, in the aftermath of World War II the Walloon side of the Belgian State had lost most of the economic primacy they had gained through their coal and steel industries. Whereas the Franco-phones in Belgium suffered an economic backlash, the Flemish region experienced a boom in their demographic and economic development that contrasted sharply with the decay of the Walloon industry and aging populace; the north became ever more attractive for industrialization, causing thus a reversal in economic and social conditions:

> Given their larger, more dynamic population and economy, [the Flemish] would be able to achieve both economic and political goals within the framework of the Belgian system through evolutionary means. [The Franco-phones] became concerned with building institutional safeguards against the Flemish revenge for real or imagined wrongs inflicted during the long period of Francophone cultural, political and economic dominance.[100]

Between the decades of 1950's and 1960's controversial economic, demographic and political issues had resulted in a growing need for federalization which wouldn't see the light up until the adoption of the 1994 Constitution and electoral reforms; and, by 1970 ethnic cleavages became more dominant than ideological divisions. At this point in time, both dominant ethnicities realized that they were in need of a political over-haul that would allow each of them to protect their own interests; 'the linguistic laws of the 1960s polarized the relation between the two ethnic communities and stimulated each group to increase its demands on the political system'.[101] Since the linguistic laws of the decade of 1960, Belgian's political, economic and social issues tended to be viewed through the prism of "ethnic problems", approach that led to the introduction of an ethno-federal state.[102] Since the beginning of the Belgian ethno-federalization process, Belgium has faced three major political deadlocks, a fact that –as some will argue- is intrinsically related to the consociative strategy adopted by the Belgian electoral institutions.[103]

A main feature of the political deadlocks faced by Belgium until the beginning of the year 2012 respond to the historical grievances from the Flemish side towards the Walloon region, and to the economic cleavages between both regions due to the continuing Flemish economic improvement (that was coupled to the relative impoverishment of Walloonia). By 1970 the ethnic cleavages were

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[99] Martin Heisler, 'Managing Ethnic Conflict in Belgium' (1977) 433 Annals of the American Academy of Political and Social Science 36
[100] ibid, 40
[101] James Jr. Dunn, 'The Revision of the Constitution in Belgium: A Study in the Institutionalization of Ethnic Conflict' (1974) 27 The Western Political Quarterly 143
[102] ibid
[103] See, for example:
 Phillip. Roeder, Rotchild, Donald. (ed), *Power Dividing as an Alternative to Power Sharing* (Cornell University Press 2005)
Donald L. Horowitz, *Ethnic Groups in Conflict* (University of California Press 2000)

so deeply rooted that Belgium had to change its democratic model from a multiple-majority democracy, into an ethnic power-sharing arrangement that has been in constant evolution.[104]

The constitutional reforms that took place in de decade of 1970 were aimed to accommodate and satisfy devolution of autonomy in different respects: the claims of the Walloons were primarily focused on socio-economic issues, and, the Flemish region was more concerned with cultural and linguistic autonomy.[105] In response to the claims, linguistic parity within the executive and proportional representation within the legislature were introduced. These reforms designed several consociational mechanisms aiming to turn Belgium into a multi-ethnic federation; nevertheless the divisions and fears of each ethnic group were (and still are) far from being resolved (i.e. the reforms failed to provide a solution for the problematic status of Brussels with 90% of Francophone and the other 10% of Dutch speaking inhabitants in the periphery of the city).

It is worth noting that the Flemish demand for cultural autonomy and the Walloon demand for economic regionalization were not "fully" satisfied until the next decade, when the regions and communities finally got their own parliaments and governments. So far, however, the devolution of further powers to the regions and the communities provided new means for the two ethnic groups to seek new demands that were based on past grievances.

The reforms produced in the decade of 1980 have appeased the demands of both ethnic groups, but this solution would only be temporary, for newly acquired institutional demands had only created more incentives to come with more demands for a greater level of devolution and autonomy. This has also been a feature in the Spanish constitutional life because, as Roeder states,

> [U]nder power-sharing institutions in ethnically divided societies, politicians have greater incentive to make all issues an ethnic issue, and so ethnicity is seldom irrelevant to any policy question…[106]

Nevertheless, it is a fact that such system indeed recognizes the autonomic character of the people's that conform a nation; furthermore, with such strategies of devolution, the different ethnicities in Belgium and Spain have been regarded as free and essential parts of two nations that have been artificially construed throughout the centuries.

By 1993, another political deadlock had arisen in Belgium's constitutional life motivated by further demands for devolution, this time the Flemish were more concerned with fiscal and economic autonomy, and by 1994 Belgium had became a full fledged federation with ever more sophisticated consociative structures that allowed for greater political devolution and autonomy. Neverhteless that was not the end of the ethnic strife that has dominated Belgian politics since the mid 20th Century; in fact, the Belgian case illustrates that using consociational institutions in divided societies may ensure a peaceful political climate, but it does not succeed in reducing the centrifugal tendencies. The political cleavages dominating Belgium's democratic path saw the biggest political deadlock between 2010 and 2012, and, there is still much more that needs to be studied from the latest Belgian backlash of their "text-book" consociational system.

Like in the case of Spain and the Basque territories, the demand for further devolution of powers in Belgium by the Flemish side has been a demand for economic independence; in both cases, the communities resent the fact that a great amount of the taxes they pay tend to flow to the least economically developed regions (Walloon in the case of Belgium, and Andalucía in the case of Spain).

So far, both of the cases analyzed suggest that the main characteristic of consociational democracy is that: it is an efficient means of accommodation because it makes ethnic divisions affordable, but it confines deliberation within each of the political elites, risking thus the political life of the countries to the perils described by Cass Sunstein's law of group polarisation.

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[104] Roeder (ed) (n 104)
[105] Heisler (n 100)
[106] Roeder (ed) (n 104) 54

Conclusions: what is the role of the Constitution in Shaping the Political Life of a Deeply Divided Society?

Why do compromises between different politically salient groups happen?

I contend that both, the Spanish and Belgian constitutional life take a step further by explicitly ordering mechanisms to engage political pluralism; and, that this step further is a positive catalyser for compromises. When I compare the Spanish and Belgian constitutions with the Mexican Constitution, I find a fundamental difference between the perspectives both constitutions take towards pluralism as a core value. Both constitutions enounce pluralism as an aspiration, nevertheless, the Mexican constitution falls short in designing an instrumental mechanism to achieve such pluralism; hence, without a first ignition mechanism, compromises don't take place as they do in Spain. From this brief comparison I draw the conclusion that as much as values like civil liberties (aspirational constitutional noms) need a special judicial mechanism (judicial review of rights), aspirational democratic norms are in need of a constitutional mechanism to pair-up.

Spain's specific combination of consociationalism and multi-level politics could, either hinder the functioning of the "federal" system; or, it could evolve into what Keating has termed "plurinational societies". The Spanish consociative model has not really ameliorated nationalistic feelings among the peoples of the autonomous communities; but it has certainly paved the way for a pluralistic allocation of political resources; although some of the informal mechanisms that were generated as a side-effect have also contributed to shape the Spanish democratic model, the source of both formal and informal mechanisms has been the constitution. 'The new constitution radically transformed the centralist non-democratic socio-political regime inherited from Francoism and made possible the creation of the Autonomous Communities System based on symmetrical devolution'.[107]

The Constitution thereby acquires the procedural sense of establishing forms of communication that provide for the public use of reason and fair balance of interests in a manner consonant with the regulatory need of the context-specific situation. The ensemble of enabling the necessary conditions must be realized through legal means that encompass both, liberal freedoms and rights of political participation. Moreover, 'according to the liberal view endorsed in this thesis, the democratic legislative process requires a specific form of legal institutionalization if it is to lead to legitimate regulation', accommodation and devolution of ethnic autonomy in deeply divided societies.[108] This leads me to conclude that, Constitutions (the basic norm, *Gründnorm)* is a necessary and sufficient condition for the democratic process to take place, but it is by no means a guarantee for the results; in the end, democracy can not define democracy.
Following the same train of thought, in Habermas' view, a democratic constitution (democratic in content and source of legitimation 'is a tradition-building project with a clearly marked beginning in time'; and, the founding event, which can be fallible and is by no means immune to interruptions and regression, must be understood as **a long-term self correcting system, a learning process.[109]**

Hence, the paradoxical relation between democracy and the rule of law resolves itself in the dimensions of historical time, provided that we conceive the constitution as a project that makes the founding act into an ongoing process of constitution making that continues throughout generations and is directly fed by the historical scars shaping the democratic life of a given nation. This is what Jürgen Habermas has termed "dynamic interpretation of constitutional design", a democratic model must both, be legitimate, and enjoy the allegiance of a large number of people in order for it to work. Legitimacy of the exercise of public power must meet the conditions of rights and institutions that are found in typical liberal societies, through what Frank Michelman has termed "a contractarian constitutional justification"; the starting point for cooperation is that citizens are assumed free and equal through an instrument that serves a communicative function with a clearly marked beginning in time.

In a way, both principles: rule of law and public autonomy are equally original and need not be in contention (which is the reason of the gap between political science and comparative constitutional studies that we are trying to bridge with this thesis). Habermas has termed this: "intuition of co-originality". This means that it is intuitive to think that private and public autonomy require each

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[107] Guibernau, 62
[108] Habermas (n 20)
[109] ibid

other: 'one is not possible without the other, but neither sets limits on the other'. The main characteristic is interdependence:

> *Citizens can make an appropriate use of their public autonomy as guaranteed by political rights, only if they are sufficiently independent in virtue of an equally protected private autonomy in their life conduct.*[110]

And this too makes sense when translated into ethnic autonomy and devolution in deeply divided societies because the level of protection of the private autonomy is directly related to the instrumentalization of public autonomy.

According to what has been argued throughout this thesis, and taking into account the brief depiction of both case studies, the following functions of a constitution have been identified as part of the abstract democratic path of a deeply divided society:

1. <u>Constitutive function</u>: 'a constitution must go further and constitute the very *demos* which governs itself under and through the constitutional regime'.[111] This derives in three claims: 1) constitutions are the principal vehicle for forging a unified political identity through the creation of institutional spaces for shared decision making; 2) shared decision making can serve as the germ of a nascent political community; and, 3) the constitution projects and encodes a vision of political community with the purpose of altering the self-understanding of the citizens in that society –for example, 'a bill of rights can embody a conception of the polity as consisting of rights-bearing citizens of equal status irrespective of differences in race, religion, or ethnicity'.[112]

The latter, is what Ernest Renan called "civic citizenship", which is the ambition of modern liberal constitutionalism. This idea can be characterized in the following way: a constitutional order must meet a <u>legitimacy</u> constraint, and a <u>stability</u> constraint; the former is normative and the latter is sociological. Put together, it means that a constitutional order must both be legitimate and enjoy the allegiance of a large number of people in order for it to work. Legitimacy of the exercise of public power must meet the conditions of rights and institutions that are found in typical liberal societies, through what Frank Michelman has termed 'a contractarian constitutional justification'; the starting point is that citizens are assumed free and equal. [113]

The civic conception of citizenship has one ambition: 'that these same conditions also supply the necessary motivational element for those institutions to work'; citizens view themselves as part of the same constitutional order, precisely because it is legitimate.[114] Notwithstanding the legitimacy element that provides Constitutions with authority, the constitutive role of the ground-norm has a strong symbolic meaning: it represents a discourse of shared values.

2. <u>Expressive function</u>: A Constitution is meant to serve as the foundation of a state; it defines individual and collective rights and duties, and provides the framework for a country's law-making, governing, and law enforcement activities. The ultimate goal of the basic norm is to achieve a just and liveable society. Not only is justice the supreme legal value, but justice is also the most important social/political/ethical virtue; justice is an end in itself and the law is the means to that end. This long-standing claim was carved in stone by Cicero: *justitia enim una virtus omnius est domina et regina virtutum* (justice as a virtue is the queen and master of them all).[115] What does that justice, which is so important, consist of? According to Cicero, it ultimately means the welfare of the people; let the good of the public be the supreme law: *ollis salus populi, suprema lex est.*[116] Hence, justice is conformed by a set of principles that assign rights and duties in basic institutions of society, that aim to achieve the good of the public; defining justice, thus, as 'the appropriate distribution of the benefits and burden of social cooperation'.[117] It is a shared promotional of national standards.

Constitutional norms solve collective action problems that may involve coordination; or, in other cases, a prisoner's dilemma; 'norms solve such problems by imposing social sanctions on

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[110] ibid

[111] Sujit (ed)

[112] ibid

[113] Frank Michelman, 'Constitutional Legitimation for Political Acts' (2003) 66 Mod L Rev 1

[114] Sujit (ed) 6

[115] M. T. Cicero, *De Legibus*, vol 1 (Angel Escobar ed, Angel Escobar tr, Editorial Gredos 1999)

[116] ibid

[117] John Rawls, *A Theory of Justice* (Harvard University Press 1971)

defectors'.[118] In this sense, Cass Sunstein holds that law performs an expressive function to make statements; as opposed to just influence behaviour directly.[119] This expressive function of the law allows regulatees to identify the norms to which they are committed, and to insist on those norms via the law; a claim that is rooted on the cultural role of law, adjudication, and even Supreme Court rulings, which symbolize our identity as members of a given collective. 'Legislation can express who we are, what our identity is and which values we hold dear'.[120] These norms communicate the regulatees that they are expected to be guided by them; to live up to their standards. Normative systems, thus, communicate a set of standards –of abstract values- to which the society has to conform; those norms might leave a scope for discretion so that the regulatees can decide how to interpret and apply those standards. Constitutions represent also a minimum assent of a society's morality (their legal identity). A veil of uncertainty is a precondition for good constitutions.[121]

Professor Wibren van der Burg has identified an expressive and communicative function of the law that is especially relevant for ideal norms. Normative systems communicate a set of standards to which society has to conform; those standards are a set of abstract values that communicate to the citizen that they are expected to be guided by them. These norms, sustains professor van der Burg, leave a scope for discretion, so that the citizens can decide how to interpret and apply those standards. The vaguer the standards are, the richer their interpretation has to be; hence, more discretion is granted to the citizens.[122]

There are three types of communication promoted by the law:

- From the legislator to the citizen. This type of communication is conformed by the normative standards set forth by the laws; they are a guide for behaviour. In the case at hand, the articles that recognize the plural composition of the Spanish nation comprise the first type of communication. They are expressive!
- Between the citizens when they comply with the norms.
- From the citizens to the legislature. By conforming to the rules, or ignoring them, or in this case upholding a different norm, citizens may express their opinion about these rules.

3. <u>Regulative function:</u> constitutions are mechanisms that enable decision making through the establishment of institutions, norms, and fora aimed to that ends. However, constitutions also disable decision making processes by 'enacting procedural roadblocks' –i.e. majority rules; 'and by setting substantive limits on political decision making (such as bills of rights)'.[123]

4. <u>Instrumental function:</u> just as law is a pre-condition for good law –Lon Fuller points out- 'acting by known rule is a precondition for any meaningful appraisal of the justice of law.'[124]

This approach is comprised by the mechanisms established in order to live up to the standards set forth. If a nation is constituted under the aspiration of enjoying certain civil liberties, the instrumentalization of such standards is the establishment of a mechanism for the judicial review of such rights; equally, the constitution envisages mechanisms that will allow the state to live up to the political standards set forth. The instrumental function of the constitution is limitative (as opposed to the expressive function, which intends to provide ample room for interpretation, thus enhancing the reach of civil liberties). The instrumental perspective of the constitution views it as a charter where initial compromises have framed the path for further compromises to be undertaken. Rules have to be there, they have to be made known to the public; and, they have to be efficient. In its instrumentalist perspective, the constitution is 'essentially a contract intended to secure mutual cooperation'.[125] The rules for advantageous cooperation are initially laid down in constitutions, legitimating especial laws governing each of the mechanisms designed. The legitimating power of the constitution comes from the authority which is invested upon it by the constitutive assemblies. Nevertheless, an efficient constitutional contract 'must be self-enforcing if it is to be maintained'.[126] The previous functions of a constitution are the formative elements for the stability of a nation, which is a pre-condition for democracy to take over (even if such stability means a trade-off, as is the case of the Dayton Accords).

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[118] Cass Sunstein, R. , 'On the Expressive Function of Law' (1996) 144 University of Pennsylvania Law Review 2021

[119] ibid

[120] Wibren van der Burg, 'The Expressive and Communicative Functions of Law, Especially With Regard to Moral Issues' (2001) 20 Law and Philosophy 31

[121] Lowenberg(n 88)

[122] van der Burg

[123] Sujit (ed) 6

[124] Lon L. Fuller, *The Morality of Law* (Yale University Press 1964) 157

[125] Lowenberg, (88)

[126] ibid

This however, does not mean that ethnic strife will simply disappear because a pluralist constitution has been enacted; as I said before: democracy can not define democracy. But it will certainly pave the way for compromises to take place in societies where ethnic divisions aim towards plurinational states.

I agree with the initial statement taken from the HDR:
The HDR 2004 posits that, Comparative Constitutional Law is a key factor to take into consideration when designing constitutional frameworks for divided societies. In a nutshell, the proposal of the HDR 2004 is: 1) to counteract denial of cultural liberty, 2) which is set forth by a constitutional bill of rights, that is backed by judicial review; and, 3) through implementation of policies that explicitly recognize cultural differences; a task for which constitutional law takes centre stage. Nevertheless, the field of comparative constitutional theory has been rather disconnected and it ought to be bridged through a communicative theory of constitutional law which gains legitimacy when it is put in perspective by the historical dimension provided by Habermas.

As a side-effect of this study, I have also found that although consociation will not erase ethnic conflicts, it definitely provides the necessary tools for the pacific democratization process of post-conflict states that suffer from deep ethnic cleavages. As ethnic issues threaten to paralyse the political debate, in order to preserve political and democratic efficiency we need to add to the picture centripetal incentives (following Horowitz) coupled with external constraints provided by consociational models. Unfortunately, a model for combining centripetalism and centrifugal forces in a democracy is far out of the scope of the present analysis; however, it is mentioned here as an effort to open the door for further studies of electoral systems in deeply divided societies.

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