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Religion
and the
Secular State

La religion
et l'État
laïque

XVIII TH
INTERNATIONAL
CONGRESS OF
COMPARATIVE LAW

XVIIIe CONGRÈS
INTERNATIONAL
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The
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Law and
Religion Studies

Brigham Young
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La religion et l'État laïque: Rapports nationaux

Religion and the Secular State: National Reports

under the direction of

Javier Martinez-Torrón
W. Cole Durham, Jr.
General Reporters/Rapporteurs généraux

Published by

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WASHINGTON

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Religion and the Secular State
La religion et l'État laïque

Interim National Reports
Rapports Nationaux Intermédiaires

issued for the occasion of

The XVIII[th] International Congress of Comparative Law
Le XVIIIe Congrès international de droit comparé

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General Reporters

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Contents

Foreword and Acknowledgments

This Interim Volume has been prepared with the intent that it be on hand at the 18th International Congress of Comparative Law held in Washington, D.C., 25-31 July 2010. After review of these materials by Reporters, and input from participants in the Congress and in a concurrent Washington Conference sponsored by the International Center for Law and Religion Studies and Catholic University of America, a final volume will be prepared. We anticipate that this final volume will include author corrections, along with more consistent formatting and other editorial refinements.

We would like to express appreciation for the extraordinary work performed by the many National Reporters who have contributed. We believe that this compilation of national reports will make a substantial contribution to the comparative study of issues of law, religion, and the state. As General Reporters, we are grateful to have had the opportunity to be part of the important process of preparing this comparative study.

Preparation of this interim volume has involved the work of many people. The final version of the text could not have been prepared without the extraordinary around-the-clock efforts of Donlu D. Thayer. The following executive team members at the International Center for Law and Religion Studies at Brigham Young University (ICLRS) have all made valuable contributions: Robert T. Smith, Managing Director; Gary B. Doxey, Associate Director; Deborah A. Wright, Administrative Assistant; and Christine Scott.

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We express profound appreciation for the generous support we receive from members of the ICLRS International Advisory Council. Without their financial and administrative assistance, none of the work of the ICLRS could be accomplished.

We also express appreciation to our families for support during the intense and demanding period of compiling this interim volume.

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General Reporters on the Topic "Religion and the Secular State /La religion et l'État laïque"

18th International Congress of Comparative Law
July 2010 – Washington, D.C.

Religion and the Secular State / La religion et l'Etat laïque

General Rapporteurs

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Recent years have seen religion assume an increasingly visible place in public life,[1] with mixed results that have been aptly described in terms of the "ambivalence of the sacred."[2] Every State adopts some posture toward the religious life existing among its citizens. That posture is typically contested, leading to constant adjustments at the level of constitutional and statutory law, as well as constantly evolving judicial and administrative decisions. While some States continue to maintain a particular religious (i.e., non-secular) orientation, most have adopted some type of secular system. Among secular States, there are a range of possible positions with respect to secularity, ranging from regimes with a very high commitment to secularism to more accommodationist regimes to regimes that remain committed to neutrality of the State but allow high levels of cooperation with religions.[3] The attitude toward secularity has significant implications for implementation of international and constitutional norms protecting freedom of religion or belief, and more generally for the co-existence of different communities of religion and belief within society. Not surprisingly, comparative examination of the secularity of contemporary States yields significant insights into the nature of pluralism, the role of religion in modern society, the relationship between religion and democracy, and more generally, into fundamental questions about the relationship of religion and the State.

The general rapporteurs understand the topic "Religion and the secular State" to be aimed at exploring the foregoing and related issues. If construed too broadly, the topic could conceivably cover virtually every subject relating to law and religion. For that reason, the national reporters were requested to focus on a number of recurring tension points in the relationship of religion and the state: (1) the general social context; (2) the constitutional and legal setting; (3) religious autonomy (and autonomy of the state from religion); (4) legal regulation of religion as a social phenomenon; (5) state financial support for religion; (6) civil effects of religious acts; (7) religion and education; (8) religious symbols in public places; and (9) tensions involving freedom of expression and offenses against religion. It was understood that in certain countries, certain of these issues may have attracted greater attention, and of course, other issues altogether might deserve attention in painting the broad picture of the relationship between religion and modern secular states. With this in mind, the aim has been to obtain a picture of the solutions provided by different countries to basically the same overarching problem: how the secular State deals with religion or belief in a way that preserves the reciprocal autonomy of State and religious structures and guarantees the human right to freedom of religion and belief.

1. Peter L. Berger, ed., *The Desecularization of the World. Resurgent Religion and World Politics* (Washington, D.C.: Ethics and Public Policy Center, 1999); José Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994).

2. R. Scott Appleby, *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (New York: Rowman and Littlefield, 2000).

3. For more extensive analysis of types of religion-state configurations, see W. Cole Durham, Jr. and Brett G. Scharffs, *Religion and the Law: National, International and Comparative Perspectives* (Austin, Boston, Chicago, New York and the Netherlands: Wolters Kluwer Law and Business, 2010): 114-122.

The underlying issues are as old as history. In his now classic work, Sir Henry Maine described the relationship between law and religion as an evolving one, starting with fusion of religion and law and moving toward separation. In his words, "there is no system of recorded law, literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance."[4] The path of progress, according to Maine, moved from the primitive blurring of law and religion toward more sophisticated systems in which the realms of law and religion are more clearly delineated. This view could easily be squared with the secularization thesis, that goes beyond the claim of progressive separation to assert that history ultimately moves toward the "withering away" of religion altogether. A still more radical position is that suggested by the views of A.S. Diamond, who subjected Maine's account to a withering attack,[5] contending that law was not even religious in the first place. Countering Maine's picture of a fusion of law and religion in early cultures, Diamond argued that law was secular *ab initio.* The mere juxtaposition of religious and secular provisions in ancient codes was not sufficient warrant to conclude that the secular offenses were infused with a religious aura. Diamond acknowledged that the frontiers of law and religion touch at two points: in the area of sacral crimes and in the administration of oaths or ordeals in litigation.[6] For the most part, however, he contended that the separation of law and religion was quite evident from early periods and at virtually all stages of social development.[7] In fact, he argued, given that scribes tended to be clerics in virtually all early cultures, it is actually remarkable how little of the extant codes are religious.[8]

The point in raising the Maine/Diamond debate here is to highlight a deeper methodological point. While Maine and Diamond are at odds on many points, they are at one in taking an essentially "either-or" attitude toward the relation of law, religion and the secular order. Either law is infused with religiosity, or it is secular, or it is at some transition point in between. The reality is that law may be both religious and secular at the same time. It may have religious meaning for some and only secular meaning for others. Moreover, particular individuals within a culture may see it, at alternating moments in their lives, as secular, then religious, then secular (or religious) again. In the same way, the relationship of religion and the secular state is always deeply complex, reflecting the relationship of the state not only to individual differences across plural societies, but also to the rich variation over time and space within individual lives and communities as a result of the freedom that lies at the core of human dignity. As noted in the Canadian report,"[b]ecause the notion of religiosity is so complex, several dimensions of *human* religious participation need to be considered."[9]

In part for this reason, it is as difficult to define what is secular as it is to define what is religious.[10] The terms describe adjacent but opposite areas of social space, each being the negation of the other, and yet each being intertwined with the other in vital ways. In what follows, our aim is to be provide perspective on the wealth of ways that modern states interact with religion. Comparative analysis identifies a range of types of secular states, and recognizes that the idea of the secular state is a flexible one that is capable of accommodating the every-increasing pluralism that is the hallmark of modern life. As the Canadian Report suggests, there are "four key principles constituting any model of

4. H. Maine, *Dissertations on Early Law and Custom* (London, 1891), 5.

5. Most notably A. S. Diamond, *Primitive Law Past and Present* (London, 1971; first published in 1935). (Citations in this article are to the 1971 edition.)

6. Id. at 47.

7. Id. at 48. Ethelbehrt's Code, e.g., which emerged in a society exhibiting primitive characteristics, was entirely secular and contained no religious rules or sanctions. Id. at 58-59.

8. Id. 47.

9. Canada III, citing Mebs Kanji and Ron Kuipers, "A Complicated Story: Exploring the contours of Secularization and Persisting Religiosity in Canada," in *Faith in Democracy?: Religion and Politics in Canada*, eds. John Young and Boris DeWiel (Newcastle: Cambridge Scholars, 2009), 18.

10. See W. Cole Durham, Jr. and Elizabeth A. Sewell, "Definition of Religion," in James A. Serritella, et al, eds., *Religious Organizations in the United States: A Study of Legal Identity, Religious Freedom and the Law* (Durham: Carolina Academic Press, 2006).

secularism. . . ."[11] These are "the moral equality of persons; freedom of conscience and religion; State neutrality towards religion; and the separation of Church and State."[12] It is clear, however, that these features can be blended in many ways. The nature of the secular state can vary considerably, depending on which of these elements is given most prominence and how each is interpreted.

As a general matter we discern two broad patterns. The first can be described as secularism, in which secularization is sought as an end itself. Secularism in this sense is an ideology or system of belief. In its harshest forms, it goes to the extreme of persecuting and repressing religion, as was all too often the case when communism was in power in former socialist bloc countries. More typically it takes the form of what the Canadian report refers to as a "'strict' or 'rigid' conception of secularism [that] would accord more importance to the principle of neutrality than to freedom of conscience, attempting to relegate the practice of religion to the private and communal sphere, leaving the public sphere free from any expression of religion."[13]

The alternative approach, which we refer to as "secularity," is a more flexible or open arrangement that places greater emphasis on protecting freedom of conscience. [14] Secularity favors substantive over formal conceptions of equality and neutrality, taking claims of conscience seriously as grounds for accommodating religiously-motivated difference. Separation in this model is clearly recognized as an institutional means for facilitating protection of freedom of religion or belief, rather than as an ideal endstate in itself. The secular state is understood as a framework for accommodating pluralism, including individuals and groups with profoundly differing belief systems who are nonetheless willing to live together in a shard social order.

The question running through this General Report and through many of the National Reports is which of these two archetypes – secularism or secularity – best describes particular legal systems and whether one or the other of these better describes broader patterns of historical convergence across legal systems. There is a tendency to see French *laïcité* and its spin-offs in Turkey and some former French colonies as an example of the former, and the approach in many common law jurisdictions (U.S., U.K., Australia, New Zealand, etc.) as an example of the latter. It is important in reflecting on this question, however, to remember that no system is static. Even confessional statutes cannot escape internal and international dialogue concerning optimal ways to configure the relationship between religion and the state. The features exhibited by specific legal systems at particular moments in their history typically reflect a political equilibrium that takes into account a variety of historical, sociological, and philosophical factors, to say nothing of current political debates and shifts in political power. Thus, it is better to think of particular systems (even those that would normally be thought of as confessional or religiously aligned states) not so much as instances of particular configurations of state and religion, but as living systems tending toward or away from other possible models. For modern secular states, the question is whether they tend more toward secularism or more toward secularity.

I. THE GLOBAL SOCIAL SETTING

The individual National Reports provide a wealth of data about the religious demography of their respective countries which provides the context for understanding the nature of their particular religion-state systems. It is not possible to replicate that information in any detail here. However, it is possible to note a number of significant global trends and patterns.

The first point is that religion is here to stay. Even staunch advocates of the secularization thesis have conceded in light of the data that religion is not withering away.

11. Canada II.
12. Id.
13. Id.
14. Id.

To the contrary, we are witnessing the desecularization of the world[15] and the resurgence of religion. In particular, religion is reasserting itself in the public sector.[16] We are witnessing a new "Great Awakening" to religion in Latin American[17] and in Africa[18] and throughout the Muslim world.[19] Similar if weaker trends are evident in the west. To the extent that the secularization thesis has any residual explanatory power, it seems to apply primarily with respect to "European exceptionalism."[20] Even in China, which has particularly strong governmental constraints on religion, religiosity appears to be on the rise among many sectors of the population, and Chinese leaders are rethinking how religion fits into and contributes to the building of a "harmonious society."[21]

Second, the trend is toward greater religious pluralization virtually everywhere. At the global level, no religion has a majority position; all are minorities. Even in countries that at one point had relative religious homogeneity, the percentage of adherents to the dominant religion is declining. In part this reflects purely secular trends: the realities of labor force movement, refugee flight, trade, education, and countless other factors. The result is that the number of religious minorities is proliferating in every country. Muslim populations are becoming substantial throughout Europe, the United States, Canada and elsewhere. The growth of other groups is less visible, but is also significant. In addition to demographic shifts associated with migration, significant shifts are occurring because of conversion (e.g., the growth of Protestantism in Latin American) and deconversion (growing numbers of non-believers in many societies). Moreover, while ethnicity and religion are often linked, the correlation is becoming less automatic. Many minority religions are not ethnically based. At a minimum, these trends mean that the realities of religious difference need to be taken into account in addressing countless legal issues.

Third, while pluralization is increasing, traditional religions continue to hold a very significant place in many societies. They typically have deep roots,[22] and have generally played a significant role in molding a country's history and shaping and preserving national identity.[23] Because of their centrality in culture, traditional religions can easily become a significant factor in nation building. More generally, politicians often cater to religious groups to garner support. Despite their dominant position, however, prevailing religions often feel threatened and motivated to find ways to strengthen their position in society. As a result, reactions to issues of religious rights are often colored by identity politics, fear of immigrants, and security concerns. Depending on the circumstances, playing to majority sensitivities can exacerbate tensions with other religious groups. Moreover, concern for minority rights sometimes generates a backlash among those in majority positions, who may feel that their position is at risk or under-appreciated. For example, in India in recent years, there has been ongoing political tension between the advocates of Hindutva (an ideology of Hindu cultural nationalism) and who had advocated equality in principle of all religions.[24]

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15. Peter Berger, ed. *The Desecularization of the World. Resurgent Religion and World Politics.* Washington, D.C.: Ethics and Public Policy Center, 1999.

16. José Casanova, *Public Religions in the Modern World* (Chicago: Univ. of Chicago Press, 1994).

17. David Martin, *Tongues of Fire: The Explosion of Protestantism in Latin America* (Oxford: Blackwell, 1990). "[M]ost writers place the number of Protestants in Latin America at between 12 and 15 percent of the population – a dramatic increase from an estimated 1 percent in 1930 and 4 percent in 1960. The largest percentages are in Guatemala, Brazil, Chile, El Salvador, and Nicaragua, but the expansion is continent-wide." Paul E. Sigmund, ed., "Introduction," in *Religious Freedom and Evangelization in Latin America: The Challenge of Religious Pluralism* (Maryknoll, New York: Orbis Books, 1999), 1, 2.

18. See, e.g., M. Christian Green and John D. van der Vyver, "Law, Religion and Human Rights in Africa: Introduction, *African Human Rights Law Journal* 8 (2008): 337-356.

19. See, e.g., Paul Marshall, ed., *Radical Islam's Rules: The Worldwide Spread of Extreme* Shari'a *Law* (Lanham, Boulder, New York, Toronto and Oxford: Rowman & Littlefield Publishers, Inc., 2005.

20. Peter Berger, Grace Davie, and Effie Fokas, *Religious America, Secular Europe?: A Theme and Variations* (2008).

21. See, e.g., Zhuo Xinping, "Religion and Rule of Law in China Today," 2009 *BYU L. Rev.* 519.

22. See, e.g., Armenia II (noting 1700 years of Christianity in the country); Malta I (tracing history of Christianity to shipwreck of the Apostle Paul on the island).

23. See, e.g., Armenia II; Greece I; Ireland II; Israel I-II; Latvia II; Nepal II-III; Peru I; Ukraine I.

24. India II.

A fourth point has to do with the status of religious freedom protection around the world. As described in more detail below,[25] most countries on earth have affirmed their commitment to freedom of religion or belief, either by ratifying the applicable international instruments, or by including appropriate provisions in their constitutions, or (in most cases) both. In the last few years, very interesting empirical work has begun to emerge that assesses implementation of religious liberty norms worldwide. Probably the most comprehensive of these studies (and one that integrates results from fifteen other global sources) is the report on *Global Restrictions on Religion* published by the Pew Forum on Religion and Public Life in December, 2009.[26] This study assesses the religious freedom setting by focusing on restrictions on religion, recognizing that it is easier to get a grip on restrictions than on the more abstract quality of freedom.

It is not possible to recapitulate the details of that report here, but the bottom line is striking. While 48 percent of the 198 countries and territories covered by the study had low restrictions on religion, 20 percent had moderate restrictions, and 32 percent had high or very high restrictions. Since some of the most populous countries on earth were among those with the highest restrictions, it turns out that only 15 percent of global population lives in countries with low levels of restrictions; 16 percent lives in countries with moderate levels of restriction, and 70 percent lives in countries with high or very high levels of restrictions.

The study distinguishes between governmental restrictions and social restrictions (e.g., hostile acts by individuals) on religion. Both India and China are countries listed as having very high restrictions on religion. Interestingly, however, China has high governmental restrictions but its level of social restrictions is not much higher than that in the United States, Japan or Italy. On the other hand, India has substantially lower levels of government restrictions (moderate to high – somewhat higher than France and Mexico, but lower than Turkey and Russia), but has very high levels of social restrictions. In the study, countries were ranked according to their "government restrictions index" – a score that sought to measure the levels of restrictions in each country.

The countries designated as having "very high government restrictions" were the top 5 percent of countries with the highest government restrictions index. Those with "high restrictions" consisted of the next 15 percent of countries with the next highest indexes; moderate were the next 20 percent of countries with the next highest indexes; and low were the bottom 60 percent.[27] The social restrictions are broken down in parallel percentiles with respect to a "social hostilities index" according to which very high includes the top 5 percent of countries on the social hostilities index; high includes the next 15 percent; moderate includes the next 2 percent; and low includes the bottom 60 percent.[28]

The full significance of these numbers cannot be explained without going to a level of detail beyond the scope of this General Report. Suffice it to say that despite wide and near universal lip service to the ideal of religious freedom, most people on earth live in countries where high or very high levels of restriction are in place. This is a concern not only because the statistics suggest systematic shortfalls in achieving fundamental human rights protection but also because related empirical work shows that there is very strong statistical data showing that low levels of governmental and social restrictions on religion are correlated with and appear to be causal factors accounting for the presence of numerous other social goods. For example, low levels of restrictions on religion are correlated with high levels of protection of other human rights, with higher per capita income (for men and women), better health and education, lower degrees of conflict in

25. See n. 36 and accompanying text.

26. Pew Forum on Religion and Public Life, Global Restrictions on Religion (17 December 2010), available at http://pewforum.org/Government/Global-Restrictions-on-Religion.aspx.

27. Id. at 6 (explanation of Government Restriction Index).

28. Id. at 17 (explanation of Social Hostilities Index).

society, higher literacy rates, and so forth.[29] Religious freedom correlates with greater religious engagement, which in turn generates social capital that benefits society in many ways. In contrast, and perhaps somewhat surprisingly, high levels of governmental restriction are not only correlated with but appear to be a causal factor of heightened religious violence in society.[30] In short, there appears to be significant empirical evidence that a secular state can best advance a wide variety of secular objectives by protecting the fundamental right to freedom of religion or belief. Secularism is more likely to impose restraints on religion than secularity; to that extent secularity may prove to be more socially beneficial.

II. CONSTITUTIONAL AND LEGAL CONTEXT[31]

A. Constitutional Overview

By the middle of the twentieth century, freedom of religion or belief came to be recognized as a fundamental human right – at least in theory, if not always in practice. By the time that international human rights were being codified in the aftermath of World War II, freedom of religion or belief emerged as an axiomatic feature of the international human rights regime, memorialized in Article 18 of the Universal Declaration of Human Rights,[32] Article 18 of the International Covenant on Civil and Political Rights (ICCPR),[33] in the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[34] and in a variety of other international instruments.[35]

Most modern constitutions have provisions affirming the right to freedom of religion or belief. This right is recognized in the overwhelming majority of the world's constitutions,[36] including virtually every European constitution and the constitution of

29. Brian J. Grim, "Religious Freedom: Good for What Ails Us," *Review of Faith and Int'l Affairs* (Summer 2008): 3, 4.

30. Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the 21st Century* (New York: Cambridge University Press, 2010).

31. The survey sent to national reporters suggesting the outline of their reports included a section regarding the "theoretical and scholarly context" within each country. The resulting contributions provide a rich account of the differing philosophical and theoretical contexts within which debates about religion and the state unfold in different countries. In many ways, "comparative theory" is often one of the most fruitful areas of the comparative enterprise, because the differing historical, theological, and philosophical debates that grow up in different cultural settings often provide different angles of vision and highlight different assumptions about the nature of religion-state interaction. It is thus with regret that limitations of space cause us to pass over these discussions here. Some of the more salient contributions are mentioned in the course of discussions of the constitutional context.

32. G.A. Res. 217 (A(III), December 10, 1948, U.N. Doc. A/810, at 71 (1948)).

33. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. no. 16, at 52, 55, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 (1976) (Art. 18).

34. Adopted 18 Jan. 1982, G.A. Res 55, 36 U.N. GAOR Supp. (No. 51), U.N. Doc. A/RES/36/55 (1982).

35. *American Declaration of the Rights and Duties of Man*, art. III, O.A.S.res. XXX, adopted by the Ninth International Conference of American States, Bogota (1948): *Novena Conferencia Internacional Americana, 6 Actas y Documentos* (1953), 297-302.

36. See, e.g., Afghanistan Const. art. 2; Albania Const. art. 24; Algeria Const. art. 36; Andorra Const. art. 11; Angola Const. art. 45; Antigua and Barbuda Const. arts 3,. 11; Argentina Const. § 14, § 20; Armenia Const. art. 26; Australia Const. Act §116; Austria Const. art. 7; Azerbaijan Const. art. 48; Bahamas Const. arts. 15 cl. 2, 22; Bahrain Const. art. 22; Bangladesh Const. arts. 39, 41; Barbados Const. arts. 11, 19; Belarus Const. art. 31; Belgium Const. art. 19; Belize Const. arts. 3 cl. 2, 11; Benin Const. art. 23, Bhutan Const.. art. 7 cl. 4; Bolivia Const. arts. 4, 21, Bosnia and Herzegovina Const. art. 2 cl. 3g; Botswana Const. arts. 3, 11; Brazil Const. art. 5; Brunei Darussalam Const. art. 3 cl.1; Bulgaria Const. arts. 13 cl. 1, 37; Burkina Faso Const. art. 7; Burundi Const. art. 31; Cambodia Const. art. 43; Cameroon Const. pmbl.; Canada Const. Act, Part 1, § 2a; Cape Verde Const. arts. 28; Central African Republic Const. art. 8; Chad Const. art. 27; Chile Const. art. 19 cl. 6; People's Republic of China Const. art. 36; Republic of China Const. art. 13; Colombia Const. art. 2; Congo Const. art. 18; Democratic Republic of Congo art. 22; Cook Islands Const. arts. 64 cl. 1d; Costa Rica Const. art. 75; Cote d'Ivoire art. 9; Croatia Const. art. 40; Cuba Const. arts. 8, 55; Cyprus Const. art. 18; Czech Republic Charter of Fundamental Rights and Basic Freedoms, arts. 15 cl. 1, 16 cl. 1; Denmark Const. §§ 70, 71 cl. 1; Dijbouti Const. art. 11; Dominica Const. art. 9; Dominican Republic Const. art. 45; East Timor Const. art. 45; Ecuador Const. art. 66; Egypt Const. art. 46; El Salvador Const. art. 25; Equatorial Guinea Const. art. 13; Eritrea Const. art. 19;

every independent country in the Western Hemisphere. All the national reports we received addressed countries with religious freedom provisions. While there are of course disputes about the universality of human rights norms, freedom of religion or belief has come to be recognized by most nations of the world (and by most religions) as a principle that has universal validity.[37] Constitutions and laws should be construed in ways that

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Estonia Const. arts. 40, 41; Ethiopia Const. art. 27; Fiji Const. art. 35; Finland Const. § 11; France Const. art. 1; Gabon Const. art. 1, cl. 2; Gambia Const., §§ 25, 32 Georgia Const. art. 9, 19; Germany Basic Law arts. 4, 140; Ghana Const. art. 21 cl. 1; Greece Const. art. 13; Grenada Const. Order arts. 1 cl. 1, 9; Guatemala Const. art. 36; Guinea Const. arts. 7, 14; Guinea-Bissau Const. art. 6 cl. 2; Guyana Const. arts. 40 cl. 1, 145; Haiti Const. art. 30; Honduras Const. art. 77; Hong Kong Basic Law arts. 11, 32; Hong Kong Bill of Rights art. 15; Hungary Const. Art. 60; Iceland Const. art. 63; India Const. art. 25; Indonesia Const. arts 28E, 29, 281 cl. 1; Iraq Const. arts. 2 cl. 2, 39, 40; Ireland Const. art. 44; Israel Palestine Order in Council art. 83; Italy Const. art. 19; Jamaica Const. arts. 13, 21; Japan Const. art. 20; Jordan Const. art. 14; Kazakhstan Const. art. 22 cl. 1; Kenya Const. arts. 70, 78; Kiribati Const. Art. 11; North Korea Const. art. 68; South Korea Const. arts. 19, 20, cl. 1; Kuwait Const. art. 35; Kyrgyzstan Const. art. 14, cl. 5; Laos Const. art. 30; Latvia Const. art. 99; Lebanon Const. art. 9; Lesotho Const. arts. 4 cl.1, 13, Liberia Const. art. 14; Libya Const. art. 2; Liechtenstein Const. art. 37; Lithuania art. 26; Luxembourg Const. art. 19; Macedonia Const. arts. 16, 19; Madagascar Const. art. 10; Malawi Const. art. 33; Malaysia Const. art. 11; Mali Const. art. 4; Malta Const. § 32b, § 40 cl. 1; Marshall Islands Const. art. 2, §1; Mauritius Const. arts. 3, 11 cl.1; Mexico Const. art. 24; Micronesia Const. art. 4, § 2; Moldova Const. art. 31; Monaco Const. art. 23; Mongolia Const. arts. 16 cl. 15; Montenegro Const. art. 46; Morocco Const. art. 6; Mozambique Const. art. 54; Myanmar Const. arts. 34, 354; Namibia Const. art. 21; Nauru Const. art. 11; Nepal Const. arts. 3, 23 cl. 1; Netherlands Const. arts. 6; New Zealand Bill of Rights Act § 13; Nicaragua Const. art. 29; Niger Const., art. 26; Nigeria Const. art. 38, cl. 1; Norway Const. art. 2; Oman Basic Law art. 28; Pakistan Const. art. 20; Palau Const. art. 4 § 1; Panama Const. art. 35; Papua New Guinea Const. art. 45; Paraguay Const. art. 24; Peru Const. art. 2; Philippines Const. art. 3 § 5; Poland Const. art. 53; Portugal Const. art. 41; Qatar Const. art. 50; Romania Const. art. 29; Russia Const. art. 28; Rwanda Const. art. 33; St. Kitts and Nevis Const. art. 11; St. Lucia Const. art. 9; St. Vincent and the Grenadines Const. art. 9; Western Samoa Const. art. 11; San Marino Const. art. 6; Sao Tome and Principe Const. art. 27; Senegal Const. art. 8; Serbia Const. art. 43; Seychelles Const. art. 21; Sierra Leone Const. arts. 15, 24, cl. 1; Singapore Const. art. 15; Slovakia Const. art. 24; Slovenia Const. art. 41; Solomon Islands Const. art. 11; Somalia Const. art. 31; South Africa Const. arts. 15 cl.1, 31; Spain Const. art. 16; Sri Lanka Const. arts. 10, 14 cl. 1, 15; Sudan Const. art. 38; Suriname Const. art. 18; Swaziland Const. arts. 14, 23; Sweden Instrument of Government ch. 2 art. 1 cl. 6; Switzerland Const. art. 15; Syria Const. art. 35; Taiwan Const. art. 13; Tajikistan Const. art. 26; Tanzania Const. art. 19 cl.1; Thailand Const. §37,Tibet Const. art. 10; Togo Const. art. 25; Tonga Const. art. 5; Trinidad and Tobago Const. §4h; Tunisia Const. art. 5; Turkey Const. art. 24; Turkmenistan Const. art. 12; Tuvalu Const. arts. 11, 23, 29; Uganda Const. arts. 29, 37; Ukraine Const. art. 35; United Arab Emirates Const. art. 32; United Kingdom Human Rights Act art. 13; United States Const. amend. 1; Uruguay Const. art. 5; Uzbekistan Const. art. 31; Vanuatu Const. art. 5 cl. 1f; Venezuela Const. art. 59; Vietnam Const. art. 70; Zambia Const. pmbl., art. 19; Zimbabwe Const. arts. 11, 19. For reliable access to the texts of these constitutions Selected Bibliography, supra p.826, especially see http://oceanalaw.com/ and http://heinonline.org/. Unfortunately these databases are by subscription only; however, these services provide the most up to date copies of the world's constitutions.

37. A sign of its universality is that the right to freedom of religion or belief has been broadly recognized along with other key human rights as having acquired the status of customary international law. See, e.g., Philip Alston, "The Universal Declaration at 35: Western and Passé or Alive and Universal," *The Review of the International Commission of Jurists* 30 (1983): 69 (arguing that the Universal Declaration is customary law); Richard Bilder, "The Status of International Human Rights Law: An Overview," in: James Tuttle (ed.), *International Human Rights Law and Practice* (Chicago: American Bar Association, 1978): 8 (arguing that the Universal Declaration is customary law); Derek Davis, "The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief," *BYU Law Review* (2002): 230 (arguing that the 1981 Declaration is customary law); Louis Henkin, *The Age of Rights*, (New York: Columbia University Press, 1990): 19 (arguing that the Universal Declaration is customary law); John Humphrey, *No Distant Millennium: The International Law of Human Rights* (Paris: UNESCO, 1989): 155 (arguing that the Universal Declaration is customary law); John Humphrey, "The International Bill of Rights: Scope and Implementation," *William and Mary Law Review* 17 (1976): 529 (arguing that the Universal Declaration is customary law); Richard B, Lillich, "Civil Rights," in: *Human Rights in International Law: Legal and Policy Issues*, ed. Theodor Meron (Oxford: Clarendon Press, 1984): 116 (arguing that the Universal Declaration is customary law); A.H. Robertson and J.G. Merrills, *Human Rights in the World*, 3d ed., (Manchester: Manchester University Press, 1989): 96 (arguing that the Universal Declaration is customary law); Louis B, Sohn,"The Human Rights Law of the Charter," *Texas International Law Journal* 12 (1977): 133 (arguing that the Universal Declaration is customary law); Bahiyyih G.Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Boston: Martinus Nijhoff, 1996): 184-85 (arguing that the 1981 Declaration is customary law); Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991): 237-38 (arguing that the Universal Declaration is customary law); Humphrey Waldcock, "Human Rights in Contemporary International Law and

respect this fundamental principle, recognizing that although it is universal, it can and should be implemented in diverse ways in different cultural and historical settings. Comparative constitutional analysis can expand horizons, but in itself, it has no intrinsic authority, except to the extent it yields insights that are genuinely persuasive to those charged with interpreting their own legal system, i.e., except to the judges and other officials responsible for interpreting constitutional norms, and to the people (the individuals and the communities) who ultimately judge the judges, constitute the constitutions, and choose their own freedom by deciding how they will rule and be ruled.

B. Comparative Perspectives: The Religion-State Identification Continuum

To grasp the full range of possible religion-state configurations, it is useful to think of them being spread out along a continuum stretching from positive identification of the state with religion (e.g., theocracies, established churches) through a posture of state neutrality and extending to negative identification (e.g., state persecution or banning of religion). It turns out that if this continuum is curved, with the two endpoints at one end and the middle at the other, as in the accompanying diagram, there is a rough correlation between the position on the identification continuum with the degree of religious freedom experience in the relevant country.[38]

The various positions along this "loop" need to be understood as Weberian ideal types; no state structure corresponds exactly with any of the described positions. Indeed, it is probably best to think of the various positions along the loop as contested equilibrium points reached in different societies at different times. In this sense, the loop structure can be used to map not only the current positions of various states, but also the range of discourse arguing for alternative positions at a given time in a particular country. For example, the major constitutional debates in the United States are focused in the range between separation and accommodation. In other countries, the range of debate is often much wider. Most of the reporting countries are positioned toward the "non-identification" middle position on the loop, but even so, the various configurations vary widely.[39] The loop structure provides a way of suggesting how the various systems covered by the reports compare with each other.

Thus, none of the countries covered by our national reporters are at the extreme positive or negative ends of the identification continuum. A Taliban state, or the era of Mahdiyyah in 19th century Sudan[40] might provide an example of the former, and Albania at the height of its atheistic period would exemplify the latter. The 1999 constitution of Sudan may come close to this type of regime, in that it seeks to subordinate the state to divine supremacy,[41] but it is somewhat more open, speaking of Sudan as an "embracing homeland" and recognizing that Christianity and other traditional faiths have a considerable following, while noting that Islam is the religion of most of the population.[42] In that sense, Sudan has affinities with the "endorsed religion" model, which is less exclusive.

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the Significance of the European Convention," *The European Convention of Human Rights*, Series No. 5 (London: British Institute of International & Comparative Law, 1965): 15 (arguing that the Universal Declaration is customary law). See also Hannum Hurst, "The Emerging Pattern of Church and State in Western Europe: The Italian Model," 1995 *BYU L. Rev.* 317-352 (summarizing statements of constituents of several states and international bodies as well as influential authors holding that the Universal Declaration of Human Rights is customary law).

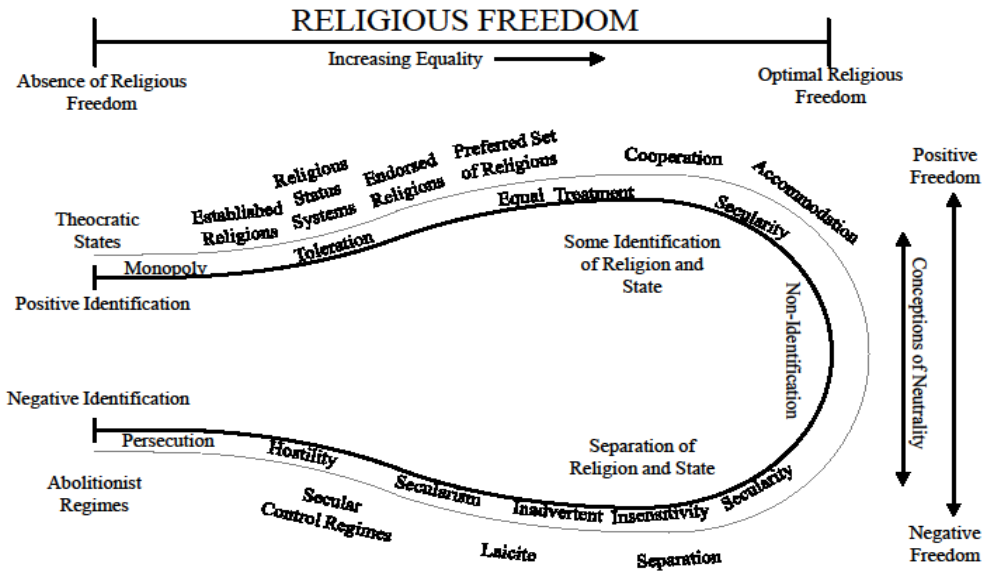
38. The accompanying diagram is taken from W. Cole Durham, Jr. and Brett G. Scharffs, *Law and Religion: National, International and Comparative Perspectives* (New York: Aspen Publishers, 2010): 117. See discussion there for a fuller analysis of the varying religion-state configurations that it represents.

39. To our regret, and despite energetic efforts to identify national reporters from predominantly Muslim countries, this is an area seriously under-represented in the national reports we received. For a valuable overview of the constitutions in this part of the world, see Tad Stahnke and Robert C. Blitt, "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries," 2005 *Georgetown J. Int'l L.* 36: 947-1078.

40. Sudan II.

41. Sudan III.A.

42. Id.



Moving along the loop, a number of the reporting countries have established churches, though most at this point fit comfortably in the "tolerant" rather than "monopoly" mode. The notion of an established church is linked to the notion of a confessional state. Greece is one of the regimes most closely linked in fact to a dominant religion, but the fact that Article 3, paragraph 1 of the current constitution provides that the Orthodox faith constitutes the *prevailing* religion is slightly different than making it the *official* religion. The reference to "prevailing" helps leave constitutional space open for other religions, although they will clearly lack many of the privileges of the Orthodox faith.[43] Other arguably established religions include Nepal was officially a Hindu Kingdom until its latest interim constitution was adopted in 2007.[44]

The United Kingdom provides the interesting example of a country with two established churches: the Church of Scotland and the Church of England. [45] The Church of England has various privileges and relations with the state. For example, the legal manner in which the church holds property is unique. Standing advisory councils in the educational system must have representatives from the Church of England. There are also downsides: as noted by the UK reporter, the state has a role in the Church of England that it doesn't have in other religious traditions. The state is also involved in appointment of bishops. Further, while Parliament has given the Church of England the "power to pass Measures, legislative acts of the Church, this is subject both to the fact that Parliament could revoke that power and the necessity for any individual Measure passed by the Church to receive the approval of Parliament."[46] While the establishment is formally intact, some point to a "'creeping disestablishment' with a distancing between Church and state."[47] The national reporter on Scotland provides a useful account of the Church of

43. Greece II.B.

44. Nepal V.

45. United Kingdom III. The UK Reporter notes that "[t]e Welsh Church Act 1914 disestablished the Church of England in Wales. For a more detailed analysis of the current state of establishment in the UK, see Anthony Bradney, *Law and Faith in a Skeptical Age* (London: Routledge, 2009) Chapter 3.

46. Id.

47. Id.,citing E. Norman, *Church and Society in England 1770-1970: A Historical Study* (Oxford: Clarendon Press, 1991).

Scotland has a separate existence, with independent jurisdiction over its belief system, governance, and discipline.[48] Other churches in Scotland remain in law private unincorporated associations, with their property held by trustees. In general, the established churches in the UK have learned how to coexist with other religious communities in ways that are consistent with high levels of religious freedom.

Sweden, which had long had an established church, decided at the initiative of the church to disestablish, effective 1 January 2000. The question whether the Church should remain a part of the State organization had been debated for many years, and was ultimately resolved by the "separation" in 2000. Since separation, the "Folk Church of Sweden" has been placed on what is formally a more equal footing with other religious communities, although the Church has in fact retained a number of its privileges. The result is a "compromise between the necessity to pay regard to the Church's position in the history of Sweden and the goal of treating religious denominations equally in Sweden."[49]

In some countries, what was once an established church has evolved into a people's church (folk church). For example, in Finland, the Evangelical Lutheran Church "is clearly a separate institution from the State, with its own legal status." The Church still has a variety of official links with the state, although many of these are gradually being abrogated, and it is clear that in general, "[t]he Finnish State is neutral in matters of religion, and the Church is legally and administratively very independent in relation to the State."[50] Over several decades, however, the Church came to emphasize its role as a folk church – as a religious institution "which serves the whole people."[51] As described by the Finnish reporter, "the concept of the state church is mainly to do with ecclesiastical law, while the concept of folk church has more to do with sociology." The evolution of major churches toward folk churches in this sense can be seen in a number of countries. Armenia, for example, may follow this model. The constitution clearly separates religion from the state, but there is a powerful ethnic identification with the Armenian Apostolic Church, and the majority of Armenians (ironically including even atheists) are steadfast supporters of the Church. Serbian identification with the Orthodox Church may be another example.[52]

The category of "religious status systems" was developed to address systems that recognize multiple religious legal systems, typically in matters of family and personal law. The impulse behind such systems is tolerant, in that they aim at respecting the differing religious norms of different communities. However, they often lead to complications in fact. Thus, in Israel, different laws govern marriage of Jews, Muslims, the Druze.[53] But if a Jewish couple is not sufficiently orthodox, they may not be able to be granted a Jewish marriage. In India, a provision of the constitution as originally adopted following partition called for "endeavors . . . [to] secure for the citizens a uniform civil code throughout the territory of India."[54] In fact, however, a dual system of marriage laws remains "under which individuals can make a choice between the secular and the religious matrimonial laws."[55] For several major religious communities there are "codified community-specific laws": the Christian Marriage Act 1872, Parsi Marriage and Divorce Act 1936 and the Hindu Marriage Act 1955.[56] These can create challenges in mixed-marriage and a variety of other situations. The Lausanne Treaty originally contemplated establishment of such a system to protect the rights of various minorities in Turkey, but the Jewish community renounced its claim for such rights and the "chain reaction generated by this initiative forced both the Armenian and Greek communities in Turkey to

48. Scotland II.A.
49. Sweden II.B.
50. Finland II.B.
51. Id.
52. See Serbia Report.
53. Israel VIII.
54. India VIII.
55. Id.
56. Id., n. 74.

put a stop to their own works on the elaboration of special provisions."[57]

The Canadian system flirted with allowing a version of the religious status system approach to operate through the mediation and arbitration system. Specifically, the Ontario government considered a proposal that would allow creation of a "Shari'a Court" to operate on consent of the parties using arbitration provisions of Ontario's laws. A government study of the proposal "concluded that Ontario should allow individuals to choose religious arbitration as a reflection of Canada's multicultural society as long as minimal safeguards, concerning such things as the legitimacy of consent and judicial review procedures, were put into place."[58] Ultimately, the Ontario government rejected the proposal, and amended the province's arbitration act to require that all family arbitrations . . . be conducted exclusively in accordance with Ontario or Canadian law.[59] The effect of the ruling was not to preclude settling "family matters according to religious norms, or before religious authority," but merely to hold that such actions "will not be automatically legally binding or enforceable before a state court of law."[60]

"Endorsed systems" are often a first step away from an official or established church. Instead of declaring that there is an official religion in the state, a constitution acknowledges the special role of a particular religion, but then goes on to affirm the religious freedom of other groups. Sometimes the recognition of religion is placed in a preamble; other times it is located in the body of a constitution. The Greek constitution actually has this structure. That is, it recognizes that the Orthodox Church is the "prevailing religion" but also protects religious freedom for others.[61] In Armenia, for example, Article 8.1 of the Constitution provides that "The church shall be separate from the State in the Republic of Armenia" but in the next sentence states, "The Republic of Armenia recognizes the exclusive historical mission of the Armenian Apostolic Holy Church as a national church, in the spiritual life, development of the national culture and preservation of the national identity of the people of Armenia."[62] Similarly, the Bulgarian constitution separates religion and state and has fairly typical language affirming freedom of religion, but "both the Constitution and the relevant legislation suggest a special role and often a special place for the [Bulgarian Orthodox Church] within what is a social and political context."[63] In Andorra, Italy and Spain, the unique place of the Catholic Church in national history is recognized, but strong protections for religious freedom are provided as well.[64] Similar patterns are apparent in the constitutional structures of several of the Latin American countries as well.[65]

The "preferred religions" model refers to countries that do not establish or endorse any particular religion, but single out a number of religions for favored treatment or recognition. This is sometimes done by distinguishing traditional religions and giving them special status or privilege. Alternatively, this may be done by establishing "multi-tier" regimes that give different groups different levels of recognition. In theory, the distinctions should be based on objective factors, but typically the effect is to favor traditional groups. Sometimes the distinctions are evident at the level of the constitution; in other systems the distinctions are adopted as part of legislation dealing with religious matters. In Slovakia, for example, only 18 churches have been registered, and the requirement that new groups can be registered only with the support of 20,000 adult members effectively precludes registration of any other communities in the country. The Russian Law on Freedom of Conscience and on Religious Organizations is nowhere near as restrictive, but its preamble mentions the "special contribution" of Orthodoxy to the

57. Turkey IX.
58. Canada VII.B.
59. Id.
60. Id.
61. Greece II.A.
62. Armenia II.
63. Bulgaria III.A.
64. Andorra III; Italy III; Spain III.
65. See, e.g., Argentina IV; Peru III.

culture and history of Russia,[66] and gives special mention to Islam, Judaism and Buddhism as well.

Probably the most common arrangement among the national reports is the cooperation model. Most European systems are evolving in this direction. Even separationist France in fact provides significant levels of cooperation in supporting religious schools and in helping with the maintenance of pre-1905 religious buildings.[67] India's "positive conception of equal treatment" and secularism without a wall of separation also appears to fit into this model.[68] Neutrality is the hallmark of this constitutional model. No particular religions are singled out for benefits or unfavorable treatment. But neutrality on this model is not hostile but friendly and cooperative. Most significantly, this type of religion-state configuration is not averse to state funding of religious activities. In part grows out of a belief that freedom of religion is not only a defensive right against state interference, but a positive right to state action enabling exercise of religious freedom.[69] Often this reflects long-standing patterns of support that are difficult to unwind. Sometimes it reflects ongoing payments that represent compensation for past appropriation of religious property.[70] Sometimes no direct transfers from the state budget to a religious community are involved, but the state facilitates funding which supports religious communities, either through assisting with the collection of contributions[71] or through tax "check-off" systems that allow taxpayers to allocate funds to religions of their choice.[72]

There are in fact countless ways that cooperation is structured. The fundamental point is that cooperation systems respect fundamental baselines of protecting individual religious freedom for all, and the fundamental commitment to neutrality and equality in religious affairs, but understanding these notions in a way that allows the state flexibility to cooperate in a variety of ways with religious communities. The larger point to make here is that the cooperation model is one of the major ways to structure the relationship between religion and the secular state. The willingness to cooperate with religion distinguishes this approach from secularism. Its willingness to help the support of a variety of communities inclines it toward secularity. Major areas of cooperation occur in the domains of finance of religious organizations and education, which are treated in subsequent sessions of this general report. The practical manifestations of this type of secularity are adequately addressed in those sections.

Accommodationist systems are similar in many ways to cooperationist systems, except that they impose tighter constraints on direct funding of religious activity. In the financial area, they are comfortable with tax exemption schemes, because these reflect private choice in the allocation of resources. An accommodationist tends to be more comfortable than a strict separationist with religion as part of national culture. There is thus more willingness to accommodate religious symbols in public settings, to allow tax, dietary, holiday, Sabbath and other kinds of religion-based exemptions and so forth. Interpretations of the United States Constitution that support the foregoing positions are probably the classic example of accommodationist positions. As noted earlier, the major debates in U.S. religion-state theory are between accommodationists and stricter separationists.[73] Like cooperationists, accommodationists apply substantive conceptions of neutrality and equality that allow religious differences to be taken into account in interpreting general laws. For example, conscientious objection to military service is taken as a difference that otherwise general laws can take into account.

Moving further around the "loop," one encounters several constitutional approaches that take a more strictly secular approach to religion-state relations. Many of the states

66. Russia IV.
67. France VIII.
68. India III.
69. See, e.g., Hungary IX.
70. See, e.g., Germany VIII; Hungary IX.
71. See, e.g., Germany VIII.
72. Italy V; Spain III(I).
73. See generally United States Report (1) - (McCauliff).

covered by national reports specifically declare themselves to be secular or *laic* in their constitutions.[74] Some prohibit the creation, recognition or establishment of any religion.[75] Others mandate the "separation" of religion and the state.[76] Still others declare the state to be secular, or in French," *laïque.*[77] Stress on formal versions of neutrality and equality can lead to similar results.Not surprisingly, some constitutions include two or more of these types of provisions. For example, Article 14 of the Constitution of the Russian Federation reads as follows: "The Russian Federation is a secular state. No religion may be established as a state or obligatory one. Religious associations shall be separated from the State.and shall be equal before the law." Particularly when one recalls that Article 28 of the Russian Constitution also includes a provision on freedom of conscience, it seems clear that the Russian constitution has covered all the secular bases. That is, it has affirmed that the state is secular as opposed to confessional. It has proscribed the creation of an official or "established" church. It specifically mandates separation of religious and state institutions. It affirms that religious *associations* shall be equal before the law, which would appear to require state neutrality. Additionally, there are the individual rights to freedom of conscience. Note that it is often hard to tell how these arguably distinct versions of the secular will play out in reality. Despite the strong assertions of secularity on each of these fronts, influence of the Russian Orthodox in particular has been growing in recent years. Favored treatment is evident in areas such as state finance of construction of religious buildings and monuments, support for chaplains in the military, instruction on basic Orthodox culture in some regions of the country, and the prevalence of religious symbols in a variety of public settings.[78]

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74. India III, India Const., preamble; Italy III; Nepal VI, Nepal Const., art.4, Serbia IV; Turkey III, Turkey Const., art. 10.

75. See, e.g., Australia Const. art. 116; Brazil Const. art. 19; Czech Republic Charter of Fundamental Rights and Basic Freedoms art. 2, cl. 1 ("it may not be bound either by an exclusive ideology or by a particular religious faith); Ethiopia Const. art. 11 cl. 2; Gambia Const. art. 200 cl. 2; Germany Basic Law art. 140, incorporating Weimar Const. art. 137 cl. 1; Ireland Const. art. 44 cl. 2 (no "endowment" of any religion); South Korea Const. art. 20 cl. 2; Kyrgyzstan Const. art. 8 cl.1; Liberia Const. art. 14; Lithuania Const. art. 43 cl. 7; Micronesia Const. art. 4 §2; Nicaragua Const. art. 14; Nigeria Const. art. 10; Palau Const. art. 4 § 1; Paraguay Const. art. 24; Philippines Const. art. 3 § 5; Russia Const. art. 14 cl. 1; Serbia Const. art. 11; Seychelles Const. art. 11 cl. 6; Spain Const. art. 16 cl. 3; Tajikistan Const. art. 8; Uganda Const. art. 7; Ukraine Const. art. 35; United States Const. amend. 1; Uruguay Const. art. 5.

76. Angola Const. art. 8; Armenia Const. art. 8.1; Azerbaijan Const. art. 18 cl. 1; Bhutan Const. art. 3 cl. 3; Bolivia Const. art. 4 ("The state is independent of religion"); Bulgaria Const. art. 13 cl. 2; Cameroon Const. pmbl. ¶ 5 cl. 14 ("neutrality and independence of the State"); Cape Verde Const. arts. 2 cl. 2, 48 cl. 3, 102 cl. 3; Chad Const. art. 1; Croatia Const. art. 41 cl. 1; Cuba Const. art. 8; Ethiopia Const. art. 11; Gabon Const. arts. 2, 6 cl. 1; Guinea-Bissau Const. art. 6 cl. 1; Hungary Const. art. 60 cl. 3; Kyrgyzstan Const. art. art. 8 cl. 3; Hungary Const. art. 60 cl. 3; Italy Const. art. 7 ("The state and the Catholic Church are independent and sovereign, each within its own sphere); Japan Const. art. 20 cl.1 ("No religious organization shall receive any privileges from the State, nor exercise any political authority;"); South Korea Const. art. 20 cl. 2; Latvia Const. art. 99; Liberia Const. art. 14; Macedonia Const. art. 19 cl. 3; Mexico Const. art. 130; Mongolia Const. art. 9 cl. 2; Montenegro Const. art. 14; Mozambique Const. arts. 12, 292; Niger Const. arts. 4, 152; Peru Const. art. 50 ("framework of independence and autonomy"; Philippines Const. art. 2 cl. 6; Portugal Const. art. 41 cl. 4; Russia Const. art. 14, cl. 2; Serbia Const. art. 11; Slovenia Const. art. 7 cl. 1; Tajikistan Const. art. 8; Turkmenistan Const. art. 12; Ukraine Const. art. 25; Uzbekistan Const. art. 61.

77. Angola Const. art. 8, cl. 1, Azerbaijan Const. pmbl.,, art. 7 cl. 1; Benin Const. arts. 2, 23; Burkina Faso Const. art. 31; Burundi Const. arts. 1, 61, 299; Cameroon Const. pmbl. ¶ 5, art. 1 cl. 2; Central African Republic Const. arts. 18, 20; Chad Const. arts. 1, 128. 225; Congo Const. arts. 1, 189; Democratic Republic of Congo Const. art. 1; Cote d'Ivoire arts. 30, 127; Ecuador Const. arts. 1, 3; France Const. art. 1; Gabon Const. art. 2, 7; Guinea Const. art. 1, 91; Guinea-Bissau Const. arts. 1, 130; India Const. pmbl.; Kazakhstan Const. art. 1, cl. 1; Kyrgyzstan Const. art. 1, cl. 1; Lithuania Const. art. 40; Madagascar art. 1 cl. 1; Mali Const. pmbl., arts. 25, 118; Mexico Const. art. 3 cl. 1; Mozambique Const. art. 12 cl. 1; Namibia Const. pmbl., art. 1 cl. 1; Nepal Const. art. 4 cl. 1; Nicaragua Const. art. 124; Russia Const. art. 14 cl. 1; Rwanda Const. art. 1; Senegal Const. art. 1; Serbia Const. art. 11; Tajikistan Const. arts. 1, 100; Tanzania Const. pmbl., art. 3 cl. 1; Togo Const. arts. 1, 25, 144; Turkey Const. pmbl., arts. 2, 4, 13, 14, 81, 103, 174; Turkmenistan Const. art. 1. Cf. Czech Republic Charter of Human Rights and Freedoms art. 2(1) ("The State ... must not be tied either to an exclusive ideology or to a particular religion"); Slovak Republic Const. art. 1 ("The Slovak Republic . . . is not bound by any ideology or religion").

78. Russia VIII-XI.

The contrast between the full range of secularist constitutional provisions in Russia on the one hand and the various forms of state cooperation and accommodation on the other is a reminder of how difficult it is in general to assess the actual nature of religion-state relations on the basis of constitutional provisions alone. The combination of traditional practice and custom, acknowledgement of historical and cultural realities, reactions aimed at curing or reversing prior abuses, constitutional and legal interpretation, religious bias and prejudice, and outright non-compliance with constitutional norms all contribute to painting the full picture of actual religion-state relationships.

One of the major models of the secular state is that suggested by the French experience, and the French notion of laïcité. As is the case with other positions on the identification continuum, this is really better thought of as a range of positions, signified by various debates going on in French society, and within a number of other countries where the role of religion in the public sphere is an issue (e.g., secular Turkey). There are no doubt versions of *laïcité* that are compatible with the more open notion of secularity. For example, the Italian Constitution declares its own form of laicism, in which the state guarantees safeguards for religious freedom. Further, although churches are seen as separate from the state sphere in Italy the state enters pacts with the Catholic Church and agreements with other denominations to promote coordination.

Similarly, while Chile uses concepts of *laïcité*, it reaches results quite different and more religion friendly than classic French *laïcité*. But a central current in this view of religion and the secular state is that religion is a source of intolerance, superstition, social tension and violence – that it unleashes forces that run counter to reason, enlightenment and progress – and thus that it needs to be countered by a secular state. This version of *laïcité* is linked with the secular side of the Enlightenment and with the experience of the French Revolution as a revolt against the *ancien régime*, including the religious *ancien régime*. It is often as much about freedom *from* religion as it is about freedom *of* religion. It sees intolerance as a peculiar vice of religion, not recognizing that secularism itself can be as guilty of intolerance as its religious counterparts. At a minimum, it is about confining religion to the private sphere, where it poses no threat to dominance in politics or to capture of state institutions. Any return of religion to public space is viewed as threatening the Enlightenment project as a whole. In countries with a predominantly Catholic background, ideas and strategies concerning secularism were forged in the confrontation with Catholicism, and often took (and continue to take) an anti-clerical cast.[79] In such settings, it is not surprising that discourse about the secular state becomes a highly charged confrontation between religious and secular "isms" rather than a dialogue about how those holding the different world views can best live together. A similar dynamic often characterizes the relationship of secularist forces and more traditional religious groups in settings where Islam is a dominant social factor and fears of Islamist elements in society are strong.

It is a short step from extreme forms of secularism/*laïcité* to regimes that are more affirmatively hostile religion state relationships. What starts as neutrality and formal equality hardens into a view of law that views itself as compromised if relevant religious differences are taken into account. Allowing flexibility for believers to act according to conscience comes to be viewed as a form of discrimination in favor of religion. State action that intentionally discriminates against religion continues to be seen as wrongful (violating neutrality and equality values), but "neutral and general laws" that have incidental effects imposing heavy burdens on believers are taken to be a normal feature of life in democracy. Equal treatment thus passes over into unintentional disadvantaging. Legislators become better at crafting neutral-seeming laws, and in the end, constraints against overt hostility disappear.

Secular control regimes constitute a secular counterpart to established religions. Two versions can be imagined. In the first, secular rulers exploit religion for political gain. Examples would include political leaders catering to religious groups in an effort to contribute to nation building, or simply to attract political support. In this sense, the

79. See, e.g., Mexico II.

Ukrainian national report notes the way that Russian rulers used its "Department of Orthodox matters" as part of the machinery for ruling Ukraine.[80] Here the parallel with control by established religions is clear; indeed, it is not merely a parallel but an identity. The second type of secular control regime emphasizes freedom from religion, either for ideological reasons, or to prevent religious communities from becoming a competing source of legitimacy within society. Stalin's anti-religious terror was prompted both by ideological concerns (anti-religious Marxism) and by fears of counterrevolutionary forces in society. Describing this phenomenon, the Ukrainian national report notes that the "Soviet regime was by no means religiously neutral nor even tolerant toward religion; rather, it thrust upon the Ukrainian people its communist ideology with religious eagerness.[81] Contemporary China would constitute another example.

Besides helping to map different types of relationships between religion and the state (including secular states), the schematization described above helps to bring out several other features of religion-state relations.[82] First, there are a range of different types of relationship which correlate with high degrees of religious freedom. Indeed, what the static diagram cannot make clear is that in fact, different points along the identity continuum may be optimal in different social settings. For example, in countries where religious communities have experienced decades of persecution, as was the case in countries that lived under Soviet hegemony, a cooperation model might be not only optimal but necessary for religious institutions to be revitalized. On the other hand, where religious institutions have been strong and controlling, a position such as French *laïcité* may be vital to carve out space for broader freedom of religion. A significant "margin of appreciation" is necessary not only because different configurations will have different practical effects; they may also have different social meanings. Forbidding religious exercises in schools may have one meaning in a setting such as the United States, where such exercises had been hotly contested and made emergence of public school systems virtually impossible when that system was first being founded. It likely would have had a very different meaning in post-World War II Germany, where the country was recovering from Hitler's *Kirchenkampf* and had clear memories of Bismarck's *Kulturkampf*, both of which attacked religious liberty in no small part by attacking religion in the schools.

Second, while freedom and equality norms can sometimes be in tension with each other, for the most part, increasing protection of equality in religion-state relations and increasing freedom go together.

Third, in the optimal "middle range" of the continuum, differing conceptions of freedom may be at work behind different religion-state configurations. Cooperationist regimes (and cooperationist models of the secular state) reflect positive conceptions of freedom, in that they assume that the state should help actualize the conditions of freedom. Separationist regimes (and separationist conceptions of the secular state), by contrast, assume a negative conception of freedom according to which religious freedom is maximized by minimizing state intervention in the religious sphere (and religious intervention in the public sphere).

Fourth, in a similar vein, the different types of configurations reflect different assumptions about what state neutrality means. One model of neutrality is state inaction. A state that gives that is totally separate and gives no aid to religion could be seen as being neutral among all religions. A second model is neutrality as impartiality (e.g., the impartiality of an unbiased umpire). This model calls for the state to act in formally neutral and religion blind ways. This corresponds to a strict version of separation that does not allow religious factors to be taken into account in assessing legal policies and state implementation schemes. A third model views the state of the monitor of an open forum. This is like the model of neutrality as impartiality, except that it allows imposition

80. Ukraine III.

81. Id.

82. This section of the General Report follows Durham and Scharffs, *Law and Religion: National, International and Comparative Perspectives* (New York: Aspen Publishers, 2010): 121-122.

of time, place and manner restrictions that set the boundaries within which religious debate and competition occur, but does not allow the state to be involved in shaping the substance of religious value systems. The first three models of neutrality correspond to differing versions of separationist or strictly secular states. A fourth model calls for substantive equal treatment and corresponds to accommodations positions that allow conscientious beliefs to be taken into account in shaping and interpreting public policies. A fifth model is a "second generation rights version" of the fourth, which views affirmative actualization of substantive rights as an affirmative or positive obligation of the state, and thus corresponds to the cooperationist position.

C. Other Constitutional Issues Involving Religion

An array of constitutional issues that govern religion-state relations in various details fit into this larger framework, and are affected by where a regime seeks to position itself along the identification continuum. Thus, as indicated earlier, most countries have ratified the key international instruments governing freedom of religion or belief. Many have constitutional provisions indicating that international treaties override ordinary legislation.83 But the international instruments tend to be read in ways that are consonant with the applicable type of religion-state system. One of the issues that has been explicit in international instruments since the 1960s is that the right to freedom of religion or belief protects not only religious believers, but atheists, humanists and other forms of conscientious secular beliefs. Not surprisingly these notions are taken more seriously among the more laicist states, including former communist states that have particularly high numbers of non-believers.84 This right to non-belief is also finding footing in more accommodationist states such as Canada and Australia, which do not expressly mention the right not to believe in their constitutions, but have found ways to protect it through caselaw.85 On the other hand, states in the more religious range of the identification continuum (established to preferred religions) are less likely to be sympathetic to unbelief. Thus, Colombia specifically notes that the state is not atheistic or agnostic,[86] and Ireland mandates that the state refrain from atheistic propaganda or any measure hostile to religion.[87] Similarly, the Indonesian constitution insists on belief in one God,[88] and that this does not permit atheism.

The scope of permissible limitations on freedom of religion also tends to vary depending on the type of religion-state configuration. All but about ten of the world's currently operational constitutions have been adopted since the end of World War II, and not surprisingly, most have been significantly influenced by the structure of international human rights instruments, including limitation clauses. Accordingly, most identify the protection of public safety, order, health, morals, or the fundamental rights and freedoms of others[89] as legitimating grounds for imposing limitations on manifestations of religion. Some, but not all, of these are clear that in order to override religious freedom claims, it must be possible to demonstrate that even limitations based on these legitimating grounds must be "necessary" in the sense of being narrowly tailored to the end being pursued and proportionate to the seriousness of the right being limited, as required by the international instruments.[90] Secularist countries are somewhat more likely to determine that religious freedom claims are outweighed by other secular interests. Accommodationist regimes are

83. See, e.g., Armenia IV; Chile,

84. See, e.g., Bulgaria IV.B, Bulgaria Const., art 37.

85. Australia IV.A; Canada III.D.

86. Colombia III, Colombia Const., art. 2.

87. Ireland III, Ireland Const., art. 44-1..

88. Indonesian Const., Preamble, indent IV and art. 29(1).

89. Similar to the European Convention on Human Rights, See Andorra III, Bulgaria IV.B, Bulgaria Const. art. 37, cl.2; Czech Republic III.B, Czech Const. art. 3, cl.4, Estonia III.B, Estonia Constitution, art. 40; Greece VI, Greece Const., art. 13, cl.2; India III, India Const., art. 25. See also Kazakhstan III.B, Kazakhstan Const., art.39, cl.1 ; Malta II, Malta Const., art. 32; Slovakia III, Slovakia Const., art. 24; Sweden IV; Switzerland IV; Turkey III, Turkey Const., art. 14, Ukraine III, Ukraine Const., Art. 35.

90. See, e.g., International Covenant on Civil and Political Rights, art. 18(3).

more likely to construe permissible limitations narrowly, thus expanding the extent to which freedom of religion or belief is protected.

Most constitutions have provisions prohibiting discrimination based on religion. In some states this takes the form of a broad provision stating that all citizens are equal before the law, which the state then interprets to protect against all forms of discrimination, including discrimination which is religiously based.[91] Other states specifically prohibit discrimination based on religion, belief, opinion, or creed.[92] In addition to protecting individuals, some constitutions also have a provision that declare that churches and religious organizations are equal before the law and require equal treatment.[93] The Italian constitution further specifies that no legal limitation or tax burden may be imposed on an organization because of its religious beliefs. In other constitutions the equality of churches is not mentioned specifically but the provision protecting against discrimination on religious beliefs for individuals has been extended to religious communities in case law, creating an obligation to treat all religions equally.[94] The equality provisions represent a fundamental commitment of most legal systems these days, but there can be substantial flexibility in the way these norms are interpreted and applied.

D. The Legal Setting

In addition to constitutional provisions, virtually all states have laws designed to implement general commitments to religious freedom. These include laws that specify how religious communities can acquire legal entity status, through registration, incorporation, or other legal means. One of the significant developments in this area over the past decade has been the emergence of a series of cases, most notably in the European Court of Human Rights, affirming the right to acquire entity status if a religious community so desires,[95] and the right to operate without such status if it does not.[96] This right embraces the right for a group to acquire legal personality authorizing it to carry out the full range of religious and belief activities. [97] Commitments made by participating States of the Organization for Security and Cooperation in Europe are to the same effect.[98] While these laws often look superficially similar, the way they are administered can make a huge practical difference for religious communities. If they are administered with the aim of facilitating the activities of religious groups and communities, they operate to enhance freedom of religion. On the other hand, if they are applied as control mechanisms, often designed to make it difficult for smaller groups to acquire entity status, they can constitute a major interference with freedom of religion or belief. In most of the reported countries, registration or incorporation procedures operated to facilitate religious freedom in a manner consistent with the openness of secularity. Many of the key

91. See Greece X.6; Switzerland IV, Switzerland Const., art. 8.

92. Colombia III, Colombia Const., art. 13; Estonia III.B, Estonia Constitution, art. 12; Finland III.B, Finland Const. s. 6; Hungary IV.B, Hungary Const., s.60; India III, India Const., arts. 15, 16, Ireland III, Ireland Const., art. 44; Japan III, Japan Const., art. 14, cl.1; Kazakhstan III.B, Kazakhstan Const., art. 14, cl.2, Korea III, Korean Const., s.1.11; Malta II, Malta Const., art. 45; Mexico III.B, Mexico Const. art. 24; Netherlands II, Netherlands Const., art. 1; Philippines III, Philippines const., art. 3, cl. 5; Spain III.B, Spain Constitution, art. 14, Turkey III, Turkey Const., art. 10; Ukraine III, Ukraine Const., art. 25.; Uruguay IV.B, Uruguay Const. art. 8.

93. Columbia III, Colombia Const, art 3; Mexico III.B, Mexico Const., art. 29; Russia III, Russia Const., art. 14; Serbia IV, Serbia Const., art. 18l.

94. Estonia III.B; Finland III.B; Spain III.B, Spain Const., art. 14.

95. See, e.g., Canea Catholic Church v. Greece, 27 EHRR 521 (1999) (ECtHR, App. No. 25528/94, 16 December 1997); Hasan and Chaush v. Bulgaria (ECtHR, App. No. 30985/96, 26 October 2000); Metropolitan Church of Bessarabia v. Moldova (ECtHR, App. No. 45701/99, 13 December 2001); Moscow Branch of the Salvation Army v. Russia (ECtHR, App. No. 72881/01, Oct. 5, 2006); Church of Scientology Moscow v. Russia (ECtHR, App. No. 18147/02, 5 April 2007); Svyato-Mykhaylivska Parafiya v. Ukraine (ECtHR, App. No. 77703/01, 14 September 2007); Kimlya v. Russia, ECtHR, App. Nos. 76836/01, 32782/03 (1 October 2009).

96. Masaev v. Moldova, ECt HR , App. No. 6303/05 (12 May 2009), § 26.

97. The Moscow Branch of the Salvation Army, ECtHR, App. No. 72881/01 (5 Oct. 2006), §74.

98. OSCE, Vienna Concluding Document, Principle 16.3.

European Court cases have involved defects in the legal structure and administrative processes under the Russian Law on Freedom of Conscience and on Religious Organizations and with other countries in the former Soviet sphere of influence, although some improvement is occurring at the prodding of the European Court of Human Rights.

In general, states that facilitate access to legal entity status are acting in a manner consistent with the ideal of secularity. States that incline toward secular control, either out of continuation of earlier patterns of restriction or because of present desires to control religious groups, comport at best with secularism and more typically with secular control orientations. Generally, cooperation rights – including access to public funding – are keyed not to registration rules governing access to base-level legal entity status but to some higher-level qualifications. Thus, cooperation regimes are generally fairly open to flexible registration rules, and in that sense, are consistent with secularity. Pressure for tightened control frequently increases as one moves toward preferred, endorsed and established religions – here not because of secularism, but because of increased religious control authorized by the religion-state regime.

Where cooperation is allowed, the need to manage the flow of funds and other aspects of cooperation often leads to the emergence of a multi-tiered religion state system.[99] At the base level of the structure is a registration system that allows religious communities to receive basic legal entity status, and in some cases qualification for indirect support through tax exemptions and the deductibility of contributions. A number of states, such as Austria and Romania, have an intermediate status for smaller religious communities that gives them some heightened status vis-à-vis ordinary non-profit organizations, but not the benefits of full financial and other benefits of the highest level of recommendation. In a number of countries, particularly those with a significant Catholic population, there is a pattern of bilateral agreements between the state and various religious communities.[100] For the Catholic Church, these take the form of concordats; for others they are agreements designed to be similar in principle to the Catholic Concordats, but without the full attributes of transnational agreements with another sovereign state.[101] The Italian national report characterizes Italy's arrangement as a four tier system where non-recognized associations receive no benefits but have complete freedom, recognized churches receive tax benefits, denominations with agreements have additional privileges, and the Catholic Church has special status at the highest tier.[102] Spain has developed a variation on the agreement system whereby for religions other than Roman Catholicism, agreements are entered into not with a single denomination, but with a federation of denominations.[103] Depending on the nature of the cooperation that is being managed, the number of "tiers" in any national structure may vary. In Serbia there is only a two-tier system which differentiates between recognized and unrecognized churches. Traditional churches are recognized and given religious instruction rights.[104]

The difficulties with the multi-tiered systems are three-fold. While the intention behind the agreement systems was good (the aim is to equalize denominations by bringing them up to the level of the Roman Catholic Church), the implementation typically falls short of the aim. In the first place, full equalization with the Catholic Church is not possible, because no other Church controls its own country, enabling it to enter into formal treaties with other states. Even leaving that aside, there is a tendency, particularly where the Catholic Church is overwhelmingly dominant, for the Catholic Church to receive more extensive benefits than other groups. Second, there is a flaw in the structure of the agreement system that is only partially rectified by Spain's federation model. Once the state has entered into a certain number of agreements, it is very difficult for smaller

99. The Serbian national report gives a useful overview of several neighboring multi-tier systems. Serbia IV.

100. See, e.g., Andorra IV; Colombia IV.B; Czech Republic IV; Hungary IV; Italy IV; Malta II; Slovakia IV.C; Spain III.E.

101. See, e.g., Hungary V.

102. Italy IV.

103. Spain III.E.

104. Serbia IV.

groups not yet covered to mobilize the political will with the state to form further agreements. Third, while the differential benefits associated with the various tiers are supposedly based on objective factors, there is a substantial risk that some level of impermissible religion-based discrimination may occur in administering these systems.

III. RELIGIOUS AUTONOMY

A. Autonomy of Religion from the State

International human rights instruments and many constitutions generally take individual freedom of religion or belief as the starting point. But in most traditions, religion is very much a communal matter, involving joint practices, shared belief, a common ritual life, and a shared common life. With that in mind, it is particularly important that the individual right includes the "freedom, either individually or in *community* with others and in *public* or private, to manifest his religion or belief . . . ."[105] The freedom of individual belief cannot be fully realized without the prior freedom of communal belief. To the extent belief systems are subjected to coercion or manipulation from external sources, they are not fully and authentically themselves. It is for this reason that protection of the religious autonomy or independence of the religious community is such a vital element of freedom of religion or belief.[106] Whether conceptualized as deriving from individual freedom, or being grounded directly in the rights of the community, freedom of religion without institutional autonomy cannot be full religious freedom.

Significantly, the notion of religious autonomy antedates contemporary conceptions of rights. It is a key aspect of the idea that the religious and secular orders are qualitatively separate if socially overlapping spheres. The basic idea is implicit in the New Testament teaching of Jesus, that human beings should "Render unto Caesar the things which are Caesar's, and unto God the things that are God's."[107] The idea of autonomy is implicit in the struggle for an independent papacy in the Roman Catholic tradition, with the idea of a Protestant nonconformist church, and with the modern constitutional notion of separation of religious and state institutions.[108] In general, it is linked to the idea – particularly prominent in the Christian tradition, but evident in other traditions as well – that spiritual and temporal matters are subject to separate jurisdictions.

Most of the national reports indicate strong support for the idea of religious or institutional[109] autonomy. What is at issue here is not the freedom of individual or personal autonomy, but "the right of religious communities (hierarchical, connectional, and congregational) to decide upon and administer their own internal religious affairs without interference by the institutions of government."[110] A variety of different metaphors are used to describe the notion. Some of the reports refer to implementation of a model of "separate spheres"[111] that is linked to notions of lack of state competence in religious matters and to state neutrality. The German national report speaks in a similar vein of maintaining equidistance of the state from various religious communities, and of withdrawing from religious issues.[112] Others focus on a "prohibited intervention" model,

105. International Covenant on Civil and Political Rights, art. 18(1) (emphasis added).

106. For an extensive collection of comparative studies of this theme, see Gerhard Robbers, ed., *Church Autonomy: A Comparative Survey*, (Frankfurt: Peter Lang, 2002).

107. Matthew 22:21.

108. Roland Minnerath, "The Right to Autonomy in Religious Affairs," in Tore Lindholm, W. Cole Durham, Jr., and Bahia Tahzib-Lie, *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoof, 2004): 293.

109. Italy III.B.2.

110. Mark E. Chopko, "Constitutional Protection for Church Autonomy: A Practitioner's View," in Robbers, *supra* note 106, at 96.

111. Canada IV; and Uruguay III.

112. Germany IV.

which underscores the freedom of the religious community. [113]

In some constitutions, the right to religious autonomy is addressed directly. [114] In others, constitutional provisions address only individual rights, but collective rights to autonomy and self-determination are addressed at the level of civil codes or other statutes. [115] Still others address the issue primarily in case law [116] or in agreements with major denominations. [117] In any event, religious autonomy entails broad protection for religious communities to govern themselves. [118] This includes both the right to specify doctrine [119] (which includes beliefs about structuring of the religious community) and the right to self-determination [120] and self-management in internal affairs. [121] Prominent among the self-determination rights are rights to autonomy in religious ritual practice, [122] the right to establish places of worship, [123] the ability to establish the group's own organization and hierarchy, [124] the right to create other legal persons pursuant to statute or canon law, [125] the right to select, manage and terminate personnel, [126] the right to communicate with religious personnel and the faithful, [127] including the right to confidential communications; [128] the right to establish educational and charitable organizations; the right to receive, produce and distribute information through the media; the right to own and sell property; [129] the right to solicit and expend funds; [130] and so forth. The right also extends to procedural issues such as having standing to sue to protect legal rights. The Turkish report noted how this had emerged as a very significant issue in *Fener Rume Patrikiligi v. Turkey*, [131] a recent case before the European Court of Human Rights. In that case, the Court admitted a request lodged by the Greek Patriarch whose lack of standing had prevented brining an action regarding the confiscation of an orphanage. The case goes beyond recovery of the orphanage itself, because Turkish policy has been not to recognize the ecumenical status of the Greek Orthodox Patriarch, considering him instead to be merely the leader of the Greek Orthodox community. The European Court, in contrast, "affirmed the judgment that the Ecumenical Patriarchate is an orthodox church established in Istanbul, enjoying an honorary primacy and a role of initiative and coordination over the entire orthodox world." [132]

Autonomy notions are often implicit in other legal norms involved in structuring religion state relations. For example, as pointed out by the Chilean report, registration systems should be understood as *recognizing* religious communities, not *constituting*

113. Czech Republic V; Japan V.

114. See, e.g., German Basic Law, art. 140, incorporating Weimar Constitution, art. 137(3).

115. See, e.g., Netherlands V, citing Article 2.2 of the Dutch Civil Code.

116. The United States is a case in point here. See, e.g., Watson v. Jones, 80 U.S.(13 Wall.) 679 (1871); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

117. In Andorra, a 2008 concordat grants "the Holy See or its designated authority the right to create, modify or suppress orders, religious congregations, and other ecclesiastical institutions or bodies, the right to communicate freely with these bodies and their congregations, and to publish and broadcast any disposition relative to the running of the Church,"

118. Czech Republic V; Israel VI.

119. Canada IV; Germany V; Japan V.

120. Armenia V (religious organizations have the right "to operate independently, . . . the right to obtain and dispose of property, the right to organize religious education, the right to train clergy, the right to publish and disseminate religious literature, the right to purchase religiously significant objects and materials, the right to accept donations, the right to have charity activities, and other miscellaneous rights . . . ."); Germany V;

121. Ireland V; Russia VI.

122. Chile III.B.

123. Colombia V.

124. Canada IV; Chile III.B.

125. Chile III.B.

126. See, e.g., Colombia V.

127. See, e.g.,Chile III.B; Colombia V.

128. Uruguay VI.

129. See, e.g., Colombia V.

130. See, e.g., Colombia V.

131. App. No. 14340/05 (ECtHR, 2008).

132. Turkey V.

them.[133] Autonomy is grounded in this independent status of religious communities. Similarly, the fact that states enter into concordats or agreements with religions is a recognition of the dignity and independence of religions and their communities.

Autonomy issues often arise in contexts where involving property or other disputes. In Japan, the law is very clear that courts can't intervene in disputes that are "dependent on doctrine."[134] United States Courts have taken the same position. For example, they have held that courts may not use a "departure from doctrine test" to assess which of two rival groups is entitled to church property because they are doctrinally closer to the original donors of the property.[135] On the other hand, the U.S. Supreme Court has recognized the legitimacy of two slightly different approaches in such cases. The first, the "deference to ecclesiastical polity" approach, defers to the acknowledged adjudicatories of a denomination to settle disputed questions. This means deferring to hierarchical decisions in a hierarchical church, or deferring to other decision-making bodies or procedures in religious bodies with other forms of governance (congregational, connectional, representational, etc.).[136] The second is referred to as the "neutral principles" approach. The name can be a little misleading. The reference is not to non-discriminatory general laws, but to routine principles of legal interpretation. The idea is that if a religious group express its autonomous view of how certain disputes should be resolved in clear secular language, courts can resolve the dispute using "neutral principles" of interpretation, without getting into any underlying religious dispute.[137]

The Canadian report analyzes a recent Canadian Supreme Court case that addressed whether a clause in a divorce settlement clause which obligated the husband to appear before a rabbinic tribunal for purposes of obtaining a Jewish divorce or *get*, thereby making it possible for his wife to legitimately remarry under Jewish law. The husband had refused to do this for fifteen years when the wife finally brought suit in secular courts. A unanimous court of appeal and the dissent in the Supreme Court held that such disputes are not justiciable before secular courts. The judges taking this view reasoned that secular law has no effect in matters of religion and that it is not the responsibility of the state to reinforce or otherwise a secular norm." The majority of the Supreme Court, in contrast, held that by entering into the contract, the husband had transformed his religious obligation into one that could be understood and applied by a secular court. The result appears to be similar to the neutral principles approach in the United States. The issue raised by this case is similar to a range of cases about the extent to which secular courts should give civil effects to religious norms that are discussed in Section VI below.

The notion that the state should not intervene in doctrinal matters lies at the core of the autonomy doctrine. The national reporters noted areas, however, where autonomy is threatened, infringed, or at least steered. In Kazakhstan, the national reporter indicated that the activities of religious communities with foreign ties may be compromised because of the expectation that these activities, as well as the appointment of the heads of religious associations shall be carried out "in coordination with" state institutions.[138] This type of intervention spills over into state interaction with domestic religious organizations as well.[139] This can lead not only to significant direct interference with autonomy, but also to the chilling and deterrence of other legitimate activities.

The national report from India indicates that interference in religious autonomy there is much more routine. The version of equality and secularism that is interpreted to allow cooperative relations with religion apparently has a cost that the state feels comfortable

133. Chile III.A.

134. Japan V.

135. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969)

136. See Watson v. Jones, 80 U.S.(13 Wall.) 679 (1871); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

137. See Jones v. Wolf, 443 U.S. 595 (1979)

138. Kazakhstan V.

139. Id.

addressing and intervening in various religious matters. Thus, the state has not hesitated to take a stand on whether certain major religions of India (Sikhism, Buddhism and Jainism) are variations of Hinduism or constitute separate religions. Despite the fact that the religions themselves view themselves as being separate, state institutions have decided to treat them for practical purposes as Hindus.[140] In the sphere of organizational autonomy, the government has appointed "non-Buddhists on the management board of the most prominent Buddhist shrine in India . . . ."[141] Restrictions on places of worship prevent such institutions from being used for a variety of reasons. Some of these are reasonable enough. Thus, places of worship may not be used for harboring criminals, storing arms and ammunition, storing contraband goods, and carrying out unlawful or subversive acts. One might raise issues of rights of sanctuary in this context, but leave that aside. The restrictions apparently also proscribe use of religious institutions for political purposes and or for promoting disharmony or feelings of enmity between various religious groups. That would appear to be significantly over-restrictive in the absence of extreme circumstance.

The Swedish reporter noted that financial subsidies to registered religious denominations are granted "only upon the condition that the denomination contributes to the maintenance and development of fundamental values of the society."[142] In general, a denomination "is expected to contribute to equality between men and women. Its members and staff are to be guided by ethical principles which correspond with the fundamental democratic values of the society. These requirements do not, however, mean the confession of the denomination should in itself be 'democratic' or that the denomination's staff must be elected in a democratic procedure. These issues are considered to remain outside the scope of secular law."[143] Such financial strings come as no surprise; it is quite reasonable for the state to condition access to its funds on furtherance of state policy. The religious community continues to have autonomy to decide whether or not to accept such funding. But over time, there is little doubt that these strings have a "steering" effect on religious communities – one that may be salutary on balance, but one that nonetheless redirects religious autonomy at least to some extent.

This leads to questions about the outer limits of religious autonomy rights. Not surprisingly, there is a range of views on such issues. One limitation is that established churches and churches that have particularly close ties to the state often have less autonomy than non-established churches in their countries.[144] This is part of the reason that Sweden opted for disestablishment in 2000.

A more sensitive and disputed area has to do with the implication of religious autonomy rights for employment disputes involving religious personnel. A set of cases on this topic is currently pending before the European Court of Human Rights. The general rule in this area is that religious communities have broad discretion in determining the terms on which they hire, retain, and terminate religious personnel. Religious employers are typically exempted from rules that proscribe discrimination on the basis of religion for the same reason that other expressive organizations (e.g., political parties, advocacy groups, and the like) are not required to hire individuals with opposed views). These rules are particularly clear when a religious body itself is hiring someone who fulfills a pastoral or teaching type role. The question gets somewhat more difficult when the employer is a religiously affiliated entity (a school, a broadcasting station, a newspaper, a hospital, a hostel or housing for the elderly, etc.) or where the employee has a less clearly religious role (a pastor or other minister, a religion teacher, a history teacher, a math teacher, a secretary to a religious leader, a news broadcaster, an individual who makes religious clothing, a truck driver at the warehouse of a religious charity, a janitor at a church-owned gymnasium).

140. India V.A.
141. Id.
142. Sweden V.A.
143. Id.
144. See, e.g., United Kingdom V.

The question is how strong religious autonomy protections are in such situations. From a secular perspective, it is all too easy to say that normal anti-discrimination rules should apply unless both the employer and the employee are engaged in religious conduct that makes religious qualifications vital to the job. But that is far too simple, and fails to understand what a serious issue this is for a religious community. From the religious perspective, it may well be that the religious status of all the employees may be extremely significant. The religious employer cannot know in advance which of its employees will have the type of spiritual impact it hopes to foster. It can be very concerned about unspoken messages that are communicated by someone who is not loyal to the religious institution. Non-adherents of the faith may substantially alter the ambience of the workplace. Misconduct by such personnel may disrupt trust relations in the workplace, and could affect the religious communities sense of whether the individual is qualified or worthy to carry out a particular task. It is for that reason that appropriate exemptions for religious employers are appearing in various jurisdictions.[145]

Even assuming that a particular case involves a dispute between a type of employer and a type of employee whose relationship would be appropriately covered by religious autonomy protections, are there other constraints that should set limits on the scope of religious autonomy rights? A leading U.S. case involved the suspension and ultimate defrocking of the bishop who had led the Serbian Orthodox Church in the United States and Canada for many years.[146] The claim was that the leaders of the Serbian Orthodox Church who had taken this action had not followed their own rules for such cases and had acted arbitrarily. Earlier dicta had suggested that while in general, courts are required to defer to hierarchical authority in resolving religious disputes, they might review arbitrary action by such tribunals. The U.S. Supreme Court rejected this reasoning on the ground that "it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance."[147] The national report from Netherlands, in contrast, suggests that while religious communities should be given broad autonomy in the employment dispute context, "this does not mean that churches can act at will. Fairness, acting in good faith, [and] following fair procedure[s] are elements that courts can and will use in reviewing church decisions."

Religious autonomy is an area that will no doubt test the perceptions of justice in various types of secular states in coming years. Protecting strong autonomy norms sends powerful signals that religious communities will be genuinely welcome in a community, and that they will be protected in living their communal life authentically, as they understand that it should be lived. Undue narrowing of autonomy is likely to send an opposite message of secular intolerance. There are difficult issues that need to be assessed, and not all autonomy claims will or should prevail. However, great sensitivity needs to be shown for what is paradoxically both the fragility and vitality of religious communities, and for the fact that they operate more effectively and more authentically if their autonomy can be respected.

B. Autonomy of the State from Religion

In general, the national reports devoted less attention to the issue of whether the state had autonomy from religion. To the extent that there were responses, they focused on constitutional or institutional structures that set limits on the extent to which religions can engage in political activity that can ultimately capture or influence the state. Colombia noted that clerics cannot be officials or judges. In the Netherlands, the church has no

145. See, e.g. Netherlands V.
146. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).
147. Id. at 714-15.

formal say in public decisionmaking.[148] Armenia's rule against religious organizations performing state functions no doubt has a similar effect.[149] The Russian report raised concerns about clericalization of the state.[150] In Ukraine, religious organizations are restricted from taking part in political parties, and they do not nominate candidates or finance campaigns.[151] The German national report chose to discuss the distinctive nature of "corporations under public law" under this rubric. This is a distinctive type of legal entity that is not formally part of the state order, but that has greater status than ordinary non-profit organizations. A substantial number of churches, including smaller churches, have been granted this status.

IV. Legal Regulation of Religion as a Social Phenomenon

Religious communities and their individual members live in modern societies that are governed by laws. Because laws have generally developed against the background of the local culture, often including religious culture, there are many ways in which religious norms and legal norms automatically align.[152] Obvious examples include the calendar, religious holidays, days of rest, and so forth. Core criminal law notions such as murder, theft, kidnaping, and the like also overlap with religious teachings. But in contemporary pluralistic states, it is not at all uncommon for religious communities to develop beliefs that are in tension with at least some legal norms. The theologian H. Richard Niebuhr, in his class text, *Christ and Culture*,[153] has identified five types of relationships between religious communities and the larger culture. As summarized by Professor Angela Carmella,[154] these range along a continuum from countercultural to acculturated responses.

"[A]t one end, he places those manifestations of religion most separate and distinct from the dominant culture, and at the other end, those manifestations most engaged in, and most similar to, surrounding culture. . . . In between . . . Niebuhr places three other responses. One, which Niebuhr calls the dualist response, considers faith to be in tension with culture, yet accepts that life is lived in and through culture, not separate from it; another, the synthesis response, places faith above culture, and acknowledges that although the culture may have virtues, faith inspires its adherents to go beyond them toward perfection; finally, the conversionist response sees faith transforming culture through love."[155]

Because many of the classic cases involving freedom of religion or belief are asserted by countercultural groups, the importance of freedom of religion for other types of interaction with culture are often overlooked. Professor Carmella gives the example of a counseling center affiliated with a Protestant seminary. All of the counselors were theologically trained and were members of the clergy. The center applied for a building permit to construct offices in a local church. Under the applicable law, religious uses were exempt from the land use law, so the counselors assumed they would have no trouble obtaining the building permit. In fact, the zoning board denied the permit on the ground that the counseling center was not a religious activity.[156] Had the center been seeking a building permit for pastoral counseling, the exemption probably would have applied. But because the center was acculturated, it no longer looked like it deserved or needed special freedom of religion protection. Similar issues can arise for each of the

148. Netherlands V.

149. Armenia V.

150. Russia III.

151. Ukraine VI.

152. See Netherlands VII (noting that "[t]he law in general has developed against the background of a Western culture based on a morality influenced by Christianity.") The same point can be made about law with different background cultures. See, e.g., national reports of India, Japan and Sudan.

153. H. Richard Niebuhr, *Christ and Culture* (1951).

154. Angela C. Carmella, "A Theological Critique of Free Exercise Jurisprudence," *George Washington Law Review* 60 (1992): 782-808,

155. Id. at 786-87.

156. Id. at 788-89.

various types of religious relationship to culture.

Note that in many ways, this continuum is the flip side of the religion-state identification continuum described above. That continuum focuses on various attitudes that state institutions may adopt toward religion (establishment, endorsement, privileging, cooperation, accommodation, separation, hostility, persecution). The Niebuhr continuum, in contrast, focuses on the attitudes that religious communities may have toward the culture in which they find themselves, including that culture's legal norms and institutions. The complexities of the interactions are compounded because of the great range of religions in every society.

Further complexity emanates from the vast set of legal norms that religious communities are expected to obey in modern administrative and regulatory states. These norms may target specific religious groups, either to grant certain privileges or to discriminate against them. More typically, in systems operating in good faith, legal or regulatory norms may be adopted that happen to run counter to specific beliefs of the community. For example, legislators desiring to encourage humane treatment of animals may publish regulations concerning animal slaughter which make preparation of kosher or halal food for Jews and Muslims illegal.

The national reports grapple with these complexities, and specify different ways that states regulate religious phenomena. It is not possible in this general report to address this range of phenomena in detail. In part, analysis of the religion-state identification continuum above goes a considerable distance toward providing comparative analysis of the types of state approaches to regulating religious phenomena that exist. In this section, we focus on a different set of issues: what are the major approaches that states take toward determining whether laws, regulations and other state actions that affect religion are permissible. Of course, some states and officials operate in lawless, arbitrary and discriminatory ways that are inconsistent with the rule of law (and typically with the requirements of the constitutions under which they operate. These are problematic cases, but our focus here is on systems that are seeking to operate legally, subject to the rule of law. What deserve attention as a matter of comparative law are the different standards that are applied as a matter of international and constitutional law in determining the breadth or narrowness of religious freedom protections.

The key question in this domain is whether religious freedom protections are sufficiently strong to generate exemptions from ordinary legislation. A number of jurisdictions hold that constitutional protections of the right to freedom of religion or belief require the judiciary to read ordinary legislation so as not to conflict with the constitutional religious freedom norm. This has the effect of creating an exemption for the conscientious claimant. Germany's freedom of religion provisions are read in this way,[157] as are Hungary's.[158] Japan's courts also appear to interpret the Japanese constitution in this manner.[159] This approach typically involves proportionality analysis to determine if the state interests involved are of a kind and with sufficient weight to outweigh the religious freedom claim. Prior to 1990, the United States Supreme Court applied a functionally similar "strict scrutiny" test according to which state action that burdened religion was impermissible unless justified by a compelling state interest that could not be advanced by less restrictive means.[160]

Canada has one of the more sensitive constitutional tests in this area. Under the Canadian test, the government must "prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. To this end, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be proportional to the objective in question . . . .

157. Germany VII.
158. Hungary VIII.
159. Japan VII.
160. Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

The first stage of the proportionality analysis consists in determining whether [there is] a rational connection with the objective [of the action] . . . . The second stage of the proportionality analysis is often central to the debate as to whether the infringement of a right protected by the *Canadian Charter* can be justified. The limit, which must minimally impair the right or freedom that has been infringed, need not necessarily be the least intrusive solution."[161] This test seems more precise than the United States' compelling state interest test; it is likely to provide very strong protection for religious freedom. The Canadian report describes a recent case in which a private party was able to invoke a religious freedom claim in order to override a contractual obligation.[162]

At the other end of the spectrum are regimes that hold that any legislation that is formally adopted and complies qualitatively with the rule of law (i.e., is not unduly vague, is not open to arbitrary enforcement, is not retroactive, and so forth) will override religious freedom claims. Australia appears to have this type of system, there being in that country "no general or constitutional exemption from ordinary laws for religions."[163] Sweden also disallows conscientious objection exemptions from military service or contractual clauses.[164] The U.S. Supreme Court moved to a similar position in 1990, in *Employment Division, Department of Human Resources of Oregon v. Smith.*[165] In that case, the Supreme Court jettisoned the standard "compelling state interest" test, and held instead that any neutral law of general applicability sufficed to override free exercise claims. [166]

To be sure, the revised standard was qualified in certain important respects. First, the Court made it clear that "the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such."[167] In particular, "government may not compel affirmation of religious belief;"[168] it may not "punish the expression of religious doctrines it believes to be false;"[169] and it may not "impose special disabilities on the basis of religious views or religious status."[170] Thus, the classic bar to state interference with inner beliefs (as opposed to outer conduct) was not abandoned. Second, the Court expressly reaffirmed its line of religious autonomy cases, emphasizing that "government may not . . . lend its power to one or the other side in controversies over religious authority or dogma."[171] Third, the Court indicated that in a number of prior cases involving "hybrid situations," free exercise claims, when coupled with other constitutional protections such as freedom of expression or parental rights, were sufficient to bar application of neutral and general laws.[172] Fourth, the Court did not overrule use of the compelling state interest analysis in unemployment compensation cases following the earlier *Sherbert* precedent, where the loss of employment was not linked to criminal activity. The Court rationalized retention of strict scrutiny analysis in this context because it involved "individualized governmental assessment of the reasons for the relevant conduct,"[173] noting that "where the State has in place a system of individual exemptions, it may not refuse to extend that

161. Multani v. Commission Scolaire Marguerite-Bourgeoys and Attorney General of Quebec, 1 S.C.R. 256, 2006 SCC 6 (2006) (Supreme Court of Canada), paras. 42-43, 49-50.

162. Canada V.A.

163. Australia VI.

164. Sweden VII.

165. 494 U.S. 872 (1990).

166. Id. at 879-81, 884.

167. Id. at 877 (citing *Sherbert*, 374 U.S. at 402).

168. *Id*. (citing Torcaso v. Watkins, 367 U.S. 488 (1961).

169. Id. (citing United States v. Ballard, 322 U.S. 78, 86-88 (1944).

170. Id. (citing McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953).

171. Id. (citing Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445-452 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95-119 (1952); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-725 (1976)).

172. Id. at 881. This so-called hybrid rights exception has been criticized by a number of courts. *See, e.g.*, Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring) (calling the hybrid rights rationale "untenable"); Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001) (for the hybrids rights rationale to prevail one must conclude that "the combination of two untenable claims equals a tenable one").

173. Id. at 884.

system to cases of 'religious hardship' without compelling reason."[174] Finally, implicit in the idea of "neutral and general laws" is the notion that non-neutral and non-general laws that intentionally target and discriminate against religious groups or religious activities remain subject to strict scrutiny.[175] In each of these situations, First Amendment protections remained what they had been prior to the *Smith* decision. Despite these exceptions, *Smith* held that in the main, "neutral law[s] of general applicability" would suffice to overrule free exercise claims.

It is important to note, however, that the United States in fact remains closer to being a "strict scrutiny" jurisdiction than the Supreme Court decisions might lead one to believe. First, Congress passed the Religious Freedom Restoration Act of 1993[176] ("RFRA"). This restored the compelling state interest test as a matter of ordinary legislation. While this measure was held unconstitutional as applied to the states in 1997,[177] it has remained intact in the federal setting.[178] Various other pieces of federal legislation have reasserted the compelling state interest test in areas where there is specific federal authority to act.[179] Even more significantly, twenty-five of the fifty states have expressly retained a heightened scrutiny approach, either by passing a state RFRA, or as a result of judicial interpretations of religious freedom provisions of state constitutions.[180] Moreover, only a handful of states have expressly followed the *Smith* decision. All in all, this means that the United States remains closer to being a country that requires exemptions than might be thought.

Another possible position on the exemption issue is that exemptions may be permissible if granted by the legislative branch. Australia appears to allow this possibility,[181] as does the Czech Republic.[182] Legislative tax exemption schemes are common,[183] as are schemes that exempt ritual slaughter from normal rules applied to slaughter of animals.[184] Still another prominent example is provisions involving conscientious objection to military service.[185] Newer sets of statutory exemptions are emerging with respect to health care,[186] insurance,[187] and discrimination issues.[188]

V. STATE FINANCIAL SUPPORT FOR RELIGION

State financial support of religion is one of the most significant issues when examining the relations between religion and the secular state. Assuming that in Western societies there is a dividing line between the legitimate competences of state and religion, it seems logical that public money should be used for secular purposes. The issue, then, consists in analyzing to what extent contemporary states perceive that funding of religion can be fit into their secular purposes.

174. Id. (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

175. This was confirmed in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

176. The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq. (2007).

177. City of Boerne v. Flores, 521 U.S. 507 (1997).

178. Gonzales v. O Centro Espirito Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

179. Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (1998) (amending 11 U.S.C. 544, 546, 548, 707, 1325 (1994)); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc et seq.; American Indian Religious Freedom Act Amendment of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (1994) (codified at 42 U.S.C. § 1996a (2007)).

180. For further details, see W. Cole Durham, Jr. and Robert T. Smith, "Religion and the State in the United States at the Turn of the Twenty-First Century," in *Law and Justice, The Christian Law Review* (United Kingdom: The Edmund Plowden Trust, Number 162, 2009. The total count of states opting for heightened scrutiny reached 25 when Tennessee passed a state RFRA in early 2010.

181. Australia VI.

182. Czech Republic VII.

183. See, e.g., id.; Ireland VI.

184. See, e.g., Czech Republic VII.

185. Australia VI; Bulgaria XIV; Netherlands VII; Sweden VII; Ukraine VII.

186. Philippines IV.B.

187. Netherlands VII.

188. See, e.g., Australia VI; Netherlands VII.

There is a first important fact: virtually all States analyzed in the national rapports grant some type of financial support to religion – or, more precisely, to religious denominations or communities – either directly or indirectly, whatever their constitutional principles are with regard to religion. Even in countries with a remarkably anti-clerical history or with a specific prohibition of funding religion, the state provides indirect forms of financing, such as tax benefits or subsidies for welfare activities run by religious groups on equal conditions to other non-profit organizations, chaplaincies in public institutions, support of religious schools or funding for the preservation or restoration of worship places of historic or cultural value (e.g. Armenia, France, Ireland, Japan, Kazakhstan, Mexico, Philippines, Uruguay, Ukraine, Ireland, USA).[189]

State financing of religion is not always dependent on the constitutional or legal context that defines the State's general attitude towards religion and religious freedom. Logical internal coherence of State financing systems is not necessarily the rule. Very often, financial support is determined by historical circumstances, by social pressure or political negotiation. Thus, some States that in theory are separatist, such as France or the US, provide indirect financial support for religion more generously than states that define themselves as cooperationist (e.g. Spain). Another separationist state in theory, Turkey, pays for the salaries of the imams of Sunni Islam but not for the clergy of other religions.[190]

What this universal support of religion reveals is that states do not find any contradiction between their secular character and some sort of public funding of religion – not even those states that adopt a strict principle of separation or secularism as a constitutional sign of identity. At the same time, while the fundamental State's attitude towards religion does not necessarily determine whether there is or is not financial support for religion, or even whether the amount of financial support is greater or less, it may have an impact on the theoretical justification of funding of religion, on the criteria used to select the beneficiaries of State funding, and on the ways the State chooses to fund religion.

A. Justification of State Funding of Religion

The theoretical justification of state funding of religion in nations with an established church or with a specially protected church (e.g. England, Scotland, Finland, Greece) does not face particular problems with respect to the established churches. As these privileged churches are closely linked to the history, the sociological structure and sometimes the political organization of those nations, their public funding does not call for a particular justification but is assumed as something "natural", even when it is achieved through the general state budget. The challenge that these states have faced lately is rather how to reconcile their traditional ways of supporting national churches with the respect for the rights of people that are not members of those churches. Even if there is an established church, those who are not members should not be required to pay taxes for the support of a church that is not their own. More sophisticated jurisdictions have methods for channeling support so that tax payments do not flow from an adherent of one religion to support for a different religion, except where there is a normal, secular justification for the support in question.[191] Moreover, there are concerns with the implications of the principle of equality, which is gaining more and more momentum in constitutional and international law. In this context, a key issue is the extent to which other legally recognized religious denominations should be granted the same or at least similar benefits to those given to the national church.

In other states that adopt a constitutional or legal perspective that combines the principles of neutrality towards religions and cooperation with religion (e.g. Germany, Spain, Italy), the theoretical justification of financial support of religion turns on the idea

189. See, respectively, Armenia I & IV, France IV & VIII , Ireland VII, Japan VII, Kazakhstan VII, Mexico VII.B, Philippines IV.C, Uruguay IX, Ukraine VIII, Ireland IX.

190. See Turkey VIII.

191. See, e.g., Germany VIII.

that religion is a positive social factor and therefore deserves public funding as well as other social factors deemed positive, such as cultural, educational, humanitarian or health initiatives and activities (see, e.g., Colombia)[192]. The understanding of religion as a positive social factor, on the other hand, is not derived only from the fact that institutionalized religion is an expression of the exercise of a constitutional right but also from the fact that religious denominations actually make positive contributions to society, for instance through constituting source of morals for citizens or taking care of social services that otherwise should be provided by the state (thus saving public effort and resources). This does not mean that non-religious institutions or initiatives must be considered negative social factors or viewed as having an inferior status, for religion and other types of belief are normally put on the same level from the perspective of constitutional freedoms. Perhaps as a consequence of this balanced approach, the trend is to apply some of the typical methods of funding religion, especially tax benefits, to other non-profit activities or institutions. German Constitution, in particular, foresees that religious denominations and other organizations promoting a certain philosophy of life (*Weltanschauung*) can acquire the same legal and economic status in comparable circumstances.[193]

This justification of public financing of religion is applicable also to separationist states. Here the basic idea is that the secularity of the state does not require discrimination against religion where the support of secular objectives may have the incidental effect of benefiting religion. After all, the state has competence to address all sorts of social factors within its territory, and religion is, no doubt, another social factor – and indeed a very significant one. In addition, it is important to note that historical circumstances have played in some states a determining role in the structuring of economic aid to religion, particularly when confiscation of church property took place in the past. Thus, the 1905 law in France determined that churches built before that date would pass to be the property of the state – and the state would take care of them – but would be operated by the Catholic Church, which is a peculiar but efficient way to support the maintenance of many Catholic places of worship in that country.[194] In Eastern Europe, the massive confiscation of ecclesiastical property under communist regimes has led to a complex, and unfinished, process of restitution of property and economic compensation to the relevant churches.[195] In other countries, as Germany, Belgium, Spain or Colombia,[196] compensation for confiscation of ecclesiastical property in the 19th century played a role in granting economic aid to the major church in the past, and still plays a role in maintaining some forms of public funding for those churches.

B. Criteria Used to Grant Financial Support

The nature of the justification of state funding of religion influences the criteria used to select the beneficiaries and to distribute funding. Among these criteria, we can mention historical roots or social acceptance – which may be applied together with certain registration procedures or the negotiation of specific cooperation agreements with the state – and the promotion or compliance with certain moral or civic values. These criteria have been applied in various ways in different countries and sometimes have led to the recognition of different tiers of cooperation with religious denominations.

Thus, within Europe, some countries grant special "upper-tier" levels of state economic cooperation to those religions that demonstrate that they have deep roots in the territory. Germany, for instance, grants the status of public law corporation to those religious denominations, and organizations promoting philosophical views of life, that provide a guarantee of permanence; this status implies, among other things, the possibility

192. See Colombia VII.
193. See Germany III.
194. See France VIII.
195. See, for example, Serbia I, II & IV.
196. See Germany VIII, Belgium II.5.A, Spain VIII, Colombia VIII.

– upon request of the relevant religion – that the state authorities collect ecclesiastical taxes from their members on behalf of the church.[197] Switzerland, inspired by German law, has a system of recognition of churches under public law, at the cantonal level, that entails the possibility of levying taxes and of receiving state subsidies.[198] Portugal, also inspired by German law, recognizes the status of "rooted religion" to those religions that can give a "guarantee of durability", with the effect that they should in principle be granted the right to enter into a negotiation process that would conclude with the adoption of a specific cooperation agreement with the state.[199] In Spain, almost all expressions of state economic cooperation are reserved to those religions that have been recognized as having "well-known roots" (*notorio arraigo*) and have subsequently signed a cooperation agreement with the state authorities.[200] Something similar occurs in Italian law.[201] Belgium has a remarkable degree of economic cooperation with "recognized religions", a category that requires, among other criteria, a relatively high number of members and settlement in the country for a long period. Since 1993, also organizations providing "moral non-confessional assistance" can enjoy the same cooperation.[202] The Czech Republic has a specific category of registered religious communities, those "with special rights."This status is granted by the Ministry of Culture and entails a privileged position in different areas, including economic cooperation in the form of state subsidies for ministers' salaries.[203] Two different tiers of registered religions exist also in Serbia, with tax exemptions being reserved for those religions in the upper tier.[204]

On the other hand, a number of European countries (e.g. Czech Republic, Slovakia, Estonia, Latvia, Portugal[205]) and other countries outside of Europe (e.g. Mexico, Peru, Colombia[206]) link eligibility for certain tax benefits to ordinary registration of religious communities, but requirements for registration may vary considerably from one country to another.[207] Portugal is an example of easy registration[208] while the Slovak Republic, with a requirement of proving membership of 20,000 Slovak citizens, is the opposite. (It should be noted, however, that Slovakian law grants a religion, immediately after registration, the same rights and privileges enjoyed by the so-called "historical churches." The restrictiveness of Slovakian law means that it in effect has only an "upper tier" when it comes to recognizing religious organizations. This presents obvious problems for new or smaller groups).[209]

In a number of jurisdictions, the process of determining eligibility for financial or tax benefits is separated from the process of granting basic legal entity status to religious communities and groups. This makes it possible to have more relaxed criteria for granting legal entity status, while maintaining adequate controls to assure that financial benefits are not abused. Thus, in the United States, religious organizations can generally acquire legal entity status without difficulty. Legal entity status is granted at the state level, and while there are differences in the types of entities available in different states, the underlying principle is flexibility and respect for religious autonomy. A variety of forms are available, affording religious groups latitude in the types of legal structures they elect to use. Tax exempt status is determined separately by tax authorities. Even then, religious groups face less burdensome filing, reporting and auditing requirements out of

197. See Germany VIII.
198. See Switzerland VI.
199. See the Portuguese *Lei da Liberdade Religiosa* of 2001, art. 37.
200. See Spain VIII.
201. See Italy V.
202. See Belgium II.5.A.
203. See Czech Republic VIII.
204. See Serbia IV.B.
205. See Czech Republic VIII, Slovakia VII, Estonia VI, Latvia IV &VII, and the Portuguese *Lei da Liberdade Religiosa* of 2001, art. 32.
206. See Mexico IV, Peru VIII, Colombia VIII.
207. See supra Section II.D.
208. See the Portuguese *Lei da Liberdade Religiosa* of 2001, arts. 32-36.
209. See Slovakia VI.

respect for the religious freedom rights of religious organizations.[210] In Australia, any institution that fulfills the constitutional definition of religion is entitled to tax benefits.[211] In England and Wales,[212] as in Canada,[213] all religious groups that register as charities are entitled to some tax benefits, and the same rule applies to other groups pursuing "the promotion of religious or racial harmony or equality and diversity". However, while advancement of religion is a charitable purpose, in England and Wales it is necessary for a charity to show that it is for the public benefit to be registered and there is no longer an automatic presumption that a religion is for the public benefit. This has led, for example, to the rejection of the Church of Scientology's application for charitable status.[214] Disclosure of the assets of a charity and their use, and independent certification of accounts, may be requirements to be granted charitable status (Scotland[215]).

Compliance with certain principles or standards set by secular law is sometimes required as a condition to obtain public funding either of a religion in general or for particular activities – especially those aimed at providing social services – run by religious institutions. In Australia, for example, agencies that receive funding for the provision of some forms of welfare are contractually bound to comply fully with discrimination laws and religious schools must reach certain educational standards.[216] In Sweden, since 1998, the State may provide financial subsidies to a registered religious denomination only upon condition that the denomination contributes to the maintenance and development of fundamental values of the society; this includes the fight against all forms of racism and other discrimination, as well as against violence and brutality, contribution to equality between men and women, and the requirement that its members and staff are guided by ethical principles which correspond with the fundamental democratic values of the society.[217]

By and large, we can affirm that full implementation of equality is the main challenge in the application of criteria for the selection of state funding of religion in most countries. Greater equality, both between religious and non-religious institutions and between different religious institutions or communities, seems to be the prevailing trend even among states with an official or privileged church. When applied to religious institutions, equality means that the beneficiaries of public funding must be determined according to objective and non-discriminatory criteria, and not according to a state judgment on the doctrines or moral value or religious communities as such. In fact, equality is often duly implemented with respect to a large percentage of religious denominations – especially those accepted as historical or traditional in the country – and most states analyzed in national rapports do not have a discriminatory approach to public financing of religion. The real problem is rather a lack of sensitivity towards the situation and needs of residual minority groups, particularly when they lack historical roots or appear as "new" or "atypical" in the country. This situation tends to be even more frequent when direct funding is involved (Spain, Estonia[218]).

In addition, it is interesting to note that, with different profiles, major churches often enjoy privileged state funding over other religious communities in a number of countries, especially in those with state churches (e.g. Finland, Norway[219]), with especially recognized churches (e.g. Greece[220]) or with concordats with the Catholic Church (e.g.

210. For more background on the U.S. system, see Durham and Scharffs, supra n. 82 at 420-23, 472-73.
211. See Australia VIII.
212. See United Kingdom VII.
213. See Canada VI.
214. See United Kingdom VII.
215. See Scotland V.
216. Australia VIII.
217. See Sweden VIII.
218. See Spain VIII, Estonia VI.
219. See Finland VIII.
220. See Greece IV.D.

Spain, Italy, Portugal, Argentina, Colombia[221]). This fact has often been justified by reference to the historical role or social predominance of those churches and to the rule that unequal situations call for unequal treatment. In practice, the privileged status of major churches has often been positive for religious minorities, for the recognition of their "untouchable" status, together with contemporary concerns about the consequences of the equality principle, has contributed to raising the level of state economic cooperation with minority religions. This is true especially with respect to countries with major Christian churches (Spain, Italy, Portugal, Colombia, Sweden, Finland[222]); in predominantly Islamic countries the trend towards equality is not so visible or not existing at all (Sudan, Turkey[223]).

C. Methods for Providing State Financial Support of Religion

Typically the methods of state funding of religion have been divided into two categories: direct and indirect economic aid.

1. Direct Economic Aid

The first category comprises different channels through which states may provide directly economic resources to religious communities.

One of them consists in budgetary provisions in favor of one or several religions for the payment of clergy's salaries, for the construction and maintenance of places of worship or institutions for the education of the clergy or the formation of other religious structures etc. Separationist countries, such as the US, Kazakhstan, Ireland, Philippines or Uruguay,[224] usually prohibit this type of economic cooperation, but not all separationist countries do the same. Turkey, for instance, pays for the salaries of Sunni imams[225]; and France pays for the preservation of Catholic churches existing when the Law of 1905 was enacted. These structures are state property but most often are operated by the Catholic Church and destined for Catholic worship.[226] Countries with a close connection between the state and a national church use this system (Sweden, Finland, Greece[227]), as do some countries (e.g., Germany, Switzerland, Belgium[228]) that abide by the principle of neutrality but construe it to allow a high degree of cooperation with traditional churches. .

Some of these latter countries use in addition another form of economic aid to religion, which is granted to some religious communities with qualified legal status: the possibility of levying taxes or fees on their members and utilizing the assistance of state structures for collection of the resulting revenues (Germany, Switzerland, Sweden, Finland[229]).

In some Latin-American countries, budgetary provisions in favor of the Catholic Church have been kept (Colombia, Argentina, Peru; also, in Europe, and as a consequence of its peculiar constitutional system, Andorra[230]). In Europe there is an interesting tendency in some predominantly Catholic countries that have drawn on state budgets in the past to move towards a third method of direct financing of religion: the so-called "tax-assignment" or "tax check-off" system (Spain, Italy, Slovak Republic, Portugal, Hungary[231]). This system allows taxpayers to donate a percentage of their income tax to

221. See Spain VIII, Italy V, Argentina III, Colombia VIII. The same applies to other countries, as Andorra, in which the preferential treatment of the Catholic Church derives from the Constitution rather than from a Concordat (see Andorra VIII).

222. See Spain VIII, Italy V, Colombia VIII, Sweden VIII, Finland VIII.

223. See Sudan VIII and Turkey V & VIII.

224. See Kazakhstan VIII, Ireland VII, Uruguay IX, Philippines IV.C.

225. See Turkey VIII.

226. See France VIII.

227. See Sweden VIII, Greece IV.D, Finland VIII.

228. See Germany VIII, Switzerland VI, Belgium II.5.A.

229. See Germany VIII, Switzerland VI, Sweden VIII, Finland VIII.

230. See Colombia VIII, Argentina III, Peru VIII, Andorra VIII.

231. See Spain VIII, Italy V, Slovakia VII, Hungary VIII, Portuguese *Lei da Liberdade Religiosa* of 2001, art. 32.

the religious community of their choice among a list of religious communities that have been recognized a qualified legal status. The percentage of income tax that is at the disposal of taxpayers varies depending on the countries (from 0.5% in Portugal to 2% in Slovakia); the resulting amount of taxpayers' choices is given directly by the state, every year, to the relevant religious representatives. Note that both the tax levying systems and the tax assignment systems channel funds from believers to their own religious denomination, and that in both cases, the channeling is voluntary – taxpayers can opt in (tax assignment) or out (tax levying) of the respective systems.

2. Indirect Economic Aid

The most frequent channel to provide indirect economic aid to religious communities is through tax benefits, in particular the exemption from paying certain taxes that is granted to religious institutions and the privileged tax treatment that is recognized to donations made by individuals or corporations to religious institutions. Virtually every state provides one or both of these two varieties of tax benefits, although the system does not work identically in all countries. For instance, in some countries the control and record of eligible institutions for tax benefits is in the hands of tax authorities and religious communities are subject to essentially the same rules as other charities (this is frequent in common law countries, as England and Wales, USA or Australia[232]), while in other countries there is a specific registry of religious communities, normally run by the Ministry of Justice, Culture or Interior, that determines their eligibility for legal entity status, and tax benefits are linked to acquisition of that status.

In the latter countries, the legal requirements to register as a religious entity and qualify for tax benefits are diverse. For example, Portugal has a very flexible system but Slovakia has a very rigid system, as mentioned above; in Spain, registration of religious entities is very easy but does not give access to tax benefits, which are reserved for those religious denominations which have signed a formal cooperation agreement with the State (at the moment, only the Catholic Church, as well as three federations of Protestant, Jewish and Islamic communities).[233] In countries that keep a specific registry for religious groups there is a tendency to grant them the same tax benefits – no more, no less – recognized to other non-profit organizations involved in providing different social services.

In addition to tax benefits, there are a variety of channels that are widespread throughout the world and are normally considered as indirect public financing of religion. Among these we can mention state funding of religious schools or religious instruction in public schools (this is frequently the case in European and some Latin-American countries); state funding of religious hospitals or eldercare facilities; and payment of chaplaincies in military centers, hospitals or penitentiaries (this is the only public funding that the state may grant to religious denominations in Philippines[234]). Although the public money invested in these activities goes, no doubt, to religious institutions, it is doubtful that these channels of indirect cooperation can be put on the same level as tax benefits, for their main purpose is not to finance religion but rather to fund public services and to facilitate citizens' exercise of religious freedom, which is not the same thing.

Thus, when some states pay for the expenses of religious schools or hospitals, or the expenses generated by religious denominational instruction in public schools, they are not strictly financing religious denominations as such but rather paying for a public service run by non-state institutions and, in the case of religious instruction, responding to the legitimate choices of parents with respect to the religious or moral orientation of their children's education. Similarly, the purpose of chaplaincies in hospitals, military centers or penitentiaries is to make religious assistance possible in difficult circumstances in

232. See United Kingdom VII, Australia VIII.
233. See Spain VIII.
234. See Philippines IV.C.

which citizens do not have free access to the worship places or ministers of their choice. In other words, it is an active way of removing the barriers to the exercise of a fundamental freedom. We can add analogous observations with respect to subsidies sometimes granted in India for pilgrimages or public religious celebrations.[235] The same can be said with respect to the public money that is often invested in the preservation or restoration of religious places that are part of the historical heritage of a country – the financing of religion that it can produce is but a side effect of what is directly intended, i.e. the protection of cultural heritage, which is no doubt a legitimate competence, and a duty, of contemporary secular states.

D. Benefits and Problematic Aspects of State Financial Support of Religion

The comparative analysis of funding of religion in different countries shows a diversified panorama of systems. As in other aspects of the relation between state and religion, there is no uniformity; nor are there pronounced trends toward convergence, apart from efforts to respect choice, to avoid using coercive tax mechanisms to urge adherents of one tradition to support others, and to have some secular justification (sometimes in addition to religious justifications) for the support given. There is, however, a common element: virtually all the contemporary states understand the need to use public funds (or to waive public funds that would be raised but for exemptions) to assist with the financing of religion in one way or other. A variety or reasons move states to reach this conclusion. Among them: (1) the affirmation of broad (though not unlimited) state authority to address matters of social relevance, including many manifestations of religion; (2) an argument of comparative treatment with other non-profit activities and institutions(funding the latter and not funding religion would seem blatantly discriminatory; and (3) the conviction that financing religious institutions is a way of facilitating the exercise of a fundamental right, freedom of religion or belief, which constitutes a legitimate secular interest.

Behind these other arguments is a more basic practical intuition, that facilitating the financial operation of religious organizations is justifiable because on balance, organizations that foster religions and beliefs are a beneficial force in society. This idea, on the other hand, can be understood in a material sense – religious institutions provide social services that save much state activity, effort and money – or in a more spiritual sense – religions are a significant source of morals and the moral dimension of citizens is indispensable for a strong and well structured society.

It is then logical that secular states do not feel threatened in their secularity by the use of public money to finance religion, especially in a political landscape characterized globally by interventionist states, which control a large parte of individual lives and are accustomed to financing a variety of activities deemed to be part of welfare societies. Public funding of religion constitutes a challenge rather than a threat to the secular state – the challenge of finding the appropriate criteria for funding.

This leads us to the problematic aspects of public financing of religion, which co-exist with its indubitable benefits. Two aspects are particularly important and therefore need special attention, for they constitute a deviation from the use of public money for secular purposes. First, public financing can be used by the state to try to control religion and therefore can threaten the autonomy of religious communities, which is a substantial part of religious freedom. And second, state economic support of religion can be used in a discriminatory way, i.e. to favor some religions at the expense of others – which is, after all, another way to try to control religious life in society in addition to being an affront to the dignity of those that suffer the discrimination. In this respect, it is perhaps acceptable that historical or sociological considerations be acknowledged as social realities and be taken into account in justifying proportionate differences in state economic cooperation with different religious communities at least where such considerations are linked to objective considerations calling for differential treatment. Such justifications are often

235. See India VIII.

asserted in Europe and Latin America, noting that unequal situations call for unequal measures. But it is unacceptable to use the history of a country or the social influence of some major religions as justification in itself for denying access to exemptions or funding to other minority or less traditional groups as a method of control that impairs their ability to exercise the full range of their right to freedom of religion or belief on equal terms with other members of society.

VI. Civil Effects of Religious Acts

Assuming, again, that there is a dividing frontier between the legitimate competences of state and religion, it seems natural that, as in any frontier, there are blurred or overlapping areas. Thus,just as some measures legitimately adopted by state authorities are bound to have an impact on the life of some religious communities, there are some acts performed within religious communities that claim recognition by civil law. The way states approach this issue may be expressive of the extent to which they try to reach a balance between respect for religious pluralism and its consequences, on the one hand, and maintenance of the autonomy of state criteria and institutions that secularity demands, on the other hand. In the national rapports submitted, most issues concerning the effects of religious acts in state law are related to marriage and family, in particular the religious celebration of marriage and the decisions on the nullity or dissolution of marriages adopted by religious courts.

A. Religious Celebration of Marriage

Comparative law shows that there are essentially two types of systems: those who recognize some civil effects to the religious celebration of marriage and those who do not.

1. Monist systems

Some systems are normally labeled as "obligatory civil marriage jurisdictions", for state law accepts as valid only those marriages that are celebrated according to a civil ceremony, in the presence of a state official. These systems, with different profiles, are more or less widespread in Europe and Latin America. This is the situation, for example, of Germany, France, Belgium, Ireland, the Netherlands, Switzerland, Hungary, Bulgaria, Kazakhstan, Ukraine, Turkey, Mexico, Argentina and Uruguay[236]. Chile followed this system for many years but changed in 2004 to a peculiar pluralistic system that accepts now the possibility of celebrating a religious marriage with civil effects in the case of religions recognized as legal persons under public law; however, the law requires that the parties ratify their matrimonial consent at the time they register their marriage in the civil registry. This has discouraged the application of the new system and the practice continues to be the celebration of a civil marriage first and then a subsequent religious ceremony for those who wish it.

In their origin, many of the systems of obligatory civil marriage were introduced by states eager to affirm their power in the face of religion, often accompanied by an anti-religious nuance. But things have changed. With the passage of time these systems have come to be understood not as an attack to the social influence of religion, or more often of a particular major church, but rather as a practical way of keeping separate the respective competences of state and religions with respect to marriage, thus avoiding the possibility of jurisdictional conflicts. The original secularist orientation of these systems, however, can still be found in some countries that prohibit the celebration of a religious ceremony prior to the civil ceremony of marriage, and sometimes even make it a criminal offense, especially for the religious minister in charge (e.g. France, the Netherlands, Switzerland,

236. See Germany IX, France IV & IX, Belgium II.2.C, Ireland VIII, the Netherlands IX, Switzerland VIII, Hungary IX, Bulgaria XXIV, Kazakhstan IX, Ukraine IX, Turkey IX, Mexico III.A, Argentina IX and Uruguay X.

Bulgaria, Belgium, Uruguay; Germany abolished the prohibition of a previous religious marriage only in 2008[237]). The alleged justification of those prohibitions at the time they were imposed was the need to prevent that the parties, living in a social culture in which religious marriage had been the rule for centuries, could think that the religious ceremony was sufficient to be married with effects under civil law, for their mistake could lead to difficult legal issues derived both from family and succession law.[238] In any event, the maintenance of these prohibitions has been criticized in the contemporary context, when – at least in many Western countries – the substantive content of marriage under civil law has been notably reduced and there is a tendency to treat equally matrimonial unions and other forms of living together.

2. Pluralistic Systems

With respect to the systems that recognize civil effects of religious celebration of marriages, sometimes they were established in Western countries as a consequence of the initial open attitude of the state towards religious freedom and religious pluralism. The United States of America and Australia are archetypal examples[239] (this is also the case of Canada, although its evolution towards pluralism is more recent[240]). The state retains full jurisdiction over marriage but understands that it is not contrary to state secularity to permit citizens to get married through a religious ceremony instead of through a civil ceremony, so long as the state law keeps a certain control over the legal requirements that the parties must fulfill and over the licenses granted to religious ministers performing the ceremony. In reality, these states recognize only the validity of a civil marriage but allow for a plurality of ceremonies and give the parties the choice to get married in the presence of a religious, instead of a civil, official.

Other times civil recognition of religious marriages in the West came as a side effect of the privileged position enjoyed by major churches after states evolved towards a higher degree of protection of religious freedom and religious pluralism – the traditional (and sometimes exclusive) recognition of the marriages of major churches was extended later to other religious marriages, in application of the equality principle, with more or less openness. Many of these states have followed the system of the US, which is often called "Anglo-Saxon pluralistic system", for instance Sweden, Finland, England, Czech Republic, Slovakia, Philippines, Brazil;[241] also Estonia, where it is particularly clear that the civil law does not strictly recognize the validity of a religious marriage but just may authorize religious ministers to perform civil marriages.[242] In some predominantly Catholic countries the recognition of a plurality of religious marriages has been made compatible with a privileged recognition of marriages celebrated according to the rules of Catholic canon law (e.g. Italy, Spain, Colombia, Portugal[243]. Malta followed a system of exclusively religious – Catholic – marriage until 1975, then changed to obligatory civil marriage until 1993, when it adopted a pluralistic system with the prevalence of Roman Catholic marriage[244]). Some states have a dual system and only recognize the validity of the civil marriage and the religious marriage of the major church – which often was in earlier times the only valid marriage under the civil law (e.g. Greece, Armenia, Andorra[245]).

In some non-Western countries, pluralistic matrimonial systems are the consequence

237. See France IV, the Netherlands IX, Switzerland VIII, Bulgaria XXIV, Belgium II.2.C, Uruguay X, Germany IX.

238. See Belgium II.2.C.

239. See Australia VIII.

240. See Canada VII.

241. See Sweden IX, Finland IX, United Kingdom VIII, Czech Republic IX, Slovakia VIII, Philippines IV.D, Brazil VIII.

242. See Estonia VII.

243. See Italy VI, Spain IX, Colombia IX; Portuguese *Lei da Liberdade Religiosa* of 2001, art. 19 and Concordat between the Holy See and the Portuguese State, 18 May 2004, arts. 13-16.

244. See Malta IV.

245. See Greece IV.F, Armenia IV, Andorra IX.

of a diverse notion of marriage deeply embedded in their societies – and also a diverse notion of the role of religion in public life. In its dimension of a bond between persons, marriage is seen as essentially a religious, and not a secular, institution – as it was conceived in Europe throughout the Middle Ages. This is the case, among the national rapports submitted, of India, Israel and Sudan.[246] Civil marriage has been introduced in these countries as an alternative for people that do not wish to celebrate a religious marriage. Indeed, in Israel there is not yet civil marriage, and civil courts take care specially of the economic aspects or marriage – irrespective of its form of celebration – and issues related to custody of children. In India, respect for the religious rules of marriage extend to acceptance of polygamy for Muslim marriages but not for the rest; and some religious rules concerning economic or inheritance rights of spouses are also recognized by civil law, especially in the case of Hindus and Muslims. In Sudan, the influence of *sharia* has determined that all state family law is tailored to fit the needs and perspective of Muslims.

B. Nullity and Dissolution of Marriages

States that have adopted an obligatory civil marriage system and the so-called Anglo-Saxon pluralistic system affirm the exclusive jurisdiction of state courts on the nullity or dissolution of all marriages. The parties are normally free to go to their respective religious courts, out of scruples of conscience, to dissolve their marriages or to have them declared null and void, but these decisions are not recognized by civil law. However, in the United Kingdom – in addition to the residual jurisdiction still recognized to the courts of the Church of England and the Church of Scotland by virtue of their status as established churches[247] – state courts will sometimes acknowledge the existence of religious legal systems and jurisdictions as an aspect of the facts of the case; moreover, the Beth Din, whilst deciding cases before it on the basis of Jewish law, has for some time ensured that its hearings comply with the Arbitration Act 1996 to guarantee that its decisions are enforceable within the state courts.[248]

In Canada there is also an interesting interplay between state law and Jewish law. The Divorce Act prevents a spouse from exercising his right to divorce for so long as he refuses to remove a barrier to the religious dissolution of marriage. This is for the protection of women's rights, for a wife is not free to remarry under Jewish law if she does not receive the *get* (religious certificate of dissolution of marriage) from her husband. This provision was introduced after consultation with the Jewish community. The Supreme Court has held that promises made by the husband to consent to a *get* are enforceable contractual obligations.[249] Also in Canada, in 2003 there were attempts to introduce *sharia* courts in the province of Ontario to settle personal disputes involving Muslims related to inheritance and family matters, which would work as arbitration courts and whose decisions would be binding and enforceable in Ontario. Many voices expressed concerns about the consequences of these courts for women and children and about possible pressures on individuals on the part or religious communities. The initiative did not succeed. The parties can of course go voluntarily to religious courts but their decisions are not binding on Canadian law.[250]

The Canadian experiences perhaps reveal some hesitations of Western legal systems about how to deal, in the realm of family law, with the recognition of religious pluralism and its limits, and about how to define the dividing line between religious autonomy and state competence. This is especially true when it comes to non-Christian religions, for a number of Western countries have a long standing practice of recognition of ecclesiastical

246. See India VIII, Israel V & VIII, and Sudan VIII.

247. See United Kingdom VIII.

248. According to the United Kingdom national rapport (see VIII), "the Muslim Arbitration Tribunal has recently announced that it will do the same thing. Very little is known about the practices of either body."

249. See Canada IV & VII.A.

250. See Canada VII.B.

decisions on the termination of marriages by state law. With different nuances, the civil law of Italy, Spain, Portugal, Malta and Andorra, in Europe, as well as Colombia in Latin America, grant full effects and enforceability to the decisions of Roman Catholic courts on the nullity or dissolution of canonical marriages.[251] Sometimes, recognition of their effects is subject to an *exequatur* process in which civil courts verify that these decisions are compatible with state law (Italy, Spain, Portugal).

Among the non-Western countries studied by national rapports, and as a consequence of their conception of the interaction between religious marriage and civil law, India, Israel and Sudan recognize not only full effects but also full autonomy to religious jurisdictions with regard to disputes about termination of marriages, and civil courts have a residual character or take care of children's custody and the economic aspects of the disputes.[252] In India, religious laws may have a remarkable negative impact on the civil rights of the spouses, especially when one of them converts to another religion.[253]

C. Perspectives for the Future

In some Eastern countries marriage continues to be an essentially religious institution that tends to function with autonomy from the State; this is especially true in those countries in which the majority of the population belong to religions that have their own legal rules and have a more or less well defined structure of courts to apply them. State laws tend to respect and not to interfere with the status quo of religious marriage unless it is deemed necessary for the protection of the rights of the parties in the marriage or the rights of their children.

On the contrary, in Europe and America there seems to be a tendency towards the reaffirmation of the state competence on marriage and family issues. State law may accept the validity of a religious ceremony of marriage or may not accept it at all. The latter cases seem more and more difficult to understand, in a context often dominated by an increasing religious pluralism in society and by a civil notion of marriage that have undergone profound changes since the times that civil marriage was created as a mirror image of religious marriage (indeed, the change is so pronounced that some scholars even tend to take one more step forward in the same direction and propose an "à la carte marriage" as the ideal in civil law). On the other hand, the opposite model, the recognition of religious ceremonies as valid forms of celebrating a marriage, is after all not so opposite, for religious ceremonies of marriage tend to be conceived precisely and exclusively as rites that can be chosen as alternative paths of access to a civil marriage, i.e. to a marriage that is otherwise governed by the civil law and the state courts.

Certainly, there are systems like those of Italy, Spain or Colombia, in which Catholic marriage is accepted by the civil law not only as a ceremony but as a complex religious institution with its own law and courts. (Note, however, that in most of those systems civil marriage is conceived as the prevailing model from a legal perspective, and hence there is the degree of control exercised by state courts over the decisions of ecclesiastical courts). But these systems – which are the consequence of concordats between some states and the Holy See – seem to be, at present, the exceptions that confirm the rule. Whether they have any future or not is still to be seen. These systems were supposed to be in frank retrocession or at least were not likely to proliferate, not even among Catholic countries.

However, experiences like the attempt to establish arbitration *sharia* courts in Ontario, mentioned above, and similar initiatives launched to the public arena in the United Kingdom, reveal that some Western countries may understand that a broader recognition of religious marriage could be a way of enhancing and protecting religious pluralism, without lessening the secular character of the state. These new developments seem to assume that it is important to afford better satisfaction of some religious communities that have an increasing presence in the West – in particular Muslim

251. See Italy VI, Spain IX, Malta IV, Andorra IX, Colombia IX, and Concordat between the Holy See and the Portuguese State, 18 May 2004, art. 16.

252. See India VIII, Israel V & VIII, and Sudan VIII.

253. See India VIII.

communities – and have a different notion of the role of religion in public life. If this happens, the consequence would be a predictable diversification of matrimonial laws and statuses in a given country. The advantages of this from the perspective of religious pluralism are evident. But also evident are its disadvantages from the perspective of the protection of rights of individuals, which could suffer strong pressures from their respective religious communities. The case of India is very illustrative of the risks of a pluralistic matrimonial system when religious laws are allowed to regulate aspects of the lives of the spouses that – at least from a Western perspective – form part of their civil rights and therefore of the competences of the secular state. Because of this, the adoption of measures that can erode the line of separation between the respective competences of the state and the religious communities with regard to marriage constitute a serious step that should not be taken trivially, for it could entail in practice that secular states partly renounce their role as guarantors of rights.

VII. Religious Education of The Youth

The school system may be – and often is – a significant instrument for the religious education of the youth and therefore constitutes an important subject for analysis from the perspective of the relation between religion and the secular state. There are two main topics that we should face here. One is the functioning and legal status of private schools with a religious ethos, for they are an effective way for religious communities to disseminate their doctrines and educate their younger members in their moral and religious values; indeed some religious denominations, such as the Catholic Church, have traditionally showed a strong interest in ensuring the freedom of religious institutions to operate their own schools. The other topic is whether religious instruction should be provided in public schools, and if so, whether this should be conducted as denominational or non-denominational religious instruction. The diverse approaches of states to these two areas reveal more generally their attitude towards the role of religion in society vis-à-vis the state – and also towards who is ultimately responsible for the education of the youth: the society itself or state authorities.

A. Private Schools

Private schools, including those with a religious ethos and run by religious institutions, are permitted to operate in almost all states, although their actual significance within the educational landscape varies considerably depending on the countries. In some countries the presence of religious schools is very important (e.g. the Netherlands, where approximately two-thirds of the schools are in private hands, almost always with a religious ethos[254]). Indeed, the religious presence can be even overwhelming, as is the case in Ireland, where the vast majority of schools are Catholic, controlled by ecclesiastical institutions, and integrated within the state system.[255] In other countries the percentage of private schools is substantial (e.g. Australia or Spain, where they cover approximately one-third of schools[256]), and in some others it is insignificant – e.g., Finland or Switzerland, where almost all schools are public and private schools are looked at with a certain distrust by many people, considering that they are not as effective for the social integration of students.[257] Some former communist countries have a predominantly public conception of the school system. Thus, Ukraine permits "spiritual educational centers" – which in practice are run by churches – and grants them some tax benefits, but studies in these centers are not officially approved by the state.[258] In Kazakhstan, there is the theoretical possibility of establishing private schools but the government's

254. See Netherlands X.
255. See Ireland IX.
256. See Australia X, Spain X.
257. See Finland X, Switzerland III & IV.
258. See Ukraine X.

administrative restrictions determine that, in practice, all schools are public and state controlled.[259] The opposite occurs in Turkey, where the system should be in theory almost entirely secular and state controlled, but in practice many schools are run by Muslim groups (religious minorities find doing so much more difficult).[260]

Very often the state recognition – and funding – of private schools is subject to compliance with some minimum educational standards aimed at guaranteeing that education received in private and public schools have a comparable quality.[261] Sometimes these standards include also respect for or promotion of certain civic values that are considered particularly important (Sweden[262]). In any event, the big question with regard to private education – especially religious schools – is the funding granted by the state.

In some countries, funding of private schools has been typically understood as incompatible with the separation of State and religion (e.g. USA, Kazakhstan[263]). The assumption is that because such institutions tend to be pervasively sectarian in practice, any substantial support would inevitably support the religious instruction that they often provide to their students. In the USA, however, the Supreme Court has allowed state funding for other expenses, such as transportation of students to parochial schools (*Everson*, 1947[264]) and even state vouchers given by local authorities to parents to cover the tuition of their children in public or private schools, when the public funding is open to all and is not aimed at supporting a particular sectarian type of school (*Zelman*, 2002[265]). In some countries, such as Australia, the state has traditionally granted generous funding for private religious schools. However, this issue has recently become contentious, and there is an ongoing debate about whether it is compatible with state neutrality and about which criteria should be used to assure that public funding does not discriminate against minorities.[266]

In contrast, many European countries, whatever their constitutional system of church-state relations is, do not find that public funding of private schools is at all incompatible with the secular nature of the state. This attitude is grounded, on the one hand, on the right of parents to have their children educated in accordance with their religious or philosophical convictions; and, on the other hand, on the understanding that education is a public service that the state must control but can be performed by state institutions or by private institutions (religious or not). The result has been a widespread system of state funding of private schools in Europe, normally generous and sometimes on an equal footing with public schools (e.g. the Netherlands, Belgium, Sweden, Slovakia, and also Czech Republic in the case of church schools[267]). In some cases, private religious schools have been integrated within the state system and largely funded with public money, as in Ireland or the United Kingdom,[268] but churches have been allowed to keep a relatively high degree of control over the operation of these schools.

In large parts of Europe, the real issue under discussion often has been not whether private religious schools should be publicly funded or not – this is taken for granted – but rather what the conditions for eligibility for public funding should be. The focus in these debates has been on guaranteeing minimum quality standards, on preventing private schools from becoming in practice ghettos that isolate certain students from the rest of society, and on prohibiting discriminatory policies by school authorities on the ground of religion or belief. These issues have also been discussed outside of Europe, with a variety of solutions. Thus, for instance, with respect to student admission policies, France and

259. See Kazakhstan X.

260. See Turkey X.

261. See, for instance, Germany X and Australia X. In Japan, the issue of the educational quality of private schools does not seem to be an issue, for some religious schools enjoy a predominant prestige in the country (see Japan X).

262. See Sweden X.

263. See Kazakhstan X, and USA (McCauliff), Introduction.

264. See USA (McCauliff), Introduction.

265. See USA (McCauliff), Shifting attitudes.

266. See Australia X.

267. See Netherlands X, Belgium II.5.B, Sweden X, Slovakia IX and Czech Republic X.

268. See Ireland IX and United Kingdom IX.

India forbid schools funded with public money from rejecting students on the ground of religion.[269] In New Zealand private schools funded by the state must reserve 5% of their admissions for students not adhering to the school's religious ethos.[270] The Netherlands have adopted a solution more favorable to the school ethos, and religious schools can choose their own policies of admission as far as they are applied in a consistent manner.[271] In Ireland, this issue is controversial, and the traditional respect for the policies followed by Catholic schools in the admission of students and the hiring of teachers is under revision, for many consider it to be discriminatory in practice.[272]

By and large, we can affirm that, with a few exceptions, the trend is to see private schools – including those with a religious ethos – as a "normal" part of the educational landscape of the country. Whether they should be funded with public money or not, it is a different question, whose answer sometimes depends on two coordinates: on the one hand, the understanding of state neutrality in religious matters; and on the other hand, the notion of which is the state role in education and also the very notion of public service. In general, an inclusive concept of state neutrality, together with a reliance on spontaneous societal channels to intervene in the management of education and other public services, tends to favor liberal funding of private schools, but there are significant exceptions. For instance, France does not have particular problems with the funding of secular aspects of education in religious schools,[273] while the United States does. In both cases, their attitude is probably linked to their respective political histories: church-state relations in France along the 19th century and the 20th century interpretation of the establishment clause by the Supreme Court in the US. Once again, history proves to be crucial to understand many of the solutions – and apparent inconsistencies – adopted by different states in their relations with religion.

B. Religious Instruction in Public School

1. Denominational Religious Instruction

In many European countries there is denominational religious instruction in public schools. France is one of the few exceptions.[274] This is seen as a natural cooperation of the state with churches and, even more important, as a guarantee of the parents' rights to determine the religious and moral education of their children (Finland stresses also that it is a right of the students[275]). For these reasons, the state recognizes the autonomy of the relevant churches to select the teachers that are qualified for this type of education and often pays for the expenses this generates. Significant is the example of Ireland, where the government and the courts have found public funding of religious education – and of Catholic chaplaincies in schools – to be fully compatible with the constitutional prohibition of endowment of religion.[276] Another common element is that denominational religious instruction is normally understood as voluntary, and must be requested by the students or their parents. Some countries, such as Latvia, specifically require a written application.[277] Ireland, where most schools are in the hands of Catholic institutions, has clearly affirmed the students' right to refuse religious instruction, although it does not seem easy to be put into practice.[278] Exceptions to the voluntary character of

269. See France X and India X.
270. See New Zealand IV.
271. See Netherlands X.
272. See Ireland IX.
273. See France VIII.
274. See France X. However, there is religious confessional instruction organized by public authorities in the region of Alsace-Moselle, which did not join the separation system after it was returned to France in 1918. See France VI.
275. See Finland X.
276. See Ireland IX.
277. See Latvia VIII.
278. See Ireland IX.

denominational religion courses in Europe are Greece, where Orthodox religious instruction is provided as a compulsory subject, although non-Orthodox students are exempted;[279] and Russia, where this matter is decentralized but many regions have imposed mandatory Orthodox religious instruction in public schools (according to the Russian national rapport, approximately 70% of students in public schools receive Orthodox religious instruction).[280]

Out of these common features, there are a variety of systems in Europe. For instance, some countries, such as Hungary, do not include religious instruction as part of the school curriculum,[281] and in others, such as the Netherlands, its inclusion in the curriculum or not depends on local authorities.[282] Finland, although including these courses in the curriculum, emphasizes the need to distinguish religious instruction from religious practices or observance.[283] Some countries not only include confessional religious instruction in school curricula but also make it mandatory for all schools to offer some kind of religious instruction, although the students – or their parents – are free to choose it or to take alternative courses on secular ethics, civil education or alike (e.g. Germany, Belgium, Slovakia, Serbia[284]). In some countries that have a concordat with the Holy See, schools are obliged to provide Catholic instruction, though students are always free to take it or not. The offering of similar courses for other qualified religions is not mandated but only possible, upon request of a minimum number of students (e.g. Italy, Spain, Czech Republic, Malta[285]).

Out of Europe the panorama is more diverse and, as one could expect, the states' attitudes towards religious instruction are heavily influenced by their respective political or judicial history. For instance, the United States is well known for excluding confessional religious education from public schools, considering it incompatible with the judicial interpretation of the constitutional establishment clause – although this does not preclude the possibility of controversies with respect to mandatory subjects with a potential doctrinal dimension, as the debate about creationism and evolutionism in public schools demonstrates.[286] In Latin America religious denominational education is excluded from public schools in those countries that experienced anti-clerical political shifts at certain points in their histories. This is the case in Mexico, Uruguay or Argentina.[287] In the latter country, religious instruction was eliminated long ago by General Peron at the national level, but it has been later reintroduced by some provinces. In other countries where institutional relations with the Catholic Church have a stronger basis, a system similar to that of Germany or Spain is followed (e.g. Colombia, Chile or Peru[288]). In Africa, Muslim education is mandatory in Northern Sudan, even in Christian schools.[289] In Asia, Japan and South Korea[290] exclude confessional education from public schools. In South Korea, where students are not free to choose their school but are assigned one by draw, the courts have declared unconstitutional the expulsion of a student from a Christian school who openly criticized religious instruction.[291] India prohibits denominational religious education when schools are totally funded by the state but not when they are partly or not funded at all, so long as the free consent of students to this type of education is guaranteed.[292] New Zealand permits religious instruction in the school premises but out

279. See Greece IV.B.
280. See Russia X.
281. See Hungry XI.
282. See Netherlands X.
283. See Finland X.
284. See Germany X, Belgium II.5.B.d, Slovakia IX, Serbia II & IV.A.
285. See Italy VII, Spain X, Czech Republic X, Malta III.
286. See United States 2 (Shreve).
287. See Mexico II, Uruguay XI and Argentina X.
288. See Colombia X, Chile IV.4 and Peru X.
289. See Sudan X.
290. See Japan X and South Korea III.
291. See South Korea IV.
292. See India X.

of the school curriculum and teaching hours, without economic aid from the state.[293] In some other countries, as diverse as Switzerland, Brazil, Australia and Canada, this matter has long been decentralized and depends on the decision of regional or local authorities, although the tendency is to allow some kind of religious instruction upon request of the parents.[294]

2. Non-Denominational Religious Education

In the last decades a different type of religious education has been gaining momentum in various countries: a neutral, non-denominational teaching that is normally conceived as an instrument to foster respect for and understanding of religious pluralism – a need that is increasingly felt in many contemporary societies.

A number of countries have introduced, or are in the process of introducing this type of non-confessional teaching about religions with different profiles and often not in competition, but in parallel, with confessional religious instruction. This is the case of Sweden and the Netherlands, for example, where this teaching is mandatory and the law provides that great care should be taken to ensure its real neutrality and objectivity.[295] In Switzerland and Australia[296] the tendency is the same, although the decision corresponds to the regional authorities and not always the subject has been imposed as compulsory for students. In some provinces of Canada[297] this education has been introduced as a mandatory subject and has been declared constitutional by the courts as far as it meets certain specific requirements that guarantee its neutrality. In Estonia the subject has been included in the school curricula as an elective. There have been attempts to make it mandatory but there is the fear that it could lead in practice to the imposition of predominantly Christian views.[298] This is the situation in Ukraine, where there is religious teaching that is neither strictly sectarian nor entirely neutral, for it is focused on the basics of Christian values; however, students are entitled to opt out.[299] Kazakhstan is currently studying the way to introduce this teaching in an appropriate way.[300] Japan and South Korea,[301] strongly opposed to sectarian religious instruction in public schools, find neutral teaching about religion not objectionable. Turkey imposes this subject as compulsory in all public schools, and opt-outs are possible only for non-Muslim students (Muslims constituting the vast majority).[302] In practice, however, the teaching is not neutral and there is a strong emphasis on the doctrines of Sunni Islam to the detriment of other religions. For this reason, the European Court of Human Rights declared this teaching contrary to religious freedom since opt-outs on religious grounds are not permitted.[303]

3. Practical Problems in the Implementation of Religious Education

The main problems of non-denominational religious education are quite clear: it requires a high degree of academic and moral qualification in teachers; and in addition, objectively, neutrality is very difficult to achieve in this particularly sensitive area. An obvious risk is that teaching about religion that in theory is non-confessional becomes in practice indoctrination in a certain religion or non-religious worldview, or is used by governments for that purpose. This explains why international organizations are

293. See New Zealand VI.
294. See Switzerland IV, Brazil V, Australia X and Canada VIII.b.
295. See Sweden X and Netherlands X.
296. See Switzerland IV and Australia X.
297. See Canada 8.b.
298. See Estonia VIII. This possibility was examined by the European Court of Human Rights in *Folgerø et al. v. Norway*, 29 June 2007.
299. See Ukraine X.
300. See Kazakhstan X.
301. See Japan X and South Korea III.
302. See Turkey X.
303. *Zengin v. Turkey*, 9 October 2007.

promoting different initiatives that serve as orientation to states interested in this type of education.[304]

Denominational religious education, from the perspective of the secular state, has generated controversies around three particular points.

One is derived from the fact that, in some countries, schools must offer confessional religion courses but, as the acceptance of this teaching is voluntary for students, those who decide not to take the courses are bound to choose alternative subjects such as secular ethics, civic education, comparative and neutral study of religions, or the like. This approach has been criticized from different angles. Some have argued that including sectarian religious teaching in the school curriculum forces unnecessarily non-religious students to take some alternative courses that otherwise they would not need. Other times the reasoning has gone in the opposite direction: secular ethics or non-confessional study of religions are important school subjects that should not be just an alternative to confessional religious instruction. On the contrary, they should be mandatory for all students and sectarian religious course should not be a cause for exemption. It has also been argued that the need to opt out may imply in practice a certain stigmatization of students not attending religion courses (this is the reason why Canadian courts have declared Christian instruction in public schools unconstitutional in Ontario, despite the fact that parents were given the possibility of opting out[305]). One way or other, the aim of these arguments seems to be the same: to take denominational religious education out of school curricula (and out of state funding), which would certainly be contrary to the long established tradition of many countries.

A second controversial point is the guarantee of equal rights to religious minorities. Usually, the organization of religion courses is attentive to the students that are members of major or at least traditional religions, while minority religions are often neglected. This is, no doubt, an important issue, as is everything related to the implementation of the principle of equality in the area of fundamental rights. However, the predictable difficulties to extend this system of religious instruction to religious minorities have been sometimes used to undermine the legitimacy of the system as applied to religious majorities and to propose its elimination. This is perhaps more difficult to understand, especially considering that, as indicated above, religion courses are designed not only to satisfy the wishes of religious communities but also to ensure the fundamental right of parents to decide on the religious education of their children. The proportionate extension to minorities of the benefits that many states grant to major religions is one of the challenges that secular state must face, and the solution does not seem to be their elimination for all. There are of course practical or even technical difficulties in the implementation of equality, but often it is just a matter of political will.

The third controversial point generated by denominational religious instruction has been the selection of the persons that are qualified to teach religion courses, especially in those countries where teachers are hired and paid by the state. Typically the relevant religious communities are recognized as having the competence to assess the qualification of teachers. Normally the religious authorities grant permits to a number of persons, according to specific and well-described academic criteria, and then schools may choose among them. In Spain some problems have been raised when teachers have had their ecclesiastical permit withdrawn not because of lack of academic qualification but because they engaged in public behavior contrary to the moral principles of the Catholic Church. The Constitutional Court has supported the position of the Catholic bishops, holding that only they are competent to say who can teach religion on behalf of the Catholic Church and recognizing that publicly known immoral conduct may have a negative educational impact on students, which only the ecclesiastical authorities are in a position to

304. See, for instance, the *Toledo Guiding Principles on Teaching about Religions and Beliefs*, prepared by the OSCE/ODIHR Advisory Council of Experts on Freedom of Religion or Belief, Warsaw 2007, where the difficulties of this type of religious education, together with detailed recommendations to make it efficient and actually neutral, are well explained. The text is available in http://www.osce.org/publications/odihr/2007/11/28314_993_en.pdf

305. See Canada VIII B..

evaluate.[306] Certainly, it seems difficult to see how to take a different stance without impairing religious autonomy, particularly in the case of churches with a clear hierarchical structure.

VIII. Religious Symbols in Public Places

One of the major areas where the difference between secularity and secularism has been evident in various legal systems around the world is in attitudes toward religious symbols in public space. Key debates have focused on the wearing of attire that has religious significance, the display of religious symbols such as the crucifix in schools and other public buildings, and the permissibility of symbolic displays and monuments in public settings.

A. Religious Attire

Probably the most controversial of these issues has centered on the right to wear Islamic head coverings. A challenge to Turkish regulations banning headscarves in public universities ultimately reached the European Court of Human Rights, where a grand chamber in a controversial decision held that the ban did not violate the right to freedom of religion or belief.[307] A subsequent case sustained expulsion of a Muslim girl from a French public school for failing to participate in physical education classes without a headscarf.[308] The Court's judgments in these cases determined that the relevant states had not exceeded their margin of appreciation, in part because of the importance of secularism (*laïcité*) in the legal systems of Turkey and France. Earlier, in an inadmissibility decision, the European Court of Human Rights rejected a claim by a Muslim kindergarten teacher that a rule prohibiting her from wearing a headscarf on the job violated her freedom of religion. There the Court held that Switzerland enjoyed a margin of appreciation that allowed a state to set restrictions on the way a public school teacher represented the neutral state.

While this issue was significant in some of the countries covered by national reports,[309] it was not a major issue for most. Several indicated that their citizens were free to wear religious symbols if they so desired.[310] A number of countries noted that both students and teachers may wear religious garb.[311] A number noted that restrictions in this area would be viewed as measures inconsistent with religious freedom.[312] The Czech reporter mentioned that in fact, Muslim headscarves were no different than head coverings routinely worn by Czech women in the countryside.[313] The Israel report indicated that his country had no restrictions in this area, and that religious head coverings were a "normal part of the landscape."[314] The Japanese report indicated there were no major controversies in this area, and that while some issues could arise since many schools require uniforms, most experts thought it would not violate Japanese constitutional principles calling for separation of religion and state to allow exceptions to uniform policy that could accommodate religious attire issues.[315] The Netherlands

306. See Spain X. See also the Constitutional Court decisions 38/2007, of 15 February 2007; and 80/2007, of 19 April 2007.

307. Şahin v. Turkey (ECtHR, App. No. 44774/98 (Grand Chamber, 10 November 2005).

308. Dogru v. France (ECtHR, App No. 27058//05 4 December 2008).

309. Not surprisingly, this was a significant issue covered by the French and Turkish reports. France X; Turkey XI. It was also a concern in some other countries. See, e.g., Belgium IV.

310. Andorra XI; Chile IV.C; Colombia XI; Estonia IX; Peru X; Philippines XI; Russia XI; Ukraine XI; Uruguay XII. The same would be true in the United States today, although there have been cases striking down older laws targeting Catholic nuns and priests that imposed constraints on the wearing of religious garb in school settings.

311. Australia X; Italy VIII; Netherlands XVI.

312. Czech Republic XI; Sweden XI.

313. Czech Republic XI.

314. Israel X.

315. Japan XI.

reporter commented that "Dutch neutrality in the public domain is not interpreted such that the public domain should be void of any religious expression. On the contrary, the plurality of religious expressions is respected."[316] In a similar vein, the Italian report indicated that *laicità* as understood in Italy allows wearing of religious symbols in schools, hospitals, public offices and by public employees, and that Italy respects the signs and symbols of all religions.[317]

In the United Kingdom there is no general legislation on the issue, but schools and others may self-regulate. This may take the form of requiring students to wear a uniform. In one case a student's challenge to a uniform policy that forbade her wearing a hijab was rejected on the grounds that she could have chosen a school that would have allowed this clothing and that the school's uniform policy was proportionate to achieving its educational purposes.[318] In another, a uniform requirement that did not allow a pupil to wear a "purity ring" was sustained on the grounds that there were other ways she could manifest her religious beliefs and the uniform fostered school identity.[319] These cases reflect a pattern of deference to local governing bodies in dealing with school clothing issues.

A number of other countries respect the right of individuals to wear religious symbols, but emphasize that there are limits. Thus, the Finnish national report indicated that individuals are free to wear religious symbols except where doing so might constitute a hazard to safety or might injure the religious feelings of others.[320] Similarly, Sweden has no rules against wearing religious garb in public, and indeed, doing so would be protected by religious freedom norms under Swedish law. However, in educational settings, restrictions may be imposed where necessary to avert threats to the order and security of the school, or where allowing the clothing would impair the pedagogic mission of the school.[321] In some countries, such limitations are imposed without any clear authorizing legislation. In Kazakhstan, for example, there is no law authorizing limits on wearing of religious symbols and attire, but the Minister of Education and Science has declared that wearing religious clothing violates the principles of school system secularity.[322]

The view that there need to be some limits on permissible religious attire would no doubt be conceded by those who did not mention limitations. The question is how tightly or narrowly such restrictions should be drawn. The difficult issue raised in many of the reports is the burqa – the total body covering with at most eye-slots for visibility. The Italian report asserts that banning the burqa from all public spaces, as some Italian legislation has proposed, would be inconsistent with human rights. It recognizes, however, that there could be limitations on religious attire if it is not freely chosen or is detrimental to human dignity.[323] The report indicates that the only limit would involve symbols that cover the face, because this would impede the person's recognition and would make it difficult to establish relations with others.[324] The Chilean report states that identity regulations may restrict headcoverings, except if they are part of ethnic or religious requirements.[325] But the report does not specify whether religious requirements as total as the burqa would be exempted. The Estonian report indicates that a person may wear a head covering for identity documents. However, the face from the mandible to the upper forehead must be uncovered. This applies both to Muslims and to Catholic nuns.

316. Netherlands XVI.

317. Italy VIII.

318. R (on the application of Begum) v. Head Teacher and Governors of Denbigh High School, [2007] 1 A.C. 100.

319. R (on the application of Playfoot) v. Millais School Governing Body [2007] HRLR 34.

320. Finland IX.

321. Sweden XI.

322. Kazakhstan XI. This is problematic from the standpoint of international human rights norms, which insist that limitations on freedom of religion or belief be "prescribed by law." See, e.g., International Covenant on Civil and Political Rights, art. 18(3); European Convention of Human Rights, art. 9(2). Interestingly, the Turkish report notes that there was no formal legislation authorizing the headscarf ban there. Turkey III.A.3.

323. Italy VIII.

324. Italy VIII.

325. Chile IV.C.

A number of other national reports suggest that there may be objective concerns that would justify regulation of wearing the burqa.[326]

There a number of countries that have had very restrictive and frankly anti-clerical rules on wearing religious attire. To appreciate the background of these constraints in Mexico, it is important to see these in the broader context of Mexican history, as outlined in the Mexican national report.[327] Mexico adopted very harsh rules in the years following establishment of a secular state under its 1857 constitution. Laws elected within the following years nationalized church property (1859), secularized hospitals and charitable institutions (1863), abolished women's religious communities and gave nuns a matter of days to leave convents (1863), passed a "Religious Freedom Act" which forbade celebration of "solemn acts of worship without permission granted by the authority in each case" (1860), substituted civil for religious marriage (1859), and passed a series of Reform Laws which consolidated the separation of church and state(1873).[328] These Reform Laws included prohibition of the use of cassocks, habits and religious badges in the streets. The 1917 constitution, which is still in force, was anticlerical and anti-religious, and continued enforcement of the Reform Laws. Constraints on religion continued to multiply, leading to a decision of the Mexican Episcopate on July 31, 1926 to suspend worship throughout the Republic. Subsequent refusal of the national Congress to repeal anti-religious laws led to armed resistance known as the *Cristiada*.[329] This conflict came to an end with "agreements" between church and state reached outside the law which resulted in a "*modus vivende*" including the relative non-application of many of the anti-clerical rules.[330] Constitutional reform of many of the anti-clerical laws was not formalized until 1992, when constitutional and legal changes were made that maintained state secularism and the separation of church and state, but strengthened religious freedom and equality of churches before the law.[331] It is against this highly polarized background that one needs to understand the Mexican national report's brief statement on religious attire: "To this day, due to a custom inherited from the [1873] *Reform Laws*, the use of religious clothes is limited to inside the temples or houses inhabited by religious ministers."[332]

The history in Turkey is similar. Ataturk's reforms following the end of the Ottoman Empire included Law No. 671 on the Wearing of Hats, which prohibited "the use of traditional and religious headwear such as the *fez* and *turban* by individuals."[333] This was adopted in 1925 "in order to modernize the society and to breach the relation with the past."[334] Subsequently, in 1934, Law No. 2596 was adopted on the Prohibition on the Wearing of Certain Garments.[335] Both are protected and made effectively unamendable by Article 174 of the constitution, which protects the reform laws that defined the essence of Turkish secularism. While the Law on Hats has ceased to have operational significance,[336] the Law on the Prohibition on Wearing of Certain Garments is still in force and is followed in practice. It provides that clergy of any denomination cannot wear religious clothing outside of places of worship and rituals.[337] This law was recently found to violate the religious freedom provision of the European Convention on Human Rights as applied to a religious group known as the *Aczimendi tarikatÿ*.[338] The European Court held that while it was understood how the clothing laws furthered Turkish secularism, as

326. See, e.g., Netherlands XVI.
327. Mexico III.A.
328. Id.
329. Id.
330. Id.
331. Mexico III.B.
332. Mexico V.
333. Turkey XI.A.1.
334. Id.
335. Id.
336. Id.
337. Id.
338. Ahmet Arslan v. Turkey (ECtHR, App. No. 41135/98, 23 February 2010).

applied to the applicants in a public setting open to all, the wearing of traditional clothing in the streets following a religious ceremony was at most a curiosity that posed no threat to public order or the rights of others. The Court distinguished this case from the earlier case involving a public university ban on headscarves on the ground that the latter involved the regulation of religious symbols in public establishments, "where religious neutrality might take precedence over the right to manifest one's religion."[339]

The Turkish national report provides a fairly detailed picture of the differential headscarf bans in primary and secondary schools (where detailed descriptions are given of uniforms for pupils and where the wearing or use of any religious symbol during educational process is banned).[340] It also provides useful background on the Turkish ban of Islamic head coverings in the university setting. It highlights the fact that the ban was a response to proliferating use of religious symbols by students that "were not only perceived as the exercise of the freedom of religion but also were deemed to represent the depening organization of political Islam."[341] The national report also describes the 2008 effort to propose legislation repealing the ban and the ultimate rejection of this attempt by the Turkish Constitutional Court.[342] The Turkish report also catalogs constraints on wearing of religious symbols by those who are in public employment.

In Sudan, not surprisingly, there is no ban on wearing religious garb, particularly in the northern part of the country that is predominantly Muslim. However, this apparent liberty is linked to significant legal restraints. Article 152 of the national penal code criminalizes "obscene and indecent acts," providing that "[w]hoever does in a public place an indecent act or an act contrary to public morals or wears an obscene outfit contrary to public morals or causing an annoyance to public feelings shall be punished with flogging which may not exceed forty lashes or with fine or both." An act is deemed to be contrary to public morals "if it is regarded as such according to the standard of the person's religion or the custom of the country where the act takes place." The practical result is that there are frequently arrests and subsequent conviction and flogging of women for failure to wear "appropriate" attire, for example by wearing trousers.[343]

In short, there is an array of responses to the issues of wearing religious symbols. Of course, many of the countries that see no difficulty in accommodating Muslim headgear do not face concerns with the rise of political Islam that have triggered concerns elsewhere. Moreover, some are countries with strong identification with prevailing religions that might be sympathetic to the use of religious symbols in their own traditions. Nonetheless, the fact that wearing of religious headgear is so easily accommodated in many countries raises questions about the necessity of bans, even in the public settings where such bans typically apply. It is not clear that wearing the headscarf would be as likely to become a political statement if secularism's bans would be replaced by secularity's accommodations.

B. Display of Religious Symbols in Public Settings

As noted by Malta's national report, many European countries where display of crucifixes or other religious symbols is common are "awaiting the grand chamber decision in *Lautsi*"[344] – the pending proceeding before the European Court of Human Rights which will either accept or reject the ruling by the chamber of the European Court that initially heard the case and held that requiring the display of crucifixes in Italian public schools violated the rights of Italian pupils and their parents to freedom of religion or belief.[345] The Italian national report indicated that the crucifix case has become the center of "a

339. Press release on Ahmet Arslan v. Turkey, 23 February 2010, available at http://www. strasbourgconsortium. org/ document.php? DocumentID=4732.

340. Turkey XI.A.2.

341. Id. XI.A.3.

342. Id.

343. Sudan XI.

344. Malta VI.

345. Lautsi v. Italy (ECtHR, App. No. 30814/06, 3 November 2009).

lively debate around the preservation of Italian identity."[346] The validity and constitutional legitimacy of the decrees mandating crucifixes in classroom, which date back to the fascist era, are disputed. Some argue that the display of crucifixes is inconsistent with the notion of *laicità* and its commitment to cultural and religious pluralism.[347] But this is reported to be a minority view, both among legal scholars and the Italian populace.[348] The majority holds that *laicità* should be able to acknowledge and give "constitutional relevance to the Catholic cultural tradition of the country."[349] In addressing this issue, some Italian courts reasoned that "the crucifix represents a sign of national identity and cannot be considered a threat to freedom of conscience: on the contrary, it allows all children, and especially the extra-communitarian ones, to perceive the values of tolerance written into the constitution."[350] While one can easily doubt that the "extra-communitarian" parents and children would sense a message of inclusion emanating from state backing of these cultural symbols, there is a certain logic to the majoritarian position. The question is whether a system of *laicità* can be something other than secularism prevailing over religious outlooks, which appears to be the result if majoritarian symbols are required to be excluded from public settings. Can it be interpreted as secularity? If *laicità* is to be understood as a framework welcoming to all outlooks, why should the institutionalization of this ideal require exclusion of religious symbols of the majority? No doubt the majority needs to learn to be sensitive to the religious feelings of minorities, but shouldn't this be a two-way street? Why is the only way of sending a message of inclusion to minorities a requirement that the public cannot acknowledge majoritarian sensitivities as well. Further, does interpreting *laicità* as secularity require emptying religious symbols of their authentic content in order to generate a more inclusive cultural symbol? These are the types of questions posed by *Lautsi*.

The issue of public display of religious symbols is arguably more difficult because the choice to make a public display is by definition a public choice, whereas clothing decisions always have an individual choice element. Thus the display decisions inevitably send a message of endorsement, and can easily be read as sending a message of exclusion. At the same time, however, a decision not to display or to discontinue a display that has been customary risks offending majority groups in the population. It may be the case (and indeed is likely) that every possible public decision will appear non-neutral to some portion of the citizenry. As is the case with religious attire, the national reports exhibit a range of responses. Andorra reports no complaints about crucifixes in public settings.[351] Argentina has no restrictions, and in fact, icons of the holy virgin are often put in public places.[352] In Colombia, religious symbols are common, reflecting Catholic heritage.[353] Hungary reports no restrictions.[354] On the other hand, even countries such as Chile, where there are no particular conflicts over display of crucifixes in public settings, there are latent issues that could easily surface.[355] At the other end of the spectrum are countries such as Mexico, where display of religious images in public would violate church-state separation.[356] Similarly, in the United States, posting of a copy of the Ten Commandments in schools, although financed with private funds, was held to violate the non-establishment clause of the federal constitution.[357] This precedent presumably applies

346. Italy VIII.
347. Id.
348. Id.
349. Id.
350. Id.
351. Andorra XI.
352. Argentina XI.
353. Colombia XI.
354. Hungary XII.
355. See Chile IV.C.
356. Mexico V.
357. Stone v. Graham, 449 U.S. 39 (1980).

to religious symbols more generally.

In Spain, in contrast to Italy, there is no legislation calling for crucifixes in classrooms. In fact, new public schools usually don't have them. They are clearly permitted in private schools. The more controversial cases involve older schools. Where controversies have arisen, courts have generally deferred to local school councils – whether they decided to keep crucifixes or not. In Andalusia, crucifixes were removed from all rooms except those where religious instruction was given.[358] Another interesting compromise is that applied in Slovakia: if the majority of parents in a classroom wish to have a cross, the school director may allow them to do so.[359] It is not clear why majority rule should apply in this setting; after all, it is typically minority rights that are at stake. But the notion that there could be a class-by-class solution at lest deserves mention. One of the more famous decisions in this area is a similar crucifix case from Bavaria, in which the German Constitutional Court held that it is unacceptable to force students to learn 'under the cross,' as the cross display should be understood not only as a cultural, but as a genuinely religious and even 'missionary' symbol.[360] That case would not necessarily require taking down crucifixes if there were unanimity among parents and students consenting to display of the symbol.

In many jurisdictions, symbols simply are not a major issue, at least not until the question becomes politicized. The Czech Republic reports that religious symbols have not been used for so long that nobody would want to reintroduce them now. The only exceptions are crucifixes in Catholic theology faculties, in church schools, and in a reserved way, in church hospitals.[361] In Australia, pervasive secular attitudes among the population result in a practice that crucifixes are not routinely displayed. The Netherlands have no specific legislation dealing with crucifixes or other symbols in public facilities, but "[o]ccasionally, a religious symbol, such as a crucifix, may be found in a town hall.[362] In secular Uruguay, schools, hospitals, courtrooms, and public offices are devoid of crucifixes.[363]

In part because of Russia's distinctive history over the past century, and its importance both as a center of Christian Orthodoxy and as a center of atheism, the Russian experience has some unique features. Apparently, there is no law governing the use of institutional symbols.[364] There are in fact a large number of religious symbols in public space, but this is not necessarily the sign of a confessional state.[365] Constitutional guarantees of the separation of church and state in Russia do not need to be understood as requiring a separation in social life. At the same time, there is a concern in Russia about the increasing clericalization of public institutions. But this is not so much an issue of symbols in public space as clerics assuming governmental posts or advisory positions. A distinctive issue noted by the Russian report is a concern with fraudulent use of religious symbols; there are a number of accounts of people dressed as priests who fraudulently solicit funds. Still another issue noted by the Russian report has to do with a tension between cultural and religious control of objects with symbolic value. "The beautiful icon 'Trinity' by Andrey Rublev is considered widely to be a national treasure.It has been displayed in the Tretjakov Gallery for the last 100 years. Its age and importance would seem adequate reasons to leave the icon untouched, but [the Russian Orthodox Church] asked permission to exhibit it for [three] days in a famous monastery during an Orthodox holiday."[366] This conflict reflects a deeper conflict regarding religious symbols: do they belong to religion or to secular culture, or if to both, how is control to be managed?

358. Spain III.N.

359. Slovakia VIII.

360. Germany XI. An earlier German case held that a crucifix in a courtroom infringed religious freedom rights because it showed excessive identification with a religious symbol. Id.

361. Czech Republic XI.

362. Netherlands XVI.

363. Uruguay XII.

364. Russia XI.

365. Id.

366. Id.

C. Monuments and Temporary Displays

Regulation of monuments is challenging because of the interface of history – acknowledging and memorializing particularly significant moments, persons and ideas – and religious life. Erection of a monument can be simultaneously a reminder of secular history and values and assertion of religious values as well. Installing a new monument may stir political sensitivities, but once one has been in place for a substantial period of time, the controversy may fade. Thus, as noted by the Spanish report, total suppression of religious monuments seems impossible without squandering a good portion of the country's cultural legacy.[367] Because such symbols are part of the landscape in most countries, there are often fewer restrictions in this field, particularly when the monuments are erected on private space. Thus, whereas Mexico has had fairly strict controls on clothing, there have been virtually no restrictions on the general use of images and religious symbols.[368] While there is some ambivalence in Chile as to exactly what monuments should be approved and what not, five temples had been declared to be national monuments in the past year.[369]

Many if not most countries maintain landmark registers, and not surprisingly, churches are often designated as protected landmarks. Armenia, for example, noted that there are many monuments and historic buildings which are under state protection.[370] One of the challenges in this area is that historic preservationists typically want to maintain structures exactly as they have always been, but religious usage may change. Alters may need to be repositioned to correspond to new forms of worship; the population center of a church may change, so that the church may wish to move to a new location; and so forth. As important as the state's interest in protecting history is, it is hard to say that it overrides the value of protecting the religious freedom of the community that gave rise to the history in the first place.

Over the past few years, the United States has seen recurrent controversies over monuments inscribed with the Ten Commandments. The United States report draws attention to two cases about such monuments that were decided in opposite ways.[371] In *Van Orden v. Perry*,[372] the Supreme Court rejected an establishment clause challenge to the retention of a Ten Commandment monument that had been donated by a private group and had been located on the state capitol grounds for over 40 years. The Court acknowledged that the Ten Commandments were undoubtedly religious, but they also had a significant historical meaning.

On the other hand, in *McCreary County v. American Civil Liberties Union of Kentucky*,[373] the Court held that recent posting of the Ten Commandments at Court buildings had a primarily religious purpose. Both cases were decided by 5-4 votes, with the difference in outcome resulting primarily from the fact that Justice Breyer voted against finding an establishment clause violation in *Van Orden* and for finding of violation in *McCreary*. Without going into the details of American doctrine, the distinction was whether there was a "religiously intended or a passive presentation of the monument that includes the Ten Commandments."[374] Stated differently, a key difference lies in whether a monument is merely acknowledging and memorializing history, or whether there is a subtext aimed at imposing a particular religious point of view. If the latter is the case, the monument lacks a secular purpose and cannot withstand establishment clause scrutiny. One of the dilemmas is that the effort to show that the monument is primarily secular may lead those defending the monument to water down the

367. Spain III.N.
368. Mexico V.
369. Chile IV.C.
370. Armenia VI.
371. United States (2).
372. 545 U.S. 677 (2005).
373. 545 U.S.844 (2005).
374. United States (2).

religious values that they wish to memorialize. As with the other symbol cases, the deeper question is whether notions of state neutrality and separation of church and state can be read in a way that leaves more room to accept authentic religiosity without empowering it to impose itself on others.

IX. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

One of the most sensitive issues in the relationship between religion and secular states concerns treatment of offensive expression targeting religion and religious sensitivities. The Danish cartoons controversy in 2005 helped sensitize the rest of the world to the fact that for a variety of reasons, including religiously grounded taboos on pictorial depictions of the Prophet Mohammed, Muslims have much higher sensitivities regarding offensive speech and insults concerning their religion.[375] But of course, Muslims are not alone in having sensitivities in this area.

Beginning in 1999, and in every year since, the Organization of the Islamic Conference ("OIC") has drafted and secured passage of resolutions addressing "defamation of religion" in United Nations settings. These resolutions were first passed in the U.N. Human Rights Commission,[376] and subsequently in the U.N. Human Rights Council.[377] In large part because of the visibility given the issue by the Danish cartoons controversy, the General Assembly began considering the issue in, and has passed a resolution entitled "Combating Defamation of Religions" in each year since[378] – albeit with declining majorities in most years.[379]

Broad defamation laws, particularly criminal ones, have come under extreme criticism in recent years from a very broad array of U.N. and regional human rights leaders. For example, in December 2008, the four freedom of expression rapporteurs of the U.N., the Organization for Security and Cooperation in Europe (OSCE), the Organization of the American States (OAS), and the African Commission on Human and Peoples' Rights (ACHPR) issued a joint statement urging international organizations to stop supporting the idea of defamation of religions because "it does not accord with international standards accepted by pluralistic and free societies. . . Restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[380]

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375. For an excellent analysis of this controversy, see Jytte Klausen, *The Cartoons That Shook theWorld* (New Haven: Yale University Press, 2009).

376. CHR Res 1999.82, at 280, U.N. ESCOR 55th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1999/167 (Apr. 30, 1999) (passed without a vote); CHR Res. 2000/84 at 336, U.N. ESCOR, 56th Sess. Supp. No. 3, U.N. Doc. E/CN.4/2000/167 (April 26, 2000) (passed without a voted); CHR Res. 2001/4, at 47, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2001/167 (April 18, 2001) (28 in favor, 15 opposed, 9 abstentions); CHR Res. 2002/9, at 56, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2002/200 (April 15, 2002); CHR Res. 2003/4, at 34, U.N. ESCOR, 59th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2003/135 (April 14, 2003); CHR Res. 2004/6, at 28, U.N. ESCOR, 60th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2004/127 (April 13, 2004); CHR Res. 2005/3, at 21, U.N. ESCOR, 61st Sess., Supp. No. 3 (April 12, 2005).

377. U.N. Doc. A/HRC/4/L.12 (Mar. 26, 2007); U.N. Doc. A/HRC/7/L.15 (Mar. 20, 2008); U.N. Doc. A/HRC/10/L.2/Rev.1 (Mar. 26, 2009).

378. G.A. Res. 60/150, U.N. Doc. A/RES/60/150 (Dec. 16, 2005); G.A. Res. 61/164, U.N. Doc. A/RES/61/164 (Dec. 19, 2006); G.A. Res. 62/154, U.N. Doc. A/RES/62/154 (Dec. 18, 2007); G.A. Res 63/171, U.N. Doc. A/RES/63/171 (Dec. 18, 2008). In 2009, the now annual resolution was passed on December 18. The official version of the resolution has not yet been posted on the U.N. site, but it was substantially the same as the draft adopted by the General Assembly's Third Committee (which deals with social, cultural, and humanitarian matters) on October 29, 2009. G.A. Third Committee Resolution, A/C.3/64/L.27 (29 Oct. 2009). (This is the document circulated in advance of the Karamah's January 18, 2010 roundtable.)

379. In 2005, the resolution passed by a vote of 101 in favor to 53 opposed, with 20 abstaining. In 2010, the support had dropped, with 80 in favor, 61 opposed, and 42 abstentions. The combination of those opposed and abstaining now exceeds the number of those voting in favor of the religion. The decline reflects growing recognition of the problematic character of the defamation of religion resolutions.

380. Joint Declaration on Defamation of Religions and Anti-Terrorism and Anti-Extremism Legislation, Frank La Rue, UN Special Rapporteur on Freedom of Opinion and Expression, Miklos Haraszti, OSCE Representative on Freedom of the Media, Catalina Botero, OAS Special Rapporteur on Freedom of Expression,

The U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression have also made several joint declarations, noting that the abuse of restrictive defamation and libel laws had reached "crisis proportions in many parts of the world."[381] They recommended minimum standards that should be followed in the development of defamation laws, including: (a) the repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards; (b) no one should be liable under defamation law for the expression of an opinion; and (c) civil sanctions for defamation should not be so heavy as to exert a chilling effect on freedom of expression, and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant. These recommendations have been repeated and endorsed by the U.N. High Commissioner for Human Rights.[382]

These recommendations have been echoed by an exhaustive report on the relationship between freedom of expression and freedom of religion in the 47 countries of the Council of Europe. The Council of Europe's Commission for Democracy Through Law ("Venice Commission") recommended that "it is neither necessary nor desirable to create an offense of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component"[383] It recommended that religious hatred offenses (1) require incitement to religious hatred and (2) introduce an explicit requirement of intention or recklessness."[384] "In the Commission's view . . ., in a true democracy imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme. . . . It is only the publication or utterance of those ideas which are fundamentally incompatible with a democratic regime because they incite to hatred that should be prohibited."[385]

Many countries continue to have blasphemy, heresy and apostasy legislation on the books.[386] As recently as April 2010, the Indonesian Constitutional Court rejected challenges to Indonesia's blasphemy and heresy law, although the Court did recognize that the legislation in question needed reform.[387] In many countries, however, while such legislation is still extant, it is seldom applied.[388]

In Canada, in a 1990 case involving holocaust denial, the Supreme Court upheld, by a narrow majority of 4 to 3, the constitutionality of Section 319(2) of Canada's criminal code, which aimed at suppressing the willful promotion of hatred against identifiable groups.[389]

Many countries no longer have blasphemy legislation.[390] Hungary repealed this

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and Faith Pansy Tlakula, ACHPR Special Rapporteur on Freedom of Expression, page 2 (December 10, 2008), available online at http://www.osce.org/documents/rfm/2008/12/35705_en.pdf.

381. http://www.cidh.org/Relatoria/showarticle.asp?artID=142&lID=1.

382. U.N. Document A/HRC/9/25 para. 42-44.

383. European Commission for Democracy through Law, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, Council of Europe study no. 406/2006, CDL-AD(2008)026 (23 October 2008), para. 64 and 89(b).

384. European Commission for Democracy through Law, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, Council of Europe study no. 406/2006, CDL-AD(2008)026 (23 October 2008), para. 89(a).

385. European Commission for Democracy through Law, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, Council of Europe study no. 406/2006, CDL-AD(2008)026 (23 October 2008), para. 46.

386. See, e.g., Netherlands XVII; Germany XII.

387. Decision of the Indonesian Constitutional Court (No. 140/PUU-VII/2009, April 2009) (translation of key portion of decision on file with the General Rapporteurs).

388. See, e.g., Canada X.A.

389. R. v. Keegstra, [1990] 3 S.C.R. 697, 114 A.R. 81.

390. Australia XI; Czech Republic XII; Estonia X; Peru XI; Philippines XII; Sweden XII.

legislation during its communist era.[391] The United Kingdom abrogated the common law crime of blasphemy in 2008.[392] Legislation proposing repeal of provisions on blasphemy against God have been proposed in Finland, but not adopted.[393]

The trend is clearly toward replacing blasphemy legislation, which typically protects injury only to the dominant religion in a country, with hate speech legislation that covers insults to any religion, ethnic, or racial group, but is narrowly crafted to minimize adverse impacts on freedom of speech.[394] In Ireland, a constitutional provision called for sanctions against blasphemy, so the offense could not be repealed without constitutional amendment. New legislation was drafted which broadened the coverage, so the range of blasphemy protection extended beyond offenses against Judaism and Christianity, and the offense was more narrowly focused on outrageous offense.[395] A referendum has been called to consider repeal of the constitutional provision on blasphemy, which will make possible the total repeal of blasphemy legislation. Usually, such legislation is drafted with the idea of complying with Article 20(2) of the International Covenant on Civil and Political Rights, which calls for legal prohibition of "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence . . . ."

For those who have shifted from blasphemy-type legislation to hate speech, a number of techniques are evident to minimize adverse impacts on freedom of expression. Thus, the Czech legislation qualifies the notion of hate speech by stressing that the speech in question must be extreme.[396] In Canada, the fact that statements were made in the course of private conversations or that statements were made in good faith to advance an opinion on a religious subject has been recognized as a defense.[397] Also, hatred convictions can be obtained only if the state can prove beyond a reasonable doubt that the accused willfully promoted hatred against a group identifiable by colour, race, religion or ethnic origin, where the promotion of hatred means that individuals are to be "despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation."[398] Stringent standards of mens rea, requiring intent, are necessary.[399] Strict intent requirements are necessary under many hate speech provisions.[400] In Estonia, hate speech legislation imposes criminal sanctions for "activities which publicly incite to hatred, violence, or discrimination on the basis of religion, among other grounds, 'if this results in danger to the life, health or property of a person . . . .'"[401] In the Philippines, mere criticisms of other religions could not be regulated by a board charged with regulating television content.[402]

Several countries report other forms of legislation aimed at protecting religious sensitivities. Thus, a number have laws proscribing interference with or disturbance of religious ceremonies.[403] Several have laws on desecration of cemeteries or interference with funerals.[404] There is also a considerable body of legislation dealing with desecration of objects or places of worship.[405] The Czech Republic mentions genocide and apartheid, and also has offenses for expression of affection for a movement aiming at oppression of

391. Hungary XIII.

392. United Kingdom XI.

393. Finland X.

394. See, e.g., Hungary XIII; India XI; Mexico VII; Sweden XII; Switzerland IX; Uruguay XIII. Scholars have recommended reform in this direction in Latvia. Latvia XI.

395. Ireland XI.

396. Czech Republic, XII.

397. Canada X.A. Australia also recognizes special protections where there is a genuine purpose to engage in religious persuasion. Australia XI.

398. Id.

399. Id.

400. See, e.g., Finland X (dolus); Latvia XI; Netherlands XVII (offender should "know or have reason to suspect" that a statement is offensive); Uruguay XIII (offensive consequences foreseeable).

401. Estonia X.

402. Philippines XII.

403. Chile XII; Estonia X; Germany XII; Ghana XII; Japan XII; Latvia XI; Malta VII; Slovakia VIII; Sweden XII; Switzerland IX.

404. Chile XII; India XI; Israel XI; Switzerland IX.

405. Chile XII, India XI; Israel XI; Mexico VII; Switzerland IX; Ukraine XII.

human rights and for protection of human dignity.[406] Estonia recognizes an offense of compelling others to be a member of a religious association.[407]

The European Court of Human Rights has decided cases that affirm the permissibility of state action designed to protect of religious sensibilities. In its controversial decision in *Otto-Preminger-Institut v. Austria*,[408] the court held that state actions in impounding and preventing showing of a film that offended Roman Catholic sensitivities did not violate freedom of expression rights. More recently, the European Court held that a conviction under a Turkish law punishing profanation of Islam violated freedom of expression rights when the work in question was a scholarly work,[409] but allowed a similar conviction to stand in connection with publication of a novel which made references to the imaginary nature of God, to the irrationality of Muslim beliefs and to the inability of Imams to think properly. The book also included expressions that could be considered blasphemous against Mohammed.[410] The manner of making the expression and intent to gratuitously offend may help explain the difference in outcomes.

A number of jurisdictions have statutes that impose sanctions for offense to religious sensibilities.[411] Thus, Finland has provisions for publicly defaming or desecrating what is held to be sacred by a church or religious community.[412] Latvian provisions protect atheist sensibilities as well.[413] India allows proscribing a newspaper, book or document if it promotes religious enmity, disharmony or offends religious feelings of any community.[414] Kazakhstan has a provision that punishes the provoking of religious hostility.[415]

In general, one can discern a shift toward both secularity and secularism in the trends evident in this field. On the one hand, there is a clear shift, in line with secularism, away from older blasphemy legislation. On the other hand, continued protection of hate speech against religious targets, the broadening of such legislation to cover all and not just dominant groups, and the efforts to draw the balance of such legislation more carefully to protect freedom of expression (including religious expression), all signal efforts to communicate that efforts will be made to protect the religious (and belief) sensitivities of all members of society.

X. CONCLUSION

In general, the national reports suggest that there is remarkable diversity in the configuration of religion-state relations around the world, even within regional blocs. This appears to be the natural consequence of the fact that religion, religious pluralism, and experience at the religion-state interface is embedded in the distinctive history of each country. Every country faces tensions in this area, and each has reached its own equilibrium position – a position which tends to shift over time in response to particular incidents, argumentation within the country, concerns about identity politics, and efforts to more effectively protect human rights.

If we accept that religious pluralism is a positive reality, or at least a reality that is unavoidably present in every country that we know, it seems reasonable to propose that constitutional and legal provisions ought should guarantee certain minimum standards of protection of freedom of religion or belief, in line with existing standards that most countries have accepted.

There is a tendency to speak of the idea of a "secular state" as though this term has a

406. Czech Republic XII.
407. Estonia X.
408. ECtHR, App. No. 13470/87, 20 September 1994.
409. Aydin Tatlav v. Turkey, ECtHR, App. No. 50692/99 , 2 May 2006.
410. I.A. v. Turkey, ECtHR, App. No. 42571/98 , 13 September 2005.
411. See, e.g., Netherlands XVIII; Spain III.D;Turkey XII; Ukraine XII.
412. Finland X.
413. Latvia XI.
414. India XI.
415. Kazakhstan XII.

univocal meaning. In fact, however, practice tends to be the result of historical circumstances that are different in different countries. In many cases, secular states were born in the course of rebellion against the hold that major religions had on society, and these historical experiences have shaped their view of the secular state and the need to protect it against dominant religions in the past, just as the effort to implement human rights norms has affected more recent history. This has often led to systems characterized by what we have termed secularism or *laïcité*. On the other hand, experience in other countries has taken the need to deal with existing pluralism as the starting point. This has been more likely to generate systems we have described in terms of secularity. Because of differences of historical experience, we can hardly expect logical internal coherence when we apply the notion of the secular state in different areas. States that may appear the same from the perspective of the great constitutional principles may adopt rather different interpretations of their constitutional ideas as they apply them in concrete areas. This is not necessarily a negative, but confirms the famous saying from Justice Oliver Wendell Holmes, that the life of the law has not been logic but experience.

It is worth noting, however, that sociological shifts evident around the world indicate that pluralism is growing everywhere. This may suggest that there is a need to shift focus from defending the secular state against religion to finding ways to secure peaceful coexistence of the many religions that are found in every society. Protection of freedom of religion or belief has long been a powerful tool to that end. This needs to be taken into account in dealing with pressing contemporary issues about how to handle the influx of immigrants in various parts of the world. Sensitivity to accompanying religious differences can substantially reduce tensions in this area.

There is also a need to recognize that idea of the secular state should not be thought of as an end in itself, but as an instrumental means toward creations of states that can help different worldviews – even deeply divided ones – to find peaceful ways to live together. In an often quoted phrase from the European Court of Human Rights' decision in *Serif v. Greece*,[416] although it is true "that tension is created in situations where a religious any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other . . . ." In achieving this objective, there is much to be said for reinterpreting the ideal of the secular state in terms of secularity, rather than secularism.

416. ECtHR, App. No. 38178/97, 14 December 1999), § 53.

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Religion and the Secular State in Andorra

I. Social Context

Because of its history, the reason for its existence, the principles contained in its Constitution, its culture, location, and the important role of the Catholic Church in its political structure, Andorra is a state unlike any other. It is a co-principality in which the Heads of State are the Bishop of Urgell (whose See is the city of Seu d'Urgell in Catalonia, close to the border with Andorra) and the President of the French Republic. Not until 1993 did Andorra adopt a modern Constitution. Prior to this, its political and legal framework were inherited directly from medieval times, when the co-principality was founded as the solution to a territorial dispute between the bishops of Urgell and the French Counts of Foix over the valleys of Andorra in the 13th century. It seems likely that the unusual situation wherein one of the Co-Princes is a bishop has guaranteed Andorra's survival, preventing it from being absorbed by either Spain or France. Andorra's independence is noteworthy, given that it consists of a series of valleys in the center of the Pyrenees, lying in the middle of the frontier between its two larger neighbors.

The demographic composition and culture of Andorra have remained stable and virtually unchanged for centuries, and are almost identical to those of the Catalan area of the eastern Pyrenees. Catalan is the only language spoken in the country historically and is the official language today. The civil law of Andorra is copied from the historical legal system of Catalonia, which is still based on the *ius commune* of the Lower Middle Ages: Canon Law (*Corpus iuris canonici*) and Roman Law (*Corpus iuris civilis*).

The economy of Andorra was typical of mountainous regions and relatively poor until the middle of the 20th century when tourism, commerce and winter sports transformed the situation.

Andorra shares its social organization, language, legal system, culture, and religion with its neighbouring region of Catalonia: the language spoken is Catalan, and Catholicism historically has been the only religion of the country. It should be noted that the proximity and institutional stability of the Bishop of the Seu d'Urgell has meant that his political influence has been more intense and more immediate than that of the French Co-Prince (which has undergone a number of changes since the rights of the Counts of Foix passed to the Kings of France and later to the Republic, resulting in periods where the French presence has been erratic).

Today, approximately 99.1 percent of the *de facto* population belong to the Catholic faith. There is a small minority of Protestants (0.35 percent), some Jews, and followers of other religions. The increased immigration of recent years has led to a slight rise in the number of Muslims and other religions.

II. Theoretical and Scholarly Context

Andorra has not developed any groups or currents of academic thought concerning its political status or the relation between secular authority and religion. This is principally because geographic, demographic, and historical circumstances have determined the intellectual, philosophical, or political organizations or movements in Andorra. Political parties have only emerged in the wake of the Constitution. There has, therefore, been no development of home-grown political schools or doctrines: cultural influences are divided between Catalonia (the language and south-facing orientation of the valleys has *inclined* the population of Andorra towards Catalonia), and a touch of French intellectualism.

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At the present time, the political postures are very similar to those of Spain and France, although Andorra also has the moderation that is customary in small states. This moderation is also noticeable in the approach to religion adopted by the political parties, which tend to favor religious freedom, while avoiding anticlerical or anti-Catholic postures, which would lead to a crisis of the constitutional system with troubling consequences. Spain has attempted on several occasions to convince the Bishop of Urgell to cede his sovereignty, but this option has always been viewed with apprehension by the people of Andorra and rejected.

III. CONSTITUTIONAL CONTEXT

The Principality of Andorra has had a special relationship with the Catholic Church since the 9th century. It is a well-established historical tradition that Charlemagne founded Andorra in 805 A.D. and donated the territory to the Diocese of Urgell. Although it was specified that the Principality of Andorra would be held under the jurisdiction of the Counts of Urgell, documents from different periods affirm that they exercised their sovereignty as vassals of the bishop. Ermengol VI, Count of Urgell, ceded his rights to the possession of Andorra to the bishop Pere Berenguer in 1133 A.D. From that moment, the Bishops became both spiritual and temporal lords of the valleys. However, the need to defend these possessions from the avarice of the nobility led the bishops of Urgell to seek the protection of influential families who could provide them with military support. A number of disputes arose in the 13th century between the bishops of Urgell and the Counts of Foix. After one conflict with the Count of Foix, bishop Pere de Urgio was forced to accept the famous *Pareatges* or agreements of 1278 and 1288, which established the regime of co-sovereignty. This agreement stated that the Counts of Foix and their descendants would hold Andorra as property of the Bishops of Urgell, and would render homage to the bishop. They would take equal share both in the receipt of tributes and the administration of the territory.

Seven hundred years later, the first constitution of Andorra declared in Article 43.2: "The Co-Princes, an institution which dates from the Pareatges and their historical evolution, are in their personal and exclusive right, the Bishop of Urgell and the President of the French Republic. Their powers are equal and derive from the present Constitution. Each of them swears or affirms to exercise their functions in accordance with the present Constitution."

The unusual nature of the system has probably been the key to the balance of power between Andorra's two neighbouring countries, either of which might have attempted to absorb the territory. In this context, Article 44.1 of the Andorran Constitution declares that "[t]he Co-Princes are the symbol and guarantee of the permanence and continuity of Andorra as well as of its independence and the maintenance of the spirit of parity in the traditional balanced relation with the neighbouring states. They proclaim the consent of the Andorran State to honour its international obligations in accordance with the Constitution."

The constitutional principles that establish the relations between religion and State are as follows: the principle of equality,[1] the principle of religious freedom,[2] and the obligation of the State to guarantee cooperation with the Catholic Church. Article 11 of the Constitution of Andorra guarantees political and religious freedom. It also establishes the right of individuals not to be forced to declare or make public their ideology, religion or beliefs. Article 11.2 of the Constitution establishes that the freedom to express one's religious beliefs or opinions should only be subject to the legal limitations considered necessary for the protection of public safety, order, health or morals, or the fundamental freedoms of other persons. Finally, in Article 11.3 the Constitution guarantees the Roman Catholic Church free and public exercise of its activities and the preservation of the relations of special co-operation with the State in accordance with the Andorran tradition.

1. CONSTITUTION OF ANDORRA, art. 6 (1993).
2. Id. at art. 119.

A suitable bilateral legal framework is therefore required for issues of mutual concern. This does not constitute the recognition of a series of privileges for the Catholic Church, but the regulation and ordering of their mutual relations for the public good, enabling it to fulfil its mission appropriately. Article 11.3 of the Constitution recognizes the full legal capacity within the Andorran legal system of church bodies established under Canon Law.

Article 20.2 of the Constitution establishes freedom of education and the establishment of educational centers, so that religious communities have the freedom to set up faith schools. Finally, Article 20.3 establishes the rights of parents to decide the type of moral or religious education that their children should receive in accordance with their own convictions.

The text of the Andorran Constitution establishes the principle of religious equality. However, Article 11.3 makes explicit reference to the Catholic Church and its relation of special co-operation with the State as forming part of Andorran tradition. There is no mention of any other religion as a potential alternative entity with which the State could co-operate. There is also explicit recognition of the legal status of entities created under Canon Law. This is the reason why the Catholic Church receives special treatment under some of the laws of Andorra. For example, Article 14 of the Andorran Nationality Act of 5 October 1995 recognizes the attribution of nationality to the representatives of the Co-Princes, the General Secretary of the Episcopal Co-Prince, and priests holding ecclesiastical offices in the parishes of Andorra.

There are no references to God or religion in the preamble of the Constitution as there are in many other European countries. It only refers to the origins of Andorran institutions in the "Pareatges," the 13th century treaties which established the regime of co-sovereignty shared by the descendants of the Counts of Foix and the Bishop of Urgell.

Unlike the Constitutions of Spain and France, the Carta Magna of Andorra makes no mention of the State's attitude towards religion. It does not say whether the State of Andorra considers itself to be secular or religious. However, the text of the Constitution can be interpreted as describing a secular state that regards religion as a positive value. The State therefore assumes responsibility for creating conditions under which religious equality and freedom are effective[3] and for co-operating with the Catholic Church.[4]

IV. Legal Context

There is no specific legislation on the subject of religious freedom or the treatment of religious groups. Relations with the Catholic Church are governed by the agreement between the Principality of Andorra and Holy See of March 2008. Dealings with other religions are based on custom and a tradition of tolerance, without there being any institutional relations.

Recognition of the system of co-principality involving one ecclesiastical Co-Prince as in the Constitution of Andorra called for an international treaty to establish the role of the Holy See in the election of the bishop. The Agreement between Andorra and the Holy See, which is responsible for appointing the Bishop of Urgell, was consolidated under the Constitution and forms the basis for the principles which guide the relations between the parts, but also the obligation to maintain the agreement *(pacta sunt servanda)* and the commitment to create laws to put the negotiated clauses into effect. It was also highly fitting that the historical legacy of the *Pareatges* should find expression in a bilateral international treaty because of the institutional significance of the figure of the Co-Princes in Andorra, and the importance of its recognition in international law.

Although it is not mentioned in the preamble of the agreement, the treaty asserts the specifically international character of Andorra, despite the historic resistance of the French Co-Prince to the recognition of this fact. France has attempted to make use on several occasions of the "colonial clause" in order to extend to Andorra the treaties it has signed, as established under international law for those territories whose foreign relations

3. Id. at art. 6.
4. Id. at art. 11.

are the responsibility of another state. The Episcopal Co-Prince has always opposed this claim, maintaining that no authority other than that which is shared equally by the Co-Princes can intervene in the sovereignty and independence of Andorra.

It is precisely in this area, where France maintains the total separation of Church and State and where there are no bilateral treaties between both parts, that the singular nature and independence of Andorra's international relations as expressed in the Andorran agreement are most clearly defined.

It should be noted that a group of parliamentarians challenged this Agreement on constitutional grounds shortly after it was signed. The principal motive of the challenge was that Article XI, 3 a) of the Agreement established the obligation for *all educational centers* to teach Catholicism, which was considered by this group to contravene the right of parents to choose their children's education, and their moral and religious upbringing in accordance with their convictions,[5] as well as their right to freedom in education and the creation of educational centers.[6] They also argued that the Article was in contradiction with the principle of state secularism.

On 4 September 2008, the High Tribunal declared Article XI, 3 (a) of the agreement to be constitutional, although subject to two important specifications in its interpretation. The Constitutional Tribunal considered that the teaching of Catholicism in "all" educational centers was acceptable under the constitution. However, it established two exceptions to this rule: (1) foreign centers which do not form part of the Andorran education system and which are regulated by specific international agreements, and (2) private educational centers whose character would be seriously affected were they obliged to teach Catholicism.

There are no bodies within the administration of the State that have specific responsibility for relations between the State and religious communities, nor are there any advisory bodies that are concerned with this area. There are institutional relations at the highest level (international law) with the Catholic Church. These relations were based in the past on tradition and the existence of the Episcopal Co-Prince. They are currently regulated by the agreement between the Principality of Andorra and the Holy See of 17 March 2008. To date, there have been no laws passed to develop this legislation, or agreements at a lower level. There are no agreements with other religious groups.

V. THE STATE AND RELIGIOUS AUTONOMY

There is no legislation in Andorra that regulates the civil aspects of religious life. The international agreement signed by the Principality and the Holy See in 2008 acknowledges in its preamble that the text is founded on the mutual recognition of independence and freedom of Church and State. Article IV specifically recognizes the right of the Catholic Church to carry out its apostolic mission and guarantees the free and public exercise of its activities. It specifically gives the Holy See or its designated authority the right to create, modify or suppress orders, religious congregations, and other ecclesiastical institutions and bodies, the right to communicate freely with these bodies and their congregations, and to publish and broadcast any disposition relative to the running of the Church.

The Andorran penal code considers religion to be an established right that deserves protection. Article 10 of the code states that the commission of a crime for religious reasons would constitute an aggravating circumstance, augmenting the penalty incurred by the crime itself. The latest reform of the penal code considered it unnecessary or even counter-productive to include a specific definition of the act of impeding the practice of religious activities or attendance at these acts, or the use of coercion to force people to attend them. This is because these crimes are already sufficiently protected among the crimes against the right of assembly and the crime of coercion.[7] Even so, there are still a

5. CONSTITUTION OF ANDORRA, Art. 20.3 (1993).

6. Id. at Art. 20.2.

7. Legislative decree of 17-12-2008, publication of the reformed text of the penal code, Official Bulletin of the Principality of Andorra, 24-12-2008.

number of crimes in the penal code that aim to protect the peaceful exercise of the right to religious freedom: Article 186 considers discrimination on religious grounds to be a crime, Article 357 refers to the breach of public order in a religious activity, and Article 399 refers to the crime of *hate speech*.

Regarding any possible restrictions on the activities of religious communities in the public sphere, Article IV, Section 2 of the agreement between the Holy See and the Principality of Andorra establishes a series of limits. The precept establishes that public and social manifestations of Catholicism are subject to the prevailing dispositions with regard to safety, public order and health, and the fundamental rights and responsibilities of other persons.

VI. Religion and the Autonomy of the State

The Catholic Church has a special role in the government of the country due to the fact that one of the two Co-Princes of the country is the bishop of the Diocese of Urgell, who the Holy See has the liberty to appoint freely, as stated in the preamble to the agreement between the Holy See and the Principality of Andorra of 2008. The government of Andorra must be informed of the designated appointee's name prior to his appointment (Article 2 of the agreement). The civil authorities can then take advantage of this "unofficial right of notice" to put forward any objections on political grounds. However, as the text of the Agreement states, in the case of an objection on the part of the Government of Andorra, the final decision rests entirely on the considered opinion of the Holy See.

With regard to the figure of the Episcopal Co-Prince, Article 43 of the Constitution of Andorra establishes the following: "1. In accordance with the institutional tradition of Andorra, the Co-Princes are, jointly and indivisibly, the Head of State, and they assume its highest representation. 2. The Co-Princes, an institution which dates from the Pareatges and their historical evolution, are in their personal and exclusive right, the Bishop of Urgell and the President of the French Republic. Their powers are equal and derive from the present Constitution. Each of them swears or affirms to exercise their functions in accordance with the present Constitution." Despite forming part of the hierarchy of the Catholic Church, his function in Andorra is political and must conform to the Constitution.

Together with the other Co-Prince, the Bishop of Urgell has many important functions in the government of the country: they are the symbol of the Andorran State's consent to honour its international obligations (Article 44.1 of the Constitution); they arbitrate and moderate the functioning of the public authorities and institutions, and are regularly informed of the affairs of State (Article 44.2); they call the general elections, appoint the President of the Government, dissolve parliament (the General Council), and authorize the diplomatic representatives of Andorra abroad, while foreign representatives in Andorra present their credentials to each of the Co-Princes. They also appoint the heads of other institutions of the State, approve and announce laws as stated in Article 63 of the Constitution, among other functions (Articles 45 and 46). Each Co-Prince also appoints a personal representative in Andorra, as established in Article 48 of the Constitution.

VII. Legal Regulation of Religion as a Social Phenomenon

There is no law within the unilateral legislation of Andorra that specifically regulates religion as a social phenomenon. There are no distinct categories according to religion or religious communities, nor is there a special register. Any religious group that aspires to full legal status must conform to the standards set out in the Associations Act (*Llei qualificada d'associacions*) of 29 December 2000. This law does not provide protection for the autonomy of the registered association, but rather imposes certain obligations which may constitute serious limitations on the character of the faith. For example, Article 17 of the law states that the internal organization of the association must be democratic and must include a general assembly, a board of directors and a presidency, regardless of the religion in question. There are a number of regulations among the many

areas of legislation that have a bearing on institutions and situations with religious significance. In these cases, the objective of the legislature is to provide special protection for religious elements. For example, the Personal Data Protection Act of 18 December 2003 states in Article 19 that religious beliefs should receive the consideration of "sensitive data," which can only be used with the express consent of the party concerned. In any case, the law forbids the organization of archives around people's religious beliefs.

Bilateral legislation, specifically that legislation contained in the agreement with the Holy See, establishes some regulations which offer more protection. Article 5, for example, recognizes the inviolability of Catholic places of worship, the exclusive responsibility of the ecclesiastical authorities over such places, and the State's role in collaborating with and protecting these places.

The Constitution does not recognize the right to conscientious objection, and the Constitutional Tribunal has never made a decision on this matter.

VIII. State Financial Support for Religion

There is no legal impediment under Andorran legislation that would prevent religious bodies from receiving financial support from the State. The Constitution itself, in Article 11.3, commits the State to a special degree of collaboration with the Catholic Church that does not exclude any possible form of financial support. Besides this, Article 47 of the Constitution states that an equal amount of the General Budget should be assigned to each of the Co-Princes for the functioning of their services, which they may use as they see fit.

Some of the activities and institutions of the Catholic Church receive either direct or indirect financing as specified in Article 13 of the Agreement with the Holy See: "In view of the special relationship between the Principality of Andorra and the Church, as enshrined in the Constitution of the Principality, the Church and the bodies it establishes in pursuit of its goals, and therefore not destined towards profit-making activities, shall enjoy exemption from taxation except in the case of indirect taxation as normally included in the prices of goods and services. The profitable activities of the Church will not enjoy this exemption from taxation. 2. Notwithstanding the previous section, there is exemption from indirect taxation for the publication of instructions, ordinances, pastoral communications and any other document from the relevant ecclesiastical authorities, and the acquisition of objects for acts of worship." Article 14 contains a commitment on the part of the State of Andorra to maintain its traditional secular collaboration with the Church with regard to its financial support. The annual budgets of each of the territorial divisions (known as "parishes") within the Principality include an amount for the Catholic Church as a form of direct support. The Parliament also completely subsidizes the two schools that belong to the Bishop's office: Col·legi Sant Ermengol and the Sagrada Família Center in Santa Coloma, also known as the Institut Janer, as mentioned in the Education Act (*Llei qualificada d'educació*), of 3 September 1993.

The 2006 Act, of 21 June, which modified the tax levied on the transfer of property, is an example of a form of indirect financing, as it exempts transfers in favour of the Co-Princes from this tax, as well as transfers of property and the creation and lease of rights over these items in the Church's favor.

IX. Civil Legal Effects of Religious Acts

The Principality of Andorra recognizes the legal effects of marriages celebrated in accordance with Canon Law. The secular effects of Canon Law marriages are valid from the moment of their celebration, and for their full recognition they must be introduced into the Civil Register by presenting the ecclesiastical certificate of the marriage ceremony.[8] The effects of declarations of nullity and dispensations of unconsummated marriages are recognized with full effect under secular law when they are sought under civil jurisdiction.[9] This is in contrast to the Agreement on Legal Affairs in Spain, in which

8. See Agreement with the Holy See, art. 9 (2008).
9. See id. at art. 10.

Article 6.2 requires that such performances should conform to secular law in order to have full effect. The Agreement of Andorra does not include this requirement. It therefore avoids the difficulties in interpretation which have arisen in Spain when applying for recognition of the legal effects under secular law.

X. RELIGIOUS EDUCATION OF THE YOUTH

The Constitution recognizes the right to freedom of ideas, religion and worship in Article 11.1; the right to education, which includes "the freedom of teaching and establishment of educational centers" in Article 20.2; and the rights of parents "to choose the type of education that their children should receive. The parents also have the right to moral and religious instruction for their children that is in accordance with their own convictions." The Education Act of 3 September 1993 also recognizes the rights of the parents to choose freely among the educational systems established in Andorra, and the rights of children to receive religious and moral instruction in accordance with their convictions.[10]

With regard to the freedom to establish educational centers, the Constitutional Tribunal recognizes the right of each center to define its own program.[11]

With regard to the teaching of religion, Article 19 of the law regulating the Andorran education system specifically states, "Educational centers must offer courses on the Catholic religion throughout the period of basic education. These courses are optional for the students." This means that religion does form part of the school curriculum, and that it must be available, although the choice is voluntary for the students.

Article 11.3 of the Agreement between the Holy See and the Principality establishes that "All education centers will guarantee the rights of the parents, in accordance with the Constitution, to moral and religious instruction for their children in accordance with their own convictions." In general, "(1) Centers must make education in the Catholic religion available during the ordinary school timetable throughout the period of basic education. This education is optional for the students. (2) Education in the Catholic religion will be given by persons appropriately authorized by the diocesan ordinary. If such persons are not priests, they should possess a document issued to this effect by the ecclesiastical authorities. (3) The ecclesiastical authorities also have responsibility for setting the content of the courses on the Catholic religion as well as proposing the textbooks and corresponding teaching materials."

Article 5 of the 1993 Education Act defines the structure of Andorran education as being plural and composed of: a) the Andorran education system and b) other centers that follow "other educational systems authorized by agreements." The Andorran education system includes both private and public education centers. Public schools may or may not be State run, depending on whether they are run by public bodies other than the State or private, linked by agreement or contract with the Government (Article 23). Private schools require authorization from the administration (Article 25).

With regard to the "education systems that differ from that of Andorra," the Education Act only stipulates the subjects which form part of the education of Andorra which must form part of the syllabus. This category of education centers includes both foreign schools and two specific educational centers: Sant Ermengol and La Sagrada Família, which were founded by the Bishop's office. Article 64 of the law regulating the Andorran education system of 1994 established the subjects that form part of "Andorran education," adding that other subjects can be included in the corresponding agreement.

The foreign education systems "that differ from that of Andorra" are regulated by agreements, specifically those of Spain and France. Both the Spanish-Andorran agreement on education of 17 May 2007, and the agreement with the Government of the French Republic on education matters of 2004 have the status of international treaties.

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10. See CONSTITUTION OF ANDORRA, art. 5 and 10 (1993).
11. Auto of the Constitutional Tribunal of 4 September 2008.

Concerning the regime which foreign centers have to abide by in relation with the teaching of the Catholic religion, Article 10 of the *Agreement on French education* says that "the centers of French education in the Principality of Andorra will have a syllabus *conforming to that of public education centers in the French Republic.* This education *is evaluated in accordance with French qualifications.* However, some specific subjects agreed by the Joint Committee *may also be evaluated by Andorran qualifications."* Only Article 11 establishes a series of clarifications with respect to the obligatory teaching of "Catalan language, geography, history and the institutions of Andorra."

The schools in Andorra that adopt the *Spanish education system* must offer education on the Catholic religion as indicated in Article 2 of the *Agreement between the Spanish State and the Holy See on Education and Cultural Affairs of 1979*. The syllabus used in "all of these education centers" must therefore include religious education in the same conditions as the other subjects considered to be fundamental. Spanish foreign schools in Andorra would therefore apply the same solution as the one proposed for the challenged Agreement, and there would be no conflict between the content of both Agreements.

It would seem, therefore, that from the point of view of ordinary legality, Article 9.3 of the Agreement does not alter the current legal framework as those who challenged it on Constitutional grounds have alleged. The Constitutional Tribunal directly opposed the application of the Agreement between Andorra and the Holy See to educational centers that do not form part of the Andorran system. The regulations of the Agreement "cannot alter that which is foreseen in these agreements because they are instruments and refer to issues that have been agreed with a third party."

It seems, therefore, that the Constitutional Tribunal accepts as a general rule that the teaching of the Catholic Religion is to be offered not only in public centers, but also in private centers, *as long as it does not contradict their own nature*.

XI. Religious Symbols in Public Places

The citizens of Andorra are free to wear or display religious symbols, as there is no legal limitation on this issue. The issue of the use of the Islamic headscarf in public buildings or educational centers has not been raised, and no court complaints have been registered concerning the presence of crucifixes or other religious symbols. The traditional emblem of Andorra does, however, contain the representation of two elements with religious significance: the mitre and staff that belong to the Episcopal Co-Prince.[12]

The legislation on cemeteries does include some references to this topic. For example, Article 18 of the Regulations of the communal cemetery of the Parish of Ordino affirms that symbols of religion and beliefs shall be admitted on condition that they do not constitute an affront to morals and good customs, and do not cause scandal or are inappropriate in a cemetery. The council has the right, however, to insist that their size be reduced, or to impose a degree of discretion on any symbolic representation that is held to be oversized or inappropriate.[13]

XII. Freedom of Expression and Offenses against Religion

The penal code of Andorra considers in its Article 339 that "any person who aims to insult publicly, carry out acts or proffer expressions which cause serious offense to the members of a religious, national, ethnic or political group, or persons who profess a particular belief or ideology must be subject to arrest." It should be understood that the punishment for *hate speech* should also be included here. One result of the particular nature of Andorran political organization is that the penal code also considers the act of slandering, insulting or defaming the Co-Princes as a serious offense. In this case, the protection afforded the Bishop of Urgell does not derive from his religious status, but from the political position he occupies in the State for historical reasons.

12. See Law on the Use of Symbols of the State, 20 June 1996.
13. Regulations of the municipal cemetery of Ordino of 29 June 1994.

NORBERTO PADILLA

Religion and the Secular State in Argentina

I. SOCIAL CONTEXT

The population of Argentina is by and large majority Catholic. There is an important Jewish community, which is smaller in number than in influence, a growing number of Muslims due to recent African immigration, and members of almost all Christian denominations, mainly evangelical and Pentecostal. The question about religion has not been included in the census in the last four decades, so there is no other available information than that given by partial studies, mostly reliable, and the denominations, sometimes optimistic in counting their flocks. In August 2008 there was a sociological study, seriously taken into consideration, about Religion and Beliefs of the Population. According to this study, 91 percent declared they believe in God, 76 percent of whom are Catholic, 11 percent agnostic or non-believers, 9 percent Protestant, Evangelical, or Pentecostal denominations, 1.2 percent Jehovah's Witness, 0.9 percent Mormon, and 1.2 percent other religions.[1] Some time earlier, Dr. Juan Navarro Floria reported these results:

> According to surveys, of nearly 38,000,000 inhabitants in Argentina, eighty percent (80%) of the population acknowledges to be Catholic, ten percent (10%) belongs to different Protestant, Evangelical and Pentecostal churches, three percent (3%) belongs to other religions (specially the Jewish numerous community, with its significant social presence, but also Muslims and members of Afro-Brazilian groups; much less numerous, Buddhists, Hindus, Mormons and members of other religious groups); and seven percent (7%) states to be atheist or agnostic. The group evidencing the highest growth are the Evangelicals (and among them, specially Pentecostals and Neo-Pentecostals), which have grown significantly in the last twenty years, especially among the low-income urban sectors.
>
> These last years have also witnessed an increase in religious practice. According to recent surveys, over 43 percent of the population goes to church at least once a month; but 80 percent admit to being a "religious persons" (whether going to church or not). The Catholic Church is the institution receiving the highest degree of trust from the population (exceeding by far, for instance, political parties, unions, corporations or the government itself) and experiences an increasing participation from its faithful. The Jewish community decreases by assimilation and emigration, while orthodox practicing groups increase among its members. The Islamic community has gained organization and presence, and in 1998, the biggest mosque in South America was built and opened that same year in Buenos Aires.[2]

During the second half of the 20th Century, Argentina received immigrants from all over the world, most of them with Catholic roots: Spanish and Italian and less, but significant, French. Other Catholics came from Ireland where they couldn't exercise freely their religion. Also victims of persecution were a huge number of Jewish immigrants, coming from the Russian Empire (then including Poland), and later Christian, Jews and Muslims from the crumbling Ottoman Empire and also from the Balkans.

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1. Ceil-Piette-Conicet, Primera Encuesta sobre Creencias y Actitudes Religiosas en Argentina, Fortunato Mallimaci, director. Buenos Aires, agosto de 2008, http://www.calir.org.ar/docs/EstudioCONICET2008.pdf.
2. Navarro Floria, J. G. "The Relations between Church and State in Argentina," http:// www.calir. org.ar.

Immigration from Japan and China came later in the 20th century (there was even a Laotian immigration into the Province of Misiones). Due to anti-Semitic laws in Europe, there was a Jewish immigration (as of Italian Jews after 1938 Racial Laws[3]), and after both World Wars people from all parts of Central Europe sought refuge in Argentina. Since the second part of the 20th century, immigrants have been arriving from border countries (Paraguay, Uruguay, Bolivia) or others in Latin America, like Peru. Lately there is an increasing immigration from Africa, many of whom are Muslims.

II. THEORETICAL AND SCHOLARLY CONTEXT

The constitutional tradition in Argentina has seen as not contradictory the preeminence of one church, the Roman Catholic. This is due to the fact that religious freedom has been assured for everyone in the country, marked by immigration and a generally successful integration in all fields.

The intensity of the bond between the Catholic Church and the State has been discussed: a "moral union" for some; for others, just an economic arrangement as a compromise solution in a tradition of ideas and political institutions rooted in liberalism. On the one side are the ideological struggles of the past – Masonry, anticlericism in the French tradition, strict separation of Church and State in the party platforms of Socialists, and others. On the other side is a hypercritical view of the influence of liberalism as not recognizing the rights of a Church with which the State should feel identified, or accepting the imposition of Church teachings upon society. Both have questioned the system created by the Constitution, and traces of this can be seen until today.

At the present time, only marginal groups would support the idea of one dominant Church. Many will be found, instead, searching for models of granting freedom for all, autonomy and cooperation, and the proper place for religion in a secularized society.[4] Some may criticize certain patterns of a "Catholic Nation" or look for a more distant relation with the State. A clear "neutral" system is demanded by others even without need of a constitutional reform. This secularity (understood as "laicismo" in Spanish) intends to avoid the principles of one religion or values that would be imposed in any way in society or even taken into consideration.[5]

Separation, neutrality, and independence of religious rulings are often brought to the debate about the place of religion in the public sphere and religion's voice in matters of abortion, gay/lesbian rights, and other sensitive issues. The Catholic Church may be seen as a "corporation" whose power and influence should be reduced to the private beliefs of its members without the right to be heard in the public sphere. A minority well placed in the cultural arena or the media show "secularism-oriented intolerance," [6] with an aggressive stand bordering on "anti-Catholicism."[7] The non-Catholic religious institutions do not have enough public exposure to provoke such reactions, though their positions are in such cases characterized as fanatical and fundamentalist.

If religious freedom can be nominally considered a goal fully accomplished, in recent decades the struggle for "equality" has become a major claim of the non-Catholic world. Packed rallies in the center of Buenos Aires in 1999 and 2001 tried to show the

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3. Smolensky, E.M. - Vigevani Jarach, Vera: "Tanti voci, una storia – Italiani ebrei in Argentina. 1938-1948), A cura di Giovanni Iannettone. Societá editrice il Mulino, Bologna, 1997). Appalling rescue of the memoir of this late Italian, highly qualified, inmigration. Practically none of the families (in many cases scarcely practicing Jews in Italy before) have kept traces of religious identitiy.

4. In first place Pedro J. Frías, Germán Bidart Campos, Angel Centeno, and more recently Juan Navarro Floria, Roberto Bosca, María Angélica Gelli and others.

5. Petracchi, Justice Enrique, in the Supreme Court ruling "Sejean," infra n. 23.

6. Martinez Torron, J. and Navarro Valls, R., Protection of Religious Freedom in the System of the Council of Europe," in "Facilitating Freedom of Religion or Belief, a Deskjbook," m236. Martinus Nijhoff Publishers, 2004. l.

7. Join Declaration, the 18th International Jewish-Catholic Joint Committee, Buenos Aires, August 5-8, 2004: "Additionally, the Jewish community has become aware of, and deplores, the phenomenon of anti-Catholicism in all its forms, manifesting itself in society at large." http://www.vatican.va/roman_curia/pontifical_councils/chrstuni/relations-jews-docs/rc_pc_chrstuni_doc_20040708_declaration-buenos-aires_en.html.

importance of the claim, as have writings, statements, and other initiatives. Since the early 1990s drafts of laws have been put forth - in one case, with approval of the high Chamber though not followed in the low Chamber. Representative (diputada) Cinthia Hotton, a member of the Baptist Church, with the support of a group of twelve others, introduced a draft now (as of October 2009) in study by the Chamber.[8] A pre-draft by the Secretary of Worship has not yet[9] been sent to Congress, though it may be at some time. The intention is to secure full legal recognition for non-Catholic denominations, giving the possibility of ways to cooperate with the State, suppressing compulsory registration and introducing a voluntary process to assure this cooperation and the full exercise of rights by denominations that choose to register, and full religious freedom for communities that choose not to register, as well as for all individuals. The U.N. Declaration on Freedom of Religion of 25 November 1981 is included as a part of the draft law, which also suggests that the main legal basis of the relationship between the Holy See and the State is the 1966 Agreement between them.

If such hopes succeed in becoming law, equality, at least in the legal field if not necessarily sociologically, shall be satisfactorily achieved. Nevertheless, the tradition of the country is very strong, towards the importance of the Catholic majority (even if a soft link with the Church), and the universal influence of the Church. However, if in the past the Catholic Church might be considered (not without reason) too close to power and using its influence too strongly in various ways, the last decade shows a Church committed to social issues. In 2002 the Church was decisive in beginning the "Argentine Dialogue," and from then on Caritas and other Church-oriented groups have played a highly appreciated role in the social field, for example in the struggles against poverty, hunger, and drugs. In many ways the Church is considered a credible "hand" of the State in alleviating the problems of the poorest parts of population. The confrontation with the State is on educational and moral matters more than for calling attention to situations of injustice and inequity. On the other hand, both Kirchner presidencies show a government cold and distant towards the Church, perhaps as never before, though this is not always so in other levels of local governments in the provinces. For the most part ecumenical and interreligious relations have replaced the pattern of a Church intending to be the only actor in the religious scene. Even in the face of persisting misunderstandings and sensitivities, the Catholic Church and the rest of the religious world are capable of giving a unified voice and showing encouraging ways of cooperation. Observers of Argentine life are surprised with the permanent participation of Christians, Jews, and Muslims (even if the Gaza events in January 2009 and subsequently have in some ways hampered this) and the way they become, jointly, partners in relations with the State.[10] This situation is a characteristic of and of utmost importance to Argentina's religious and civic life.

III. CONSTITUTIONAL CONTEXT

A. Political History of Argentina

With the arrival of Spanish subjects over the course of three centuries, the territory of what is today Argentina received the preaching of the Gospel to the native populations and the installation of churches and convents at the same time that towns were founded. In 1621, under the Jesuits, the University of Cordoba was established, as the fourth university in all Latin America.

8. The draft follows closely previous ones prepared by CALIR and by the Secretary of Worship. Before introducing it, Rep. Hotton (of a party of the center) sent it to the Archbishop of Buenos Aires and President of the Bishops Conference. Though unofficially, Card. Bergoglio gave his support to the initiative. The consultation has been resented by some Evangelical groups.

9. As of October 2009.

10. This is remarkable in some Provinces, in the first place, Córdoba. On the national level, the Archbishop of Buenos Aires and local bishops, share with non Catholic personalities saying a word, giving support or calling for attention on moments of tension or pain. A Jewish Rabbi, Sergio Bergman, very close to Card. Bergoglio, is at this time one of the most relevant voices claiming for the rule of law and democratic respect, he is even seen with a future in politics.

After the process of Independence (1810-1816) there was an increasing number of businessmen and qualified workers who arrived mainly from Britain and Germany. The first mixed marriages took place in those days, at times not without conflict with the Church authorities. Bible missions arrived at the same time, sent by British institutions.

In 1825 Argentina and Great Britain signed the Treaty of Peace, Trade, and Friendship in which religious liberty was assured for British subjects. The Anglican and Scots Presbyterian churches were built then, and a few years later the German Protestant temple. In the Province of San Juan, the Governor was ousted and the Act of Religious Freedom burnt publicly. Some of the "caudillos" (local leaders), in their armed struggle against Buenos Aires, carried in their flags the motto "Religion or Death." In fact, Buenos Aires, under the administration of Bernardino Rivadavia, began an Ecclesiastical Reform, by suppressing convents and confiscating Church properties, under the strong influence of regalism. The governments after Independence considered themselves heirs of the system of Patronage that the Popes had recognized to the Spanish Crown as a way of favoring evangelization. The new country lacked communication with the Holy See until 1856.

In 1853, after the fall of dictator Juan Manuel de Rosas, the country obtained a lasting and foundational Constitution. One of the greatest concerns of its framers was to attract useful immigration, specially bearing in mind the British, German, Dutch and others, to whom freedom of worship should be guaranteed. The Preamble of the Constitution invites "all men of the world who wish to dwell on Argentine soil" and ends by "invoking the protection of God, source of all reason and justice."

At the same time, the framers reached a compromise solution on the relation between State and Catholic Church. Some required that it should be recognized as the State Religion and even "the only true Religion." Certainly there was no one against some kind of recognition. So Article 2 determines that the Federal Government supports the worship of the Roman Catholic Apostolic Church.

Other articles assume the Patronage, by the intervention of the State (with its three powers) in the communication and appointments made by the Holy See, thus interfering in the autonomy of the Church. Congress had the task of assuring peaceful relations with native Indians and favored their conversion to Catholicism as well as authorizing the entering of other religious congregations than those already installed. Only the President and Vice-president were required to belong to the Catholic Communion, as well as to be born in Argentine soil or to be of Argentine-soil-born parents if born abroad.[11] All other public offices were open to people without reference to their religious affiliation. Free exercise of religion is a right for "every inhabitant" (Article14), and specified, unnecessarily, in Article 20 for foreigners.

Even if these compromises did not fulfill what the Church expected in coherence with the teachings of the Popes at that time, a Franciscan friar (Mamerto Esquiú) in his "Preaching on the Constitution" when he swore allegiance in Catamarca, encouraged obedience and submission to the Supreme Law, as a guarantee of peace and freedom. This sermon was edited by the Government and was of great help for the full acceptance of the Constitution.[12]

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11. In fact, several Presidents where more or less agnostic, Socialist or Communist candidates where admitted to run for Presidency. But there was no case in which a non baptized in the Catholic Church run for the Executive. President Menem, himself a Catholic, was a son, husband and father of Muslims.

12. Padilla, N., *Ciento cincuenta años después* y GENTILE, *Por qué una ley de libertad religiosa* en AA.VV., *La libertad religiosa en la Argentina. Aportes para una legislación*, Roberto Bosca, compilador, CALIR- Konrad Adenauer Stiftung, 1ª Ed. 2003, 31 y 47, http://www.calir.og.ar

- Bianchi, *Historia de la Formación Constitucional Argentina (1810-1860)*, Lexis Nexis, 2007, 174.
- Bermudez, *La libertad religiosa en la Constitución Nacional* en *La libertad religiosa en el Derecho Argentino*, Bosca, Roberto y Navarro Floria, Juan G., compiladores, CALIR-Konrad Adenauer Stiftung, 2007, 74.
- Alberdi, *Bases y puntos de partida para la organización de la República Argentina*, Cap. XVIII, 12. Organización de la Confederación Argentina, en Besanzón, Imprenta de José Jacquin, 1858, tº I. 12.
- Alberdi, *Bases y puntos de partida para la organización de la República Argentina*, Cap. XVIII, 66. Organización de la Confederación Argentina, en Besanzón, Imprenta de José Jacquin, 1858, tº I. Secretaría de Culto, *Digesto de Derecho Eclesiástico Argentino*, ed. MRECIC, 2001, 87. *Constitución De La Nacion*

The Constitution was reformed in 1860, 1866, 1898, and 1949 but remained untouched in matter of Church and State Relations. It must be said that what happened in 1949 was more to be appreciated as a new Constitution ("Perón´s Constitution"), as social rights were incorporated, as were special clauses on family and education, and the clause referring to the conversion of native Indians was suppressed. The Holy See regretted that the occasion (the Peronist Government was then considered to be a friendly one) to eliminate the Patronage and arrive to a Concordat was missed

In 1954-55, General Perón, in his second Presidency, launched a campaign against the Church. All the official machine in this campaign was arrayed against the Catholic Church. The teaching of the Catholic religion, established in public schools in 1943, was suppressed. In one night session Congress recognized the right of remarriage for divorced couples. Congress also voted the establishment of a Constitutional Assembly to amend the Constitution by eliminating all clauses concerning the Catholic Church and assuring a "real free exercise of religion." The election for this Assembly never took place.

On 16 June 1955, after a failed coup against Perón, while police and firemen looked the other way, gangs set fire to the building of Archbishop of Buenos Aires Curia and to seven other churches. Centuries of historical records where lost forever. Many priests and lay people were imprisoned, and a bishop and a canon of the Cathedral were expelled from the country.

After the Revolution that ousted Perón, the first Agreement with the Holy See was reached: the one concerning religious attention to the Armed Forces in 1957.[13]

On 10 October 1966 an Agreement between Argentina and the Holy See was achieved after nearly eight years of fruitful conversations. Pope Paul VI described it as the first result of the Second Vatican Council in Church and State relations. In fact, these relations would be based in autonomy and cooperation: the State recognizes the jurisdiction of the Church in its internal life, and renounced to the Patronage system established in the Constitution for the appointment of bishops and the admission of bulls and prescripts emanating from the See of Rome.

A previous notification by Rome of its intention to appoint a bishop or create a diocese must be made under strict secrecy. If the Government has any "objection of a general character," conversations should take place in order to solve the problem. The Government has thirty days to make observations. The practice is that the Foreign Ministry, through the Secretary of Worship, gives its consent in the first two or three days. It is possible that, by the accord of both parties, this mechanism will be suppressed in the near future. [14]

In 1994, the Constitution was amended. Article 75.22 concerning the powers of the Congress specifies:

> To approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws. The American Declaration of the Rights and Duties of Man; the Universal, Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments;

Argentina Comentada, editor Daniel Sabsay, Coordinador Pablo L. Manili, Serrano, María Cristina, Art. 2: *Padila*, N. Art. 14. Aporte sobre Libertad de Culto. Ed. Hammurabi, 2009.

13. Padilla, N. y Navarro Floria, J. G., "Asistencia religiosa a las Fuerzas Armadas – En el 40 Aniversario del Acuerdo entre la Nación Argentina y la Santa Sede sobre jurisdicción castrense," Buenos Aires, Secretaría de Culto, 1997. Navarro Floria, Juan G. Precisiones jurídicas en torno al Obispado Castrense en Argentina., athttp://www.calir.org.ar.

14. Padilla, N., A 30 años del Acuerdo entre la Argentina y la Santa Sede, ed. Secretaría de Culto, 1996, available at http://www.calir.org.ar .

> the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House.
>
> The articles on Patronage were formally eliminated, as was the requirement for the President and Vice-president to belong to the Catholic Communion, and leaving the oath of office free, according to the religious beliefs of each person.[15]

The clause on the conversion of native Indians, which had been reestablished when the 1949 Constitution was abolished in 1956, has been replaced, with the active support of the Church, by a clause recognizing the spiritual and cultural values of the "indigenous people" (Article 75.17).

B. Constitutional Provisions and Principles Governing Religion and the State

As explained previously, the Federal Government "supports" the Catholic Church, literally "the worship." This "support" has been at times understood as merely economical (with the intervention of State in Church affairs as a counterpart). But, in the words of one of the framers, "this means for us that it is the true Religion; we wouldn't give support to a chimera." Indeed there is a preeminent status for the Catholic Church, understood also prior to 1994, as a "moral union" (in words of one of Argentina's most eminent constitutionalists, Germán Bidart Campos).

This state of affairs has coexisted with a complete freedom of religion for all individuals and denominations, many of which have had an explosive growth in recent years. In his Report on Argentina, the Special Rapporteur on Freedom of Religion and Belief of the U.N. recalled the General Remark n. 22 of 20 July 1995 of the Human Rights Committee noted that a State's recognizing one religion as a State Religion or establishing an official or traditional religion is not in contradiction with human rights, provided that no discriminatory treatment be made towards the others.[16]

Though before 1994 the Argentine State could be qualified as "confessional," the above-noted amendments reinforced its character as a secular State (laicidad positiva) with a preeminent religion, a State that appreciates religion as a whole and assuring free exercise for all. It must be noted that in the late 19th century, the State took power over civil matters as, for example, civil marriage prior to a religious one (the only form that produced legal effects), birth and death registrations, and secularized cemeteries. Religion was suppressed in all schools in regions under federal law, admitting religious instruction only after school hours by the ministers of the denominations to which the children belonged. The regulation of non-Catholic denominations started in 1945 with the requirement of registration of churches and denominations in order to be allowed to exercise religion freely. This law, still valid, is from 1978, which was enforced by the "de facto" Government. Since 1989 many drafts have been made by the Secretary of Worship, by the Congress, and by the denominations themselves, but the issue is still pending.[17]

Some additional specific points worth mentioning are as follows:

1. *Are issues of religion and religion-State relations specifically addressed in the Constitution?* Is religious freedom explicitly protected? Article 2 ("The Federal Government supports the Roman Catholic worship"; Article 14 ("All inhabitants have the right to….profess freely their worship"), same provision for foreigners (Article 20). The human rights treaties and declarations, that contain specific prescriptions on freedom of religion, are declared by Article 75 par. 22, of "constitutional hierarchy."

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15. Only one, Vice-president Carlos Alvarez (1999) chose the oath by "God and Fatherland" instead of "by God, Fatherland, and on the Holy Gospel," the traditional formula.

16. Informe del Relator Especial de las Naciones Unidas, en La Libertad Religiosa en la Argentina, Compilador Roberto Bosca, CALIR-KAS, 2003, available at http://www.calir.org.ar.

17. Padilla, N. Ley de Libertad Religiosa, "la historia que he vivido," 2009, at http://www.calir.org.ar.

2. *Is there a preferred or privileged religion or group of religions?* According to Article 2, the Roman Catholic Church is preeminent or preferred in relation with all other creeds (see above).
3. *Is there any reference to religion as foundation or source of State law?* The Agreement between the Holy See and the Argentine Republic, October 10th, 1966, is the principal source, after the Constitution, of State law in what concerns the relation between the State and the Roman Catholic Church. According to Article 75, par. 22, the concordats with the Holy See, as well as other treaties, have a superior rank over internal legislation. There are many laws, decrees and other rules concerning religion both in national and provincial legislation.[18] As an example, the Civil Code, Article 33 can be mentioned: the Catholic Church is recognized as a "artificial person of public law" (before being amended in 1968: "person of necessary existence") as the State national and provincial. Many other provisions in the same Code, and in the Penal Code and others, have special provisions on religion or religious ministers. Specifically, there is a law n. 24.483 for Institutes of Religious Consecrated Life, voted in 1992. Their canonical statutes are recognized after registration (voluntary) in a Registry at the Secretary of Worship. Until then, and with the exception of the pre-constitutional orders – Franciscan, Dominicans, Jesuits, of Mercy – were not given any specific legal status different to any civil association. As to non-Catholic denominations, law n. 21.745 and the decree 2.037/1979 makes it compulsory to register at the National Registry of Worships (Cultos) as a condition for their activity.
4. *Is there mention of State cooperation with or separation from religion?* The Agreement with the Holy See is based on the principles of autonomy and cooperation. The Constitution of the Province of Córdoba specifically addresses the issue in Article 6, after assuring freedom of religion: "The Province of Córdoba, according to its cultural tradition, recognizes and guarantees the Roman Catholic Church the free exercise of its worship. Relations between the Church and the State are regulated by the principles of autonomy and cooperation. At the same time, the Agreement guarantees the free and public exercise to all denominations, without any restrictions other than those imposed by moral, good customs, tradition, and public order."

IV. LEGAL CONTEXT

A. Legislation

1. *Financial capacity and support*. Article 33 of the Civil Code, considers the Catholic Church an "artificial person of public law." Other religious groups are persons of private law.

As a consequence of the "support" provided to the Catholic Church there are laws that a) benefit Diocesan seminaries and five institutes of consecrated life, b) grant an allowance to residential and auxiliary bishops, and c) grant an allowance to the parishes located in border areas or those enduring utmost economic hardship. Such economic contribution, however, is minimal: in 2009, it totaled (adding all mentioned allowances and other minor ones) some five million dollars (USD 5.000.000), an insignificant portion of the national budget. Even if this support is small and the fact that the State supports economically one creed, it is deemed necessary for the economic life of the Church until better ways of support are found, either by tax deductions, by plans launched by the Church itself ("Plan Compartir" – Sharing Plan), or through the contribution of the parishioners.

2. *Tax exemptions*. Most tax exemptions benefit all religious faiths. Argentina being a federal country, there are national, provincial and municipal taxes, each of which follows

18. Digesto De Derecho Eclesiastico, dirigido por Juan G. Navarro Floria, coord. Octavio Lo Prete y Luis M, de Ruschi, Secretaría de Culto 2001. A more recent collection of all the national legislation in La libertad religiosa en el Derecho Argentino, CALIR-KAS, 2007, available at http://www.calir.org.ar.

its own regime. Yet the common denominator is the tax exemption applied to the Catholic Church as well as to all remaining religious creeds on the same terms.

The most significant exemption regarding income tax is the one applied to religious institutions. It exempts churches and other religious institutions from paying taxes on incomes of any kind and also on their property. To profit this exemption, a special statement must be obtained from the tax administration authority (*Administración Federal de Ingresos Públicos*), for each subject, except in the case of the Catholic institutes of consecrated life, where exemption is automatic.

Furthermore, as regards to import and export customs duties, broad exemptions are foreseen for religious institutions. Special regulations favor the coming to Argentina of ministers and personnel of all denominations. This is specifically included in the Agreement with the Holy See for Institutes of Consecrated Life called by the bishops.

3. *Discrimination*. The draft of what is now law n. 23.598 was presented by the then Senator Fernando de la Rúa in 1988, as a response to attacks on cemeteries and premises of the Jewish Community. The penalties for all discriminatory actions due to religious or racial reasons, or criminal offenses based on those reasons, have their penalties increased, and the Courts have based on them a few cases of racial discrimination.

4. *Spiritual attention to the Armed Forces, prisons and hospitals.* Argentine law establishes religious attention for the Armed Forces, Police Forces and others, for Catholic members, by the 1957 Agreement on the subject (above mentioned). For five years now it has been said to be the will of the different governments (first of President Néstor Kirchner, now of President Mrs. Cristina Fernández de Kirchner) to modify the legislation in order to favor religious pluralism.

Hospitals and prisons also have religious assistance for the inmates, with Catholic chaplains. Non-Catholic ministers are called according to the wishes of those interned. A matter of interest is the existence in the Province of Buenos Aires of "Evangelical pavilions" in prisons, where the internal life of the inmates is regulated by the pastors. [19] A Jewish synagogue was opened recently at one of the biggest prison buildings in Buenos Aires.

5. *Religious festivities*. Recognized as national holidays are Holy Fridays, Immaculate Conception (December 8), and Christmas. Holy Thursday is an optional non-work day. Laws n. 24.571 (1995) declared non-work days for all Jewish inhabitants for New Year – Rosh Hashanah (2 days) and Yom Kippur (1 day). In 2005, a law extended this to the 4 days of Pesaj. Law n. 24.757 (1996) declared non-work days for the End of Fasting (Id al Fitr). Law n. 25.151 (1999) establishes that those who do not work due to the religious festivities shall receive their pay and all other benefits. In schools and universities teachers and students are allowed to be absent (for example from an examination) on those days. This is also the case for the Seventh-day Adventists.

B. Case Law

As to case law related to religion, the Supreme Court, after 1983, has passed some remarkable sentences. We will focus on these, omitting those prior to this period.

1. *Conscientious objection*. The Supreme Court ruled that a young man called to what was then compulsory military service was exempted from having to use weapons because he claimed to be a Catholic and, therefore, asserted that to take arms is against the Fifth Commandment. It must be noted that the Court did not determine Catholic Church teachings about war and military service but considered the conscience demands of the claimant. The Court limited this to "times of peace" and was of the opinion that the soldier should have to serve in other ways.[20] Previously, during the military regime,

19. "El Cristo de los presos," por Alejandro Seselovsky, Pagina 12, Sociedad, 14.3.2004, quoted in Padilla, Norberto. "El derecho de practicar la religión," Martín Sánchez, Isidoro y Navarro Floria, Juan G. (Coords.): *La libertad religiosa en España y Argentina*, Fundación Universitaria Española (2006) Madrid, 38/64.

20. C.S.J.N. Fallos 312:496 (1989). 9. Portillo, Alfredo. See also: Padilla, Norberto, Comunicación "La obligación de armarse en defensa de la Patria y de esta Constitución y la objeción de conciencia," en Coloquio

conscientious objection had not been allowed to Jehovah Witnesses because this creed had been suppressed in 1976.

In another case, the problem was a sick Jehovah's Witness, who, according to the hospital, needed a blood transfusion. Members of the Court expressed the opinion that no coercion should be exercised on the person, who was free to accept or not accept a medical treatment. The right of privacy and of religious freedom was enhanced. By then the man was no more in hospital, and the majority of the Court did not share the position of the others who believed that the right of refusal of transfusion should be an established position for any other case to rise in the future. The majority understood that each time the problem would arise, a decision should be taken as to the proper result.[21]

The Jehovah's Witness Association in the southern Province of Neuquén alleged that the educational regulations on patriotic symbols could violate their religious freedom. The Court considered there was not a "case, but Justice Elena Highton expressed an in-depth opinion on the subjects of religious freedom and conscientious objection. [22]

2. *Respect of Religious Feelings.* The Supreme Court accepted for the first time the full operative force of international treaties in a case in which a claimant (a professor of Constitutional Law) demanded to exercise the "Right of Reply" recognized by the American Convention on Human Rights (Article 14) after a television program in which the Holy Virgin was insulted. For the divided Court, "the defense of religious feelings, in this case, by the exercise of the Right of Reply, is a part of the pluralistic system that in the religious matter our Constitution adopted in Article 14. It is clear that when persons, symbols or dogmas that nourish the faith of people by slander, mockery or ridiculous presentation, these can feel morally under coaction in the free and public exercise of their religion, due to the understandable fear of been the object of ridicule that can be caused, for reasonable fear of being the object of ridicule, due to the extraordinary spreading by the current power of mass media."[23]

3. *Marriage.* In a controversial decision, the Court considered the Senate's analysis of a reform of the Civil Code in which the establishment of divorce with the right of remarriage was admitted. The Court declared that the previous practice of divorce without dissolution of bonds of marriage had became unconstitutional. One of the arguments was that indissoluble matrimony is a Catholic Church teaching, and that its imposition on those who do not adhere to that creed violates freedom of religion. In consequence, the Civil Registry Office was forced to marry the claimant.[24] A short time later, the Senate approved the bill.

In a further ruling, the Supreme Court rejected the claim of a couple wishing to get married with a clause of indissoluability. Only one of the Justices, Dr. Antonio Boggiano, deemed that option possible due to the protection of religious freedom and the right of privacy. [25]

4. *Prescription of Religious Oath.* The Chamber of Appeals of Tucumán declared that a clause in the Constitution of the Province was not in accordance with the provision of the American Convention on Human Rights that forbids discrimination on the basis of religion. The Constitution established an oath formula for the Governor taking office "by the Holy Gospel," and one of the candidates (to this day in office) objected because he professes the Jewish creed. [26]

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de Derecho Eclesiástico del Estado, Facultad de Ciencias Jurídicas y Sociales, Universidad Católica de Valparaíso, 29 y 30 de agosto de 2002. Navarro Floria, Juan G. El derecho a la objeción de conciencia, Buenos Aires, 2004.

21. C.S.J.N. Fallos 6.4.1993. Bahamondez, Marcelo s/ medida cautelar.

22. C.S.J.N. A. 639. XXXV. "Asociación de Testigos de Jehová c/ Consejo Provincial de Educación del Neuquén s/ acción de inconstitucionalidad."

23. CSJN, 7.7.1992 JA 1992, III, 194, (Ekmedjian vs. Sofovich).

24.C.S.J.N., *Sejean v. Zacks de Sejean* (1986), Fallos 308:2268.

25. C.S.J.N. 5.2.1998, E.D. 176-431 (Sisto y Franzini).

26. Cámara Contencioso Administrativo, Tucumán, Sala I, 2.5.2003, "Alperovich, José J. c/ Pcia. de Tucumán," La ley 2003-E-490, con nota de Germán J. Bidart Campos.

V. THE STATE AND RELIGIOUS AUTONOMY

In Argentina´s State structure there has always been an office for religious matters. Until 1898 it was the Ministry of Justice, Worship (Culto), and Public Education. After that, Worship became part of the Ministry of Foreign Affairs, with the addition "de Culto" (Worship). Today this is the Ministerio de Relaciones Exteriores, Comercio Internacional y Culto (Foreign Affairs, International Trade and Worship Office). It must be said that the term "Culto" is wrongly translated sometimes as "Cult," which is misleading. The proper terms would be Worship or Religious Affairs. The rank has been General Director, Under Secretary, or State Secretary, with the functional rank of Ambassador. At present there are a State Secretary and an Under Secretary who internally divide protocol duties. The Secretary of Worship has special intervention in relation with the Holy See (coordinated often with other areas in the Ministry). [27] There are two General Directors, one for Catholic Worship and one for the National Registry of Denominations (Cultos). The first has as a primary task to be the link between the State and the Roman Catholic Church in Argentina, having in charge the Registry of Institutes of Consecrated Life and administering the means of support due to the Church by the laws above mentioned. The second Director is the link between the State and the denominations different than the Catholic Church.

During the presidency of Fernando de la Rúa, when the author of this Report was State Secretary, an Honorary Advisor Council for Religious Freedom was created, including representatives from Catholicism, Greek Orthodoxy, Evangelical churches, Judaism, and Islam, acting exclusively in their private character, not in representation of their organizations. The first task was to prepare the draft of the Law on Religious Freedom. After the end of this Government (December 2001), the Council was no more part of the structure of the office of the State Secretary. The Council members, with the author of the Report, the Chief of Cabinet (Dr. Navarro Floria) and the Council Secretary (Dr. Lo Prete) created CALIR (the Argentina Council for Religious Freedom),[28] maintaining fluid relations with the Secretaría de Culto since 2003.

As to the evaluation of the place of the Secretary of Worship in terms of the protection of freedom of religion or belief of individuals and communities, it has struggled diligently at least since 1989 for a new regulation on religious freedom (only for some short periods was this not so). The Secretary tries its best to cooperate with all churches and organizations; in many ways this was and is a forum where the leaders of the religious world are gathered or are invited to meet with the authorities. The Secretary of Worship is generally respected and appreciated as a toiler in the remarkable religious coexistence in Argentina. This is one of the ways that the State shows its appreciation of religion and diversity as a value in society.

As for discrimination on religious grounds (and for discrimination on other grounds), the office in charge is the Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo (INADI), highly ideologized and focused on the "moral agenda" (gender, gay/lesbian rights, sexual and reproductive rights), encouraging ways of "religious diversity." In a few Provinces and in the Autonomous City of Buenos Aires there are local offices against discrimination and specific offices for the relation with religious organizations.

VI. RELIGION AND THE AUTONOMY OF THE STATE

Law 21.745 (1978) that created the "Registro Nacional de Cultos," provides the following powers to the State authority: to accept or deny the registration of religious organizations as a condition to any exercise of their activities. The denial of registration can be based on the failure to accomplishment the registration requirements, and the revocation of authorization can be due to the non-fulfillment of duties imposed by the law, or verification that the principles and purposes that gave birth to the organization and

27. Available at http://www.culto.gov.ar/.
28. Available at http://www.calir.org.ar/.

subsequent approval are hazardous to public order, national security, or morals and public decency. In such cases, cancellation implies the prohibition to act in any part of the country and the loss of juridical law status (obtained at the Registry Office for civil organizations). Decree 2037/1979 provides regulation details of the law.

The provisions of the law and the decree are strongly contested as unconstitutional because they condition the exercise of religious liberty to a State authorization. The Secretary of Worship generally provides broad criteria for access to registration, the same as to cancellation, if there are any in recent years.

The law does not include the possibility of filing appeal against what the Authority resolves, but based on the Administrative Proceeding Act, this can be done. There are rarely problems reaching the Courts in these matters. At the present time, the Japanese "Nichiren Shoushu" is still fighting the annulment of the resolution that in 1998 ordered the cancellation of its registration. It must be said that in 2000 a Court ordered their premises be opened as a provisory measure, and so it is at the present time.

There are no other laws interfering with the free choice of individuals in faith matters.

As to religious peaceful coexistence, the State and religious groups and leaders are frequently side by side in defense of human rights, the fight against poverty, and the quality of education and moral values. [29]

VII. Legal Regulation of Religion as a Social Phenomenon

Legal provisions in Argentina generally take into consideration particularities of religious affiliation.

Cemeteries are owned by religious groups (Jewish, Muslim), by private enterprises, or by the local States where the various religious rites can be performed (being generally one Catholic chapel).

As laws punish "ill treatment" or cruelty towards animals, there has been administrative questioning about animal slaughtering (in Umbanda rites), but if there is no cruel treatment, it is not forbidden.

There are no records of a person's religious affiliation or its consequences under State law.

Conscientious objection is admitted in various cases: military service (in theory, because there is only a voluntary service), for education, health agents (about the teaching of "sexual and reproductive rights" or provision of birth control methods). An "institutional conscientious objection" is admitted for faith-based schools or health institutions.

The Catholic Church can own social communication media, though non-Catholic denominations as such may not (even if there are many under other associational ways to accomplish these ends). A recent and very polemic law on the matter has, surprisingly, left this issue unmodified, despite requests by the affected.[30]

VIII. Civil Legal Effects of Religious Acts

Enforcing the 1966 Agreement, the Supreme Court understood that the Catholic Church has full power to determine under canonical law what falls under its provisions for the full exercise of its autonomy. Example: what Canon Law considers a church or liturgical garments and vessels of liturgical use cannot be subject to coerced execution. This is so according to case law but is covered by no specific legislative provisions. The drafts on Religious Freedom look to assure all denominations the same right. Also, human rights (to marry and to work) cannot be invoked by a priest ousted from his parish for getting married against Church discipline. For the Court, Church Law is free to establish

29. Recently, the Town Council of Río Cuarto (Province of Córdoba) created a Registry for Civil Unions (admissible for same sex partners). The Catholic bishop and the evangelic pastors issued a joint statement against the initiative.

30. CALIR, Comunicado 09 de octubre de 2009, available at http://www.calir.org.ar/comu09102009.htm.

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the requirements for exercising ministry (a principle that the lower Courts have recognized for other creeds in similar situations).

Religious marriage has no civil effects, neither have Church Courts decisions. A lower Court did not admit as a requisite for declaring divorce what had been accorded by a couple's going first to a Rabbinical Court prescribed by Jewish laws.

Secular courts can not enforce the decisions of religious or hierarchical bodies.

As to property, the Civil Code refers to Canon Law where in some cases the disposal of Church property refers to the previous authorization by an ecclesiastical authority.

IX. Religious Education of the Youth

Many denominations (foremost the Catholic Church) have schools, and their faith is a specific subject in school plans. Other privately owned schools include religion as an optional subject, some have interdenominational teaching. The Catholic Church as well as Protestant and Jewish communities own Universities that grant titles recognized by the State. A National Council of Superior Education (CONEAU) supervises academic requirements not interfering in confessional particularities of the universities that have that character.

State education does not include any kind of religious or interdenominational teaching. As said above, there is a deeply rooted tradition of "secular school / *escuela laica*" since law 1.420, which marked a defeat for the Catholic Church, or so it was intended by some of its promoters. It was a way, however, to integrate immigrant children coming from all over the world.

In 1943, under the military regime with strong right-wing Catholic influence, Catholic religious teaching was introduced in all public schools, providing an alternative teaching on moral and ethics for those who refused it. In 1954 the Government of President Perón eliminated religion from school, and it has not been reestablished. Some provinces have Religion in their curricula, for example the Provinces of Salta, La Pampa and Santiago del Estero. The Constitution of the Province of Córdoba grants the right of parents to have religious teaching (whether Catholic or not) for their children in public schools, but this clause has not been enforced. The Constitution of the Province of Buenos Aires requests that education follow the principles of Christian morality, respectful of freedom of conscience. The Constitution of the Autonomous City of Buenos Aires specifies that education shall be "*secular – laica*."

The Federal Law of Education n. 26.206 (2006) omits referring to a transcendent dimension of education. The previous law did so and recognized the right of subjects of education to be "respected in their freedom of conscience, their religious, moral and political beliefs."

X. Religious Symbols in Public Places

People residing in Argentina can freely use the religious symbols of their choice. There are no specific regulations on religious symbols in public facilities. Frequently icons of the Holy Virgin have been and are put in place by authorities, trade unions, workers, and employees in public offices, railway and bus stations, airports, police precincts, prisons, and even banks. The Crucifix is usually displayed in courtrooms. In other public offices, it generally depends of the preferences of each officer or Superintendency office. [31]

31. Only recently, the Town Council of the Capital of the Province of La Pampa (City of Santa Rosa) voted that the image of the Virgin of Luján, Patron of Argentina, be removed. The local Bishop, deeply regretting this, respectfully demanded to go to the Town Hall and take the image to be worshiped in some other place. But this is quite unusual and due more to local problems than to a more rational decision. In March, 2002, by the initiative of a group of people, an image of the Virgin Mary was installed at the entry hall of the Palace of Justice (seat of the Supreme Courts and other inferior ones). The Argentine Association for Civil Rights brought an action of protection, which was accepted at first instance. Three of the judges of the Court accepted the action, alluding that the image placed "does not fit in" with the scope of Art. 2 of the Constitution. One of the Justices said that the image compromised the Judiciary Power with a religion "shared by just a part of those who make it up and of the court patrons who go to it." The first instance ruling made way for the action and ordered

XI. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

The Constitution forbids the imposing of "previous censorship" upon the press, and for the Supreme Court this is virtually an "absolute" principle. But responsibilities (civil and criminal) may follow in cases of harmful behavior. "Blasphemy" is not a criminal offense. On exercise of the "Right of Reply," see Section V, above.

Law 23.598 against discrimination increases penalties by a third when the offense has been committed for, between other reasons, religious ones. Prison from one to three years is the punishment for those promoting organizations or making propaganda of religious or racial superiority or engaging in hate speech against persons or groups for racial or religious reasons.

As for defamation or slander of religious beliefs, the Courts of the Autonomous City of Buenos Aires took action when an art exhibition was displayed at a City-owned gallery, in which the contents were highly offensive to Catholic feelings. In first instance, a Catholic association obtained an order of closure, revoked by the higher Court. [32]

XII. CLOSING REMARKS

The Argentine system shows a Constitution which has a theist conception, as God is invoked in the Preamble. A preference is recognized to one Church, assuring at the same time freedom for all. The plurality and diversity of the society is recognized and esteemed. The non-discrimination principle is present in all the legal system. [33]

How equality can be obtained, and what kind of equality, remain largely open questions: Freedom "against" the majority Church? Freedom for the same privileges that awake criticism when exercised by the majority Church? Equality as a minimum that could easily lead to the displacement of religion and leaving national tradition and deep feelings of the people aside?

The Supreme Court has a standard, useful for this matter also: Equality in equal circumstances. [34]

The denominations and the State are faced with the challenge of finding the best way to govern the particularities of Argentina's religious world. It is understood that the only way of arriving to good results is, if there is not a risk of a religious confrontation, and if all concerned make as a priority trust, generosity, care for the common good, desire for

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the removal, due to the affection of religious freedom of those who did not share the same religious faith. The Supreme Court, by resolution of the majority (three votes to five) upheld the decision and ordered the image removed, alleging that there had been no administrative act providing for its placement. The Federal Administrative Chamber revoked the decision of the lower court. Leaving apart procedural issues, the principles upheld were as follows:

- From a single public manifestation of a religious belief, even though it may emanate from one of the powers of the State, one cannot infer a presumption of discriminatory treatment or of absence of impartiality with respect to those who do not profess it.
- The presence of a Catholic religious symbol is not manifestly illegitimate in a public building, but is rather an option of those who exercise the power of superintendency. Neither imposition nor exclusion are preordained.
- Devotion to the Virgin Mary is a manifestation of faith that is very much a part of the people in general, even beyond those practicing the Catholic religion, as an expression of popular religiosity.

Those who alleged protection did not concretely mention that an act of discrimination or inequality had been committed, understood, according to the doctrine of the Court, as arbitrary or answering to "a purpose of hostility against a particular person or group of persons, nor does it amount to improper favor or personal or group privilege." Specifically, there was not even an attempt to prove that someone's free and egalitarian access to Justice had been restricted because of the fact that the image was placed.

32. It is significant that Protestant, Jewish and Islamic organizations stood by the Archbishop of Buenos Aires when ordering a day of fasting and prayer in reparation of the offense caused by the exhibition.

33. Gelli, M.A., "Espacio púlico y religión en la Constitución Argentina. Laicismo y laicidad en una sociedad plural." La Ley, Suplemento Especial 70 Aniversario, noviembre, 2005. Navarro Floria, J. G. Derecho Eclesiástico y libertad religiosa en la República Argentina, en "Estado, Derecho y Religión en América Latina," 53, Marcial Pons, 2009.

34. The issue was masterfully considered by Juan G. Navarro Floria in his conference address, "Los desafíos de la libertad religiosa," at the International Congress held by CALIR in March, 2008. See also in the same Congress: Gentile, Jorge H. Libertad religiosa en la Argentina, available at http://www.calir.org.ar/congreso/documentos/ GENTILE.pdf.

giving religion its place in today's society as source of the highest spiritual, human and cultural values, a guarantor of peace, freedom, and justice.

HRANUSH SHAVARSH KHACHATRYAN

Religion and the Secular State in Armenia

I. INTRODUCTION

The Armenian people are among the most ancient Christians in the world. Therefore, the history of Armenia has seen numerous wars waged for the sake of Christianity. The Armenian people have been proud of the conflicts that preserved the Christian identity of Armenians. Armenians view Vardan Mamikonyan, the leader of these combats, as a national hero and a symbol of their Christian identity. Armenia's Christian identity has continued to this day. This paper will examine this identity and how it has led to a special relationship between religion and the State during recent Armenian history.

For Armenians, Christianity was not only a religious option, but a cultural option as well. Being a part of the Christian world makes up one of the main cornerstones of Armenian historiography. Even fundamental religious institutions such as the Armenian Apostolic Church have attached particular significance to the cultural essence of Christianity. The Armenian Church sanctified not the miracle-workers, but the martyrs. The main virtue and merit of a Christian was his readiness to sacrifice himself for Christianity. The church always encouraged this phenomenon. This perception dominates other intellectual and cultural choices made by the Armenian people.

II. HISTORICAL & CULTURAL CONTEXT

Many academics view Christianity as a main component of Armenia's identity. The Armenian Constitution reflects the importance of the church in Armenia. Article 8.1 reads: "The church shall be separate from the State in the Republic of Armenia. The Republic of Armenia recognizes the exclusive historical mission of the Armenian Apostolic Holy Church as a national church, in the spiritual life, development of the national culture and preservation of the national identity of the people of Armenia."

Undoubtedly, the Armenian Apostolic Church has played an essential role in the historical and cultural orientation of Armenian people and impacted the nation's cultural and political conduct. In the 5th and 6th centuries, Armenians created their alphabet in order to provide an Armenian translation of the Bible. This history has provided Armenia with enormous sources for rendering Armenian history, as well as having a full picture of other countries' historical scene.

With over 1700 years of Christian history, Christianity has become a part of Armenia's ethnic identity rather than religious identification. The formal atheistic heritage of Soviet society has shifted the religious culture of Armenia. At present, many Armenians identify their ethnicity by their religious affiliation. Armenian society recognizes that different ethnicities have different religions. However, many Armenians disapprove of deviations from the general norm. This mentality is typical of Armenian authorities, although the legal sphere has tended to secure religious freedoms.

Although its constitution makes Armenia a secular country and separates church and State, the Armenian Apostolic Church is still perceived as a State church. However, no church or religious establishment, including the Armenian Apostolic Church, receives financial allocations from the state budget. Additionally, no religious activity is officially financed or receives tax exemptions. Most Armenians approve of this concept.

Defining "State religion" remains difficult despite this expression being widely used. The similarity between the Armenian words "state" and "national" likely make it difficult to define "State religion." Because the Armenian word for national can also mean

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"ethnic," many Armenians perceive the Armenian Apostolic Church as ethnic church, and "national church" as "State church." Thus, the Armenian Apostolic Church, or an ethnic-national church can also be perceived as a State church.

Armenian public opinion shuns religious proselytism and missionary practice despite granting each other a freedom of conscience. The Armenian Apostolic Church never proselytized. Armenians tend to view proselytizing by other religious organizations as political and a danger to the ethnic unity of Armenians. The media also promotes this view. Armenians see religious diversity as a direct threat to their ethnic unity. The Armenian Apostolic Church also safeguards this ethnic identity.

III. Religious Diversity in Armenia

According to the last official census in 1991, the Armenian population was 3.2 million with ethnic minorities making up 2.2 percent. The official census did not identify religious affiliation, so official religious statistics of the country remain unknown. However, Armenians identify religion with nationality, so the nationality provided on the census will likely match with individual's religious affiliation.

Experts believe that the main religious minorities follow their own ethnic religious doctrines. From this, one may determine that the number of ethnic religion practitioners likely corresponds to the number of those who identify with a specific ethnicity. Table 1 represents the ethnic composition of the population of Armenia.

Table 1. Ethnic Composition of Armenia, 1991

Overall	Armenians	Assyrians	Yezidis	Greeks	Russians	Ukrainians	Kurds	Others
3,213,011	3,145,354	3409	40,620	1176	14,660	1633	1519	464

However, the number of ethnic groups does not necessarily correspond to the number of followers of each ethnic religion. Furthermore, the number of followers of a religious direction and the religious picture on ethnic minorities slightly diverge. The best example is that of ethnic Russians, whose ethnic group together with Presbyterians comprises the larger group "Old Ritualists." They are also known as Molokans and perceived as "sect followers" in Russian society. Among Molokans and ethnic Russians are also ethnic Mordvins. Mordvins are perceived as Russians due to their Molokan affiliation. Eighty percent of Molokan respondents defined their ethnicity as Russian and their religion as Christian, Molokan, Hopper, Constant, or Maksimist. One percent of Old Ritualists defined their religion as Christianity.

Some observers of the Orthodox Church are concerned that the church list encompasses members of other ethnic groups such as Assyrians, Ukrainians, and Byelorussians. One of the Russian Orthodox churches is located in the Assyrian village Dmitrovo/Ararat marz. Assyrians and Armenians make up a majority of the members. The number of ethnic Russians never seems to correspond with the number of Russian Orthodox religion followers. In Armenia, the Russian Orthodox Church is represented by four registered religious organizations. Due to their unorthodox religious convictions, Old Ritualists are not registered, though this does not hamper their religious practice.

Another ethnic minority group structure reveals incongruence between ethnicity and religious affiliation. People speaking one of the Iranian languages, Kurmangi, categorize themselves as Kurds or Ezidis, with most identifying with the latter. Both groups profess Ezidism. Muslims also make up a small percentage of Kurds. Some 40,620 Ezids and 1,519 Kurds would be listed as Ezidism followers if not for its non-traditional religious orientation. Ezidism is a religious trend with a strong focus on ethnicity, religious regulations, and cultural traditions meant to protect their ethnic purity. Throughout the last decade, this group has seen marked changes concerning the religious association of many inside this group. "New believers," as they are called in Armenia, sometimes do not identify with a particular affiliation. Sometimes they say "we worship God," "we worship the cross," "we are Christians," or "we follow Jesus." Generally they belong to "Jehovah Witnesses" or "The Fifties Witnesses." Notably no Kurds or Ezidis ever belong to the

Armenian Apostolic Church because the Armenian Apostolic Church does not approve of missionary practice. Of 302 respondents, 221 chose one of the traditional Ezidi religions such as a Sun-worshipper, Shams, or Yezidi. Sixty-one preferred new non-traditional religious trends: 22 Witnesses of Fifties, 9 Christians, 7 Followers of Jesus Christ; 23 identified with other trends, and 22 stated they had no particular affiliation. These results show that at least 20 percent of those questioned affiliate with non-traditional religions. These differences are a source of tension in some Kurdish-Ezidi families.

Women are more likely to become followers of a non-traditional religion. This can hamper traditional religious rituals inside the family. Ezidi families with strong religious backgrounds vehemently confront their spouses when they attempt to change.[2] Religion among Ezidis is the exclusive ingredient of ethnic identity and is first among ethnic indicators. Consequently, non-traditional religious trends in an Ezidi environment may arouse serious concerns among representatives of the Ezidi religious elite (Sheikhs and Peers) as well as intellectuals and community leaders. For Kurds and Ezidis, quantitative ethnic indicators do not correlate with religious indicators.[3]

Many representatives of the Assyrian community remain uncertain in determining their religious affiliation. In the four Assyrian villages where the majority of Assyrians are concentrated, people are not fully cognizant of their religious identity. In Dmitrovo village, since the Soviet times, there has been a Russian Orthodox Church where Assyrian people attended religious services. This tradition formed because there were no other Assyrian clerics for Russian-speaking Assyrians. Thus, the priests of the Russian Orthodox Church performed these services which led to a gradual conversion of many Assyrians to the Orthodox Church. The Assyrian congregation did not understand the specifics of Christian belief, but still call themselves "Christians." The square in front of the Russian Orthodox Church has become the center for Assyrian national festivities, both secular and religious, even though these activities have little to do with the Orthodox church and doctrine. Many Dmitrovo Assyrians consider any Christian trend acceptable and implement new religious practice via existing activities of the Russian Orthodox Church, the Armenian Apostolic Church, or Protestant Church.

During the last decade, in Dvin village, a Nestorian church attempted to unify the religious ethnicity of the Assyrians in Armenia. Assyrians dwelling in the villages Atzni and Nor Artagerz are far from being Orthodox or Nestorian; they call themselves Christians and reflect this identity by accepting new Christian trends as long as they can still preserve their cultural traditions.

All four settlements are permeated by non-traditional religious organization such as the Seventh-day Adventists, Witnesses of Fifties, and Jehovah's Witnesses. "Just Christians" treat these religious trends with certain mistrust but still accept them as long as they don't see any direct threat to their own identity. Research shows that 78 percent of the Assyrian respondents called themselves "just Christians" and only 5 percent "Orthodox Christians." After the Oriental Assyrian Catholicosate Church opened in the village of Dvin, several local Assyrians began to identify their religion as Assyrian-Christian. The Assyrian community is represented by just one religious organization called "Assyrian Religious Organization of Armenia Holy Apostolic Church of Oriental Assyrian Catholicosate." Other ethnic minorities in Armenia adhere to other "ethnic religions."[4] However, only the Jewish community, Jews of Armenia, is registered. The representative of the Catholic Church addresses the religious needs of Catholic Poles.

2. The religious practice of Yezidism is rather active, and it may be termed as "daily." There is no event without sacrifice and no significant event in Yezidi life takes place without the participation of a religious mentor, such as important events such as marriage and death. However, the differences between the views on death and afterlife as well as on the practice of sacrifice often makes the Christian-Yezidi women, especially humble wives, go against the will of their husband , which is unacceptable in the Yezidi absolute patriarchal society.

3. Ezidism in Armenia is officially represented by two registered religious organizations.

4. For example, Ukrainians and Byelorussians adhere to the Orthodox religion; Greeks will be Greek Orthodox religion and Georgians are Georgian Orthodox. Poles tend to be Catholic, and Germans followers of Lutheranism. Jews, of course, may practice Judaism.

Catholics in Armenia are represented by three registered religious organizations that include mainly ethnic Armenians. Other registered religious groups include a wide range of Protestant organizations. These include 13 Evangelical Organizations, 21 Fifty Witnesses, and one each of Seventh-day Adventist, The Word of Life or Charismats, God's Church, The Anointed by God, and "Armenian Community of New Apostolic Church." "The Church of Jesus Christ's Last Days," "The Community of Baha'i Faith Followers," "The Christian Religious Organization of Jehovah's Witnesses," and "Arordineri Ught" (Armenian Pagans).

The majority of Armenians are steadfast supporters of the Armenian Apostolic Church. Activity within this church varies. Even atheists identify themselves as followers of the Armenian Apostolic Church. Due to the efforts of the Armenian Apostolic Church, Armenia has seen a moderate increase in religious activity among youth. Charismats and Jehovah Witnesses are more "mobile" and actively proselyte, which has attracted new followers.

Apart from registered religious organizations, there are also functioning religious groups without official registration. In general, these groups can be classified into three areas:

1. Entities registered as a social organization, but holding religious practices, e.g., "Transcendental Meditation," "Armenian Rerich Association," and followers of the Moon Doctrine. Further research is required in order to determine the activity level, rituals, and the number of adherents.
2. Groups not registered in any legal form yet still performing religious activities, e.g., Russian Old Ritualists, Krishna's Followers, and Scientologists. The exact number of the followers of these groups is uncertain, but experts estimate that they are limited.

Why these groups remain unregistered remains unclear. The registration procedure is simple; it only lasts one month and does not cause any problems. Registration does not affect day-to-day operations of the community. Registration benefits communities by enabling the groups to engage in legal affairs. As previously mentioned, Old Russian Ritualists do not register due to their desire to minimize any contact with administrative bodies. It is possible that other religious communities and organizations may not register because the number of their followers is less than the two hundred required by law for the registration of a religious organization.

A far more important issue is why some religious groups are registered as non-governmental organizations rather than a religious organization. According to Armenian law, only religious organizations can legally exercise religious practice. Perhaps the central issue relates to a legal requirement that requires 200 or more members to register. Non-governmental organizations do not require a minimum number of members. Individual practitioners such as magicians or wizards have remained beyond legal focus. The law views them as beyond the framework of administrative and social interest.

IV. RELIGIOUS FREEDOMS, RELIGIOUS RIGHTS, AND EQUALITY

Armenia has signed on to all international conventions guaranteeing religious freedom and has consented to all treaties concerning religious rights. These treaties comprise an indivisible legislative part of Armenia. Thus, all international laws and agreements regarding freedom of conscience have legal effect in Armenia. At the same time, Armenia has initiated the formation on inter-state legislation regulating the legal relationships between individuals, religious organizations, and the State. It should be mentioned that the law "On the Freedom of Conscience and Religious Organizations" was one of the first laws enacted by the independent Armenian State in 1991. The Supreme Soviet adopted these principles even prior to the Constitution and other international treaties. This law complies with international norms aimed at securing religious freedoms. The first three articles of Armenian law "On the freedom of conscience and on religious organizations" provide for a freedom of conscience and profession of faith. The first article reads: "Each citizen decides freely his/her position toward religion and has the

right to profess a desired religion or not to profess any religion, and to engage in religious rights individually or together with other citizens." Article 2 and 3 provide an equality of rights "irrespective of their religious beliefs or religious affiliation." It also states that "the right of freedom of conscience is subject only to such restrictions which are necessary to ensure public safety, law and order, the health and morality of the citizens and for the defense of the rights and freedom of other citizens."

Armenia later placed these rights in the Constitution along with other basic human rights. The government not only provided a freedom of conscience and belief but also gave Armenians the freedom of religious organization. Article 8.1 guarantees: "Freedom of activities for all religious organizations." Article 26 guarantees: "Everyone shall have the right to freedom of thought, conscience, and religion. This right includes freedom to change the religion or belief and freedom to, either alone or in community with others, manifest the religion or belief through preaching, church ceremonies, and other religious rites." Article 27 of the Constitution of Armenia reads: "Everyone shall have the right to freely express his/her opinion. No one shall be forced to recede or change his/her opinion. Everyone shall have the right to freedom of expression including freedom to search for, receive, and impart information and ideas by any means of information regardless of the state frontiers." Article 28 summarizes the aforementioned ideas: "Everyone shall have the right to freedom of association with others."

Equality of rights for Armenian citizens is also reflected in "On Child's Rights." which highlights religious protections. The fourth article mentioned is titled "Possession of Equal Rights for Children." It states that "Children have equal rights - regardless of their and their parents' or other legal representatives' (adoptive fathers, tutors and curators) nationality, race, sex, language, **conscience**, social status, education, conditions of child's birth, state of health and other circumstances." Armenian Legislation secures the rights of parents to bring up their children the way they choose and in the faith they desire. According to Article 10 of "On Child's Rights," "Every child has right to free conception, conscience and denomination. [A] Child's views, believes and opinions are subject to proper consideration in accordance with his age and maturity." The right to the freedom of conscience and expression of beliefs may be constrained only by law if it is necessary for purposes of state and social security, public order, child's health, their moral character or for the protection of the rights and liberties of other persons."

In view of child's interests, according to Article 10 of "On Child's Rights": "The affiliation of a child under the age of 16 to religious organizations without the consent of a parent or other legal representative."

Article 111 of the Family Code also counsels that when preparing for rearing of children deprived of parental care "his/her ethnic origin, *certain religious* or culture belonging, native tongue, possibilities of providing continuity of rearing and education should be taken into consideration."

Apart from norms forbidding the segregation against the person, Armenian Legislation tries to prevent the cases of religious hatred. For instance, according to Article 9 of the law "On Parties": "Formation and activity of such parties, whose aims or activity are directed towards . . . the instigation of national, racial and religious hatred, incitement to violence and war, is prohibited." In Article 9 of the Armenian law "On Conducting Meetings, Assemblies, Rallies and Demonstrations" there is a provision that accounts for possible future bans of public events: "The organization and convention of public events is prohibited if such events aim to . . . instigate national, racial or religious hatred, campaign for violence or war, as well as in other causes prohibited by the law." According to Article 21 of the RA law "on Non-Governmental Organisations" the NGO can be dissolved if the activity of the organization is directed towards ." . . instigating national, racial or religious hatred, campaign for violence, or war." According to Article 8(b) of "On Advertising," an advertisement is banned "if it contains insulting phrases, comparisons, and images with regard to race, nationality . . . religion or other beliefs."

According to Article 2 of the law "On the Freedom of Conscience and Religious Organisations," "The direct or indirect limitations on the citizens' right to belief, the

persecution on religious grounds or the inhibition of other rights, and the incitement of religious hatred entail responsibility before the law."

Crimes committed out of religious hatred or religious bigotry are prosecutable according to a series of criminal code Articles: 112, 113, 119, 143, 185, and 265. Article 160 of the same Code prescribes punishment for cases of "hindering the exercising of religious rights," while Articles 226.1 and 226.2 cover cases of "incitement of hatred based on natinality, race or religion." Article 392 of the Criminal Code entitled "Crimes Against Human Security" governs "[d]eportation, illegal arrest, enslavement, mass and regular execution without trial, kidnapping followed by disappearance, torture or cruel treatment of civilians" as well as crimes committed against religious groups. Whereas Article 393, entitled "Genocide" defines genocide as a serious crime based on the religious factor: "[T]he complete or partial extermination of national, ethnic, racial, or religious groups by means of killing the members of this group, inflicting severe damage to their health, violently preventing them from childbearing, enforced hand-over of children, violent re-population, or physical elimination of the members of this group . . . ." Article 397.1 of the Criminal Code enables prosecution for "the acts of denial, downplaying, approval, and justification of genocide and other crimes against peace and human security . . . if it has been implemented on the basis of race, skin color, nationality, ethnicity or **religious** affiliation for the purpose of instigating hatred, segregation and violence against a person or group of people."

V. INTERNAL (*FORUM INTERNUM*) AND EXTERNAL (*FORUM EXTERNUM*) FREEDOM OF RELIGIOUS ORGANIZATIONS: SELF-GOVERNMENT AND EQUALITY OF RIGHTS AMONG RELIGIOUS ORGANIZATIONS

According to Article 8.1 of the Constitution, "in Armenia the church shall be separate from the State." Before the adoption of the Constitution, Article 17 of the Armenian code covered this principle.

"On the freedom of Conscience and on Religious Organizations" states that "In the Republic of Armenia the Church and the State are separate." The same article defines the internal relations between the church and the State.

According to this article the State:

1. Shall not force a citizen to adhere to any religion.
2. Shall not interfere in the activities and internal affairs of the Church and religious organizations as long they operate in accordance with the law; no state agency or person acting on behalf of this agency shall operate within a Religious Organization.
3. Prohibits the participation of the Church in governing the State and shall not impose any governmental functions on the Church or Religious organization.

Thus, religious organizations have the right to organize and administer their activity according to their internal institutional structure. They also have the right to employ their own personnel, and to appoint, replace, and dismiss their employees. These organizations also have discretion over their budgets according to their own standards and desires. When dealing with internal problems, the organizations are not accountable to any governmental body and operate according to their own internal code. In other words, the law provides religious organizations with the right to act independently from the State. "On the Freedom of Conscience and On Religious Organizations" provides for not only the freedom of conscience of individuals but also for the internal autonomy of religious organizations.

Accepting the right of religious organizations to operate independently, the Legislation of Armenia stipulates the following rights: the right to obtain and dispose of property, the right to organize religious education, the right to train clergy, the right to publish and disseminate religious literature, the right to purchase religiously significant objects and materials, the right to accept donations, the right to have charity activities, and

other miscellaneous rights specified in Article 7 of "On the Freedom of Conscience and Religious Organizations." To take advantage of these rights, a religious organization must register with the government and receive recognition as a legal entity according to the procedure set forth in Article 7. Religious organizations are formed on a voluntary basis. Many of these organizations resemble NGOs. However, religious organizations differ from NGOs under "On Non-Governmental Organizations." This statute states that "NGOs are not allowed to engage in religious activity; only registered religious organizations can perform such functions." According to Article 14 of "Freedom of Conscience and On Religious Organizations," "A religious Community or organization is recognized as a judicial person after being registered by the Committee of Religious Affairs of the Council of Ministers." The registration procedure requires a precondition; the number of the members should not be less than 200. Although children under 18 can participate in their parents' religious community activities, they cannot be registered as members of the religious organization. According to Article 14 of the abovementioned law, there is "positive" discrimination for ethnic religions because ethnic groups can register their religious organization without any membership number restrictions.

The Armenian registration procedure is simple and can be completed within a month if religious organizations submit the required documents upfront. According to Article 16, the registration may be rejected if the application is contrary to any laws currently in effect. However, the code provides a remedial opportunity if rejected: "Applicants whose registration has been rejected or no decision is rendered within the deadline, may seek judicial remedy." So far, no registration application has been turned down.

Religious organizations cannot perform state functions, although Armenian legislation does not prohibit cooperation between the State and religious organizations. There are numerous examples of the cooperation between the State and religious organizations such as social aid distribution as well as educational and cultural activities. Some of these operations have involved the State, various Protestant organizations, the Mormon Church, Catholics, and others.

Only the Armenian Apostolic Church, which has the most followers of any religious organization in Armenia, has legally regulated relations with the State. The law "On the Relations between the State of Armenia and The Holy Apostolic Church of Armenia," regulates the relation of the State and the Church concerning the management and study of cultural establishments, collections, museums, libraries, and archives in possession of the Armenian Apostolic Church. This same law provides state recognition of Armenian Apostolic Church marriages, provided the marriage is registered in the corresponding civic establishment. No legal restriction prevents the State from having legally regulated relationships with other religious organizations.

Relationships between the State and religious organizations are regulated by a special Department on Ethnic Minorities and Religious Affairs ["DEMRA"]. This department is responsible for distributing information on religious freedoms, analyzing religious situations, discussing urgent problems, and seeking solutions via regular meetings with religious organizations. The DEMRA is also responsible for providing help to the Ministry of Justice concerning the registration of religious organizations. Individuals can also apply to DEMRA for counsel on religious rights and freedoms, or to defend these rights. If necessary, DEMRA can turn to outside experts. In such cases, individuals or religious organizations do not bear financial responsibilities. However, the Department does not have an independent expert team. In case of complaints, the Department can seek judicial remedy.

VI. Historical Monuments, Sanctuaries, and Other Places for Performing Religious Activities

According to Article 7 of the law "On the Freedom of Conscience and Religious Organizations," religious organizations have the right "to perform religious services, rites, and ceremonies: in sanctuaries and buildings belonging to them, in places of pilgrimage, in religious institutions, as well as cemeteries, houses and residences of citizens, hospitals,

in homes for the mentally retarded and the handicapped, detainment centers, military camps at the request of citizens living there and being members of a given religious organization."

There are no special registration or inventory procedures for sanctuaries unless these sanctuaries have special historical or architectural value. No religious organization can interfere with the relations between the State or any other organization. Nor can religious organizations interfere with the selecting and establishing of a sanctuary. This procedure is subject to laws governing the relations between the State and religious organizations, as well as by architectural norms.

The government may earmark special sums from the budget to renovate sanctuaries or places of particular historical-architectural value, if these places are national property and are used only by groups. For example, in 2007 the State allocated funds to repair the roof of a Russian Orthodox Church. In 2008, it financed the renovation of a Jewish cemetery and several churches. It should be stated that according to law, religious organizations should maintain privately owned sanctuaries; thus many religious organizations prefer to have their sanctuaries as state property. State-owned properties have a better possibility of reconstruction and maintenance.

At present, according to the survey conducted by the Scientific Center of Monument Research, many monuments are listed as being under state protection, including monuments belonging to the AAC, as well as historical monuments such as pagan temples and Chalcedonic churches.[5]

VII. PRINCIPLES OF STATE SECULARISM

According to Article 5, subsection 6 of the "Law on Education," no religion is taught in state-funded schools in Armenia: "Education in the educational establishments of Armenia is of a secular character." "The State Educational Establishment of Armenia" describes "the subject matter and objective of non-commercial organizations." It states that "[t]he activity of the establishment is based on democracy and humanism, accessibility, association of national and human rights, free development of a human being, autonomy, and secular principles of education." Religious organizations, however, have the right to educate and train their members, as stipulated in the law "On Freedom of Conscience and Religious Organizations." Article 7(b)(c), provides guidance concerning how religious organizations can establish groups for religious instruction by utilizing the facilities belonging to churches.

The religious moral norms regulating human relations are not accepted by the judicial system and are not applied if an individual prefers to regulate his affairs by secular norms. There are no cases of internal problems of religious organization members disputed in the courts of Armenia. Such issues must find resolution inside a religious organization, by norms of the organization's internal Code. No member of a religious organization can appeal to the court if his rights are violated. The court never applies or refers to religious norms.

In Armenia there are no recorded cases of someone expressing offense concerning a religious symbol. Armenian law does not prohibit the wearing of religious symbols such as clothes, scarves, or other symbols in public places. Armenians seem to support freedom of religious expression through dress and practice.

VIII. CONCLUSION

Armenia is one of the world's oldest and most thoroughly Christian countries. It has Armenia has nevertheless allowed people of all denominations and faiths to worship freely. Armenia has established legal protections for people of all faiths. Because of the special relationship between ethnicity and religion in Armenia, the legal system provides freedoms to individuals concerning their manner of worship.

5. The list of historical monuments under State protection that was prepared for this report has been eliminated from this interim publication.

CAROLYN EVANS

Religion and the Secular State in Australia

I. SOCIAL CONTEXT

Australia is a predominantly Christian country, however, in recent years there has been a strong growth in groups that describe themselves as not having a religion and in religious minorities including Muslims, Hindus and Buddhists. At the 2006 census date, Christians represented 63.9 percent of the population, non-Christian believers represented 6.2 percent (corresponding to over 120 different religious denominations of 250 or more followers), and the remaining 30 percent either stated that they had no religion or declined to state their religion. Forty-four and one-half percent of the Australian population reported that their religion was either Anglican or Catholic, whilst the largest non-Christian religion represented was Buddhism, with 2.1 percent of the population.[1]

II. THEORETICAL AND SCHOLARLY CONTEXT

Australia became a federated nation in 1901 with the coming into effect of the Australian Constitution. Since that time (and indeed for most of the period of white colonization), Australia has been a broadly secular State with Christian influences on law and politics. Section 116 of the Constitution (discussed further below) prohibits the Commonwealth level of government from establishing a religion and, despite no equivalent existing in most State constitutions, no State government has an established religion or is likely to do so. Nevertheless, Christianity remains the dominant religion and elements of Australia's Christian heritage can be seen in areas such as the reciting of Christian prayers at the opening of parliament[2] and the maintenance of Sunday as the most common day of rest.[3]

Australia is not a particularly religious country compared to many and religion has rarely played a critical role in public life or debates. While religion has played a relatively muted role in Australian public life, several questions have attracted ongoing attention and debate. The first is what role, if any, religious arguments, commitments or values have in public, political life. The second is the extent to which government should contribute financially to religious institutions such as schools, hospitals and welfare agencies and the third is the extent to which those institutions should be exempt from ordinary laws, particularly non-discrimination and human rights laws.[4] While religious arguments and commitments have never been wholly absent from Australian political and public life, they have rarely played the focal role that they have in some other countries. Catholic-Protestant sectarianism played a divisive role in Australian public life for a period[5] and traditionally the Australian Labor Party has enjoyed greater support from

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1. Australian Bureau of Statistics, 2006 http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/ census? opendocument#from-banner=GT. See also David Marr, "What we Believe," *The Age* (Melbourne), 21, 24.

2. Standing Order 38 of the House of Representatives (the lower house of the Australian Federal Parliament) provides that on taking the Chair at the beginning of each sitting, the Speaker shall read two designated prayers including the Lord's Prayer. Senate Standing Order 50 imposes an identical requirement on the President of the Senate (the upper house).

3. Although not strict sabbatical maintenance as compared to earlier periods of Australian history. Public holidays also still include key Christian holy days such as Christmas, Good Friday and Easter but there are no public holidays relating to other religions.

4. This third issue is dealt with in more detail under heading VI below.

5. See, e.g., Clive Bean, "The Forgotten Cleavage? Religion and Politics in Australia" (1999) 32 *Canadian*

Catholics and the conservative Liberal Party has enjoyed greater support from Protestants.[6] Sectarianism, however, has rapidly declined in Australia and the distinctions between the political parties in religious terms are thus less pronounced. [7] For several decades, Australian politicians rarely mentioned their own religion in public life or raised religious arguments for or against particular policies or in order to attract votes.

Some shift in the generally secular approach to politics occurred with the coming to power of the conservative Howard government in 1996, which actively sought greater engagement with Christian groups and increased funding to religious groups to carry out public functions (such as education, health provision, welfare). The Howard government more actively drew on religious (particularly Christian) language and arguments in public debates, and even appointed a bishop to the position of Governor-General.

Before the last election, in which the Labor Party was elected to government, Labor leader Kevin Rudd wrote an influential piece on Dietrich Bonheoffer that drew attention to Rudd's own religious convictions and their importance to his political philosophy.[8] Since being elected Prime Minister, Mr. Rudd has continued to refer to Christian principles and his own faith from time to time[9] in a way that has been usual in Australian politics before the Howard government. This approach seeks to demonstrate a connection between progressive politics and Christianity rather than ceding the territory of religious influence to the conservative parties.[10] The role of religion in public life is still relatively muted, however, and has certainly not reached the levels of the "culture wars" in the United States. Many have criticized the increased religiosity in Australian political and public life because they see this as undermining the secularity of the public square in Australia and as having the potential to re-ignite sectarianism[11] or (perhaps more plausibly) to increase tensions between people of different religious faiths and those who have no religion.[12] Those critical of the role of religion in public life have also been concerned at the growing government funding given to organizations run by religion.[13] For example, there have been groups who have argued for a long time that governments should not be involved in funding religious schools,[14] and others who have expressed concern about religious organizations receiving subsidies for running large hospitals.[15] A

Journal of Political Science 551; Ross Fitzgerald, Adam Carr and William Dealy, *The Pope's battalions: Santamaria, Catholicism and the Labor Split* (1st ed., 2003).

6. Matthew Buchanan, "Catholic Politicians Blessed with Rise to Top of Parties," *Sydney Morning Herald* (Sydney), 5 December 2009.

7. Marion Maddox, *God Under Howard: The Rise of the Religious Right in Australian Politics* (1st ed., 2005); Amanda Lohrey, "Voting for Jesus: Christianity and Politics in Australia" (2006) 22 *Quarterly Essay* 1; Anna Crabb, "Invoking Religion in Australian Politics" (2009) 44 *Australian Journal of Political Science* 259; Rodney Smith, "How Would Jesus Vote? The Churches and the Election of the Rudd Government" (2009) 44 *Australian Journal of Political Science* 613; Max Wallace, *The Purple Economy: Supernatural Charities, Tax and the State* (1st ed., 2007); John Warhurst, "The Catholic Lobby: Structures, Policy Styles and Religious Networks" (2008) 67 *Australian Journal of Public Administration* 213.

8. Kevin Rudd, "Faith in Politics" (2006) 17 *The Monthly* 22.

9. See, e.g., Chris Uhlmann, "St Kevin's Halo May Choke Him," *The Australian* (Sydney), 24 October 2009; Janet Albrechtsen, "PM Proves a Convert to The Politics of Faith," *The Australian* (Sydney), 15 July 2009.

10. See, e.g., ABC Television, "Kevin Rudd: The God Factor," *Compass*, 8 May 2005, available at http://www.abc.net.au/ compass/s1362997.htm; ABC Radio National, "Kevin Rudd: Bonhoeffer and "the political orchestration of organised Christianity," *The Religion Report*, 4 October 2006 available at http://www.abc. net.au/rn/religionreport/ stories/2006/ 1755084.htm.

11. See, e.g., Judith Brett, *Australian Liberals and the Moral M*Iddle *Class: From Alfred Deakin to John Howard* (1st ed., 2003) 54, referring to Editorial, *The Vigilant* (Melbourne), 25 June 1925; Editorial, "Leave God Alone," *The Australian* (Sydney), 10 November 2009.

12. See, e.g., Atheist Foundation of Australia, "Submission to HREOC Discussion on Freedom of Religion and Belief in the 21st Century in Australia" (20 October 2008), available at http://www.hreoc.gov.au/frb/ submissions/ Sub032.Atheist_Foundation.doc.

13. CRU; Adele Ferguson, "God's Business," *Business Review Weekly*, 29 June 2006, at http://blogs. theage.com.au/business/executivestyle/managementline/archives/brw2906p042-046.pdf; Humanist Society of Queensland, "Submission to HREOC Discussion on Freedom of Religion and Belief in the 21st Century" http://www.hreoc.gov.au/frb/submissions/Sub981. Humanist_Society_of_Queensland.doc.

14. *A-G (Vic) ex rel. Black v. Commonwealth* (1981) 146 CLR 559.

15. See, e.g., Leslie Cannold, "Women Are Being Failed By Our Hospitals," *The Age* (Melbourne) 3 November 2009; Angela Shanahan, "Sickness That Curbs Religious Freedom," *The Australian* (Sydney) 31

number of people currently argue that institutions run by religious entities that rely on exemptions from discrimination law should not be eligible for government funding.[16] However, governments have continued to fund religious organizations to operate in areas such as schools, hospitals, and welfare agencies as well as allowing many of them exemptions from elements of non-discrimination law.[17]

In a rather peculiar turn, religious groups in Australia have received increasing amounts of government funding and have taken a more prominent place in the provision of social welfare and in politics over the last ten years. At the same time the number of Australians who describe themselves as religious has diminished significantly and religion has started to play a less important role in the private lives of most Australians. Most of these changes have played out, however, at the social and political level with little involvement from the courts or the legal system and with little reference to Australia's international obligations to protect religious freedom. This is in part because the formal legal protection of religious freedom in Australia is comparatively weak.

III. CONSTITUTIONAL CONTEXT

A. The Australian Constitution

Unlike most modern constitutions, the Australian Constitution does not contain a bill of rights. It does, however, include several provisions that protect particular rights to some degree. One of these is section 116 which reads: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

Section 116 was based on the religion clauses of the United States Constitution,[18] although it modified its wording somewhat with respect to the non-establishment and religious freedom clauses, and added prohibitions on imposing religious observances or religious tests for public offices. While it appears to provide a relative robust protection for religious freedom, the section has a number of limitations. First, it applies only to the Commonwealth parliament and not to State parliaments. [19] As States have responsibility for areas such as education, health, and aspects of welfare, this is a significant limitation. Second, section 116 only prohibits the Commonwealth from making a "law" prohibiting free exercise, establishing a religion, etc. It is not a free standing *right* of an individual, but a *limitation* on the legislative power of the Commonwealth Parliament. Consequently, the right to religious freedom cannot be asserted to protect an individual against actions by private individuals or organizations. Nor does section 116 create a positive obligation on the Commonwealth to take action to protect religious freedom; section 116 simply prohibits the Commonwealth from enacting certain laws.

Finally, the fact that only law-making is prohibited means that executive actions are only imperfectly covered by section 116. When a member of the executive acts under a statutory power in such a way as to establish a religion or to prohibit free exercise then that executive action may be invalid. It is not invalid as directly breaching s 116 (because

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October 2009; Senator Lyn Allison, "Does God Have a Place In Government?" (Speech delivered at the Australian National Secular Association, the Council of Australian Humanist Societies, and the Rationalist Society of Australia, Separating Church and State Conference, Melbourne, 17 June 2006), available at http://www.democrats.org.au/speeches/ index.htm? speech_id=1861.

16. See, e.g., Margaret Thornton, "Balancing Religion and Rights: The Case against Discrimination," *The Age* (Melbourne), 4 October 2009; ABC Radio National, "Religion and The Law," *The Law Report*, 17 Nov. 2009.

17. Institutions run by religions have reasonably broad exemptions from non-discrimination laws in many Australian jurisdictions. This is discussed in more detail under heading 3.

18. The most comprehensive account of why and how s 116 was included is in Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891–1906* (1976). See also Stephen McLeish, "Making Sense of Religion and the Constitution: A Fresh Start for Section 116" (1992) 18 *Monash University Law Review* 207, 213–21.

19. See, e.g., *Grace Bible Church v. Reedman* (1984) 36 SASR 376, 379 (Zelling J) ("Grace Bible Church Case").

s 116 only deals with laws). Instead, it is invalid because the enabling statute cannot authorize action that is in breach of s 116 in most (although not necessarily all) circumstances.[20] However, when executive power is prerogative or common law power, then section 116 may not apply to restrict executive action.

B. State and Territorial Protection of Religious Freedom

There are three States or Territories in Australia in which religious freedom is explicitly protected by law. Since 1934, section 46 of the Tasmanian *Constitution Act 1934* (TAS), has protected "freedom of conscience and the free profession and practice of religion" and prohibits any requirement to take an oath or pass a religious test in order to hold public office. It has never been the subject of litigation.

More recently, both the Australian Capital Territory and Victoria have introduced human rights Acts: the *Human Rights Act 2004* (ACT) ("the ACT Act") and the *Charter of Human Rights and Responsibilities Act 2006* (VIC) ("the Victorian Charter"). These Acts require courts, where possible, to interpret all legislation consistently with the human rights protected by the Acts.[21] Where that is not possible, certain courts can make declarations that a provision cannot be interpreted compatibly with human rights.[22] This does not invalidate the law (as would a constitutional bill of rights), but it does require an explanation to be given to parliament as to what response the government has to the declaration.[23] In addition, it is unlawful for public authorities to breach rights[24] and some remedies are available when they do so.[25]

Both the Victorian Charter and the ACT Act prohibit discrimination on the basis of religion (among other characteristics) and also set out a right to freedom of religion or belief, subject to the general limitation provision in s 7, which provides that "[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom," taking into account certain listed factors. To date there have been no court decisions regarding s 14 of the Victorian Charter or s 14 of the ACT Act.[26]

IV. LEGAL CONTEXT

A. The Definition of Religion under the Constitution

The Australian courts have been relatively generous in defining the scope of religious freedom. In an early Australian case, *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* ("the *Jehovah's Witnesses Case*"), Latham CJ referred to the problems of defining religion when he noted that: "It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various

20. *A-G (Vic) ex rel. Black v. Commonwealth* (1981) 146 CLR 559, 580–1 (Barwick CJ) ("the *DOGS Case*"). See also *Kruger v. Commonwealth* (1997) 190 CLR 1, 86 (Toohey J), 131 (Gaudron J) ("*Kruger"); Minister for Immigration and Ethnic Affairs v. Lebanese Moslem Association* (1987) 17 FCR 373, 379 (Jackson J).

21. *Human Rights Act 2004* (ACT) s 30: "So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights." *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 32(1): "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

22. *Human Rights Act 2004* (ACT) s 32; *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 36.

23. *Human Rights Act 2004* (ACT) s 33; *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 37.

24. *Human Rights Act 2004* (ACT) s 40B(1); *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 38(1).

25. *Human Rights Act 2004* (ACT) s 40C(4); *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 39. In both cases, however, it is very difficult to obtain damages for breach of a right protected under the Act.

26. Although s 14 of the Victorian Charter was raised in a disciplinary hearing regarding a dentist who told a patient suffering from a mental illness that she was afflicted by evil spirits and that she should attend his church to be cured. The reliance on s 14 was unsuccessful, in part because the Victorian Charter was not in force at the time the original decision was made. See *Dental Practitioners Board of Vitoria v. Gardner (Occupational and Business Regulation)* [2008] VCAT 908 (Unreported, Judge Harbison, Members Dickinson and Keith, 14 May 2008).

religions which exist, or have existed, in the world."[27] His Honor also noted that s 116 "proclaims not only the principle of toleration of all religions, but also the principle of toleration of absence of religion."[28] While no consensus has been reached in the cases over the definition of religion, the definition of religion that has the widest usage is that set out by the Australian High Court in the *Church of the New Faith v. Commissioner of Pay-roll Tax (Vic)* ("the *Scientology Case*")[29] in the context of a legislative provision giving a taxation exemption to "religious institutions."[30]

The Church of the New Faith, more commonly known as Scientologists, challenged the decision of the Commissioner of Pay-roll Tax who had held that Scientology was not a religion for the purposes of this exemption. The justices in the case, however, made clear that they intended their discussion of the definition of religion under the legislation to have a broader application, including to the constitutional definition of religion.[31] In what is generally considered to be the leading judgment, Mason ACJ and Brennan J set out a two-part test. A religion must consist of "first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief."[32] A religion was not to be treated as fraudulent and outside the category of religion simply because there are allegations that the founder set it up as a "sham" if there is evidence of the sincerity of believers.[33] On this basis, the Scientologists were held to be a religion.

B. Free Exercise of Religion

While the courts have defined religion quite broadly, they have been far narrower in defining the type of legislation that would impermissibly violate the free exercise or establishment clauses. The tone for later cases was set in an early High Court case where Griffith CJ and Barton J dealt dismissively with an appellant who refused to attend the training required under the *Defence Act 1903* (Cth) on the basis that his Christian beliefs required him to be a conscientious objector.[34] The justices dealt with the case almost contemptuously; with Griffith CJ describing the appellant's position as "absurd"[35] and Barton J declaring that the case was "as thin as anything of the kind that has come before us."[36] At other times, courts used similar reasoning to dismiss a claim by a man who refused, on the basis of religious conviction, to pay the portion of his taxation that would be used to provide for abortions[37] and to dismiss a claim that a legal obligation to reveal the contents of a religious confession was a breach of s 116.[38]

The courts have recognized, however, that the protection of s 116 extends beyond beliefs to encompass some forms of conduct.[39] Mason ACJ and Brennan J in the *Scientology Case* recognized that religion was more than a set of theological principles or a belief in the supernatural: "Thus religion encompasses conduct, no less than belief."[40]

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27. (1943) 67 CLR 116, 123.

28. Id.

29. (1983) 154 CLR 120.

30. *Pay-roll Tax Act 1971* (VIC) s 10. The factual background to the case is outlined in the *Scientology Case* (1983) 154 CLR 120, 128–9 (Mason ACJ and Brennan J).

31. *Scientology Case* (1983) 154 CLR 120, 130 (Mason ACJ and Brennan J).

32. Id. at 136.

33. Id. at 141. See also Wilson and Deane JJ at 170, who held that it is irrelevant to the determination of religious status whether members are "gullible or misguided or, indeed, that they be or have been deliberately mislead or exploited."

34. *Defence Act 1903* (Cth) s 143(3).

35. *Krygger v. Williams* (1912) 15 CLR 366, 371.

36. Id. at 373.

37. *Daniels v. Deputy Commissioner of Taxation* [2007] SASC 431 (Unreported, Debelle, Sulan and Vanstone JJ, 7 December 2007) [12] (Debelle J).

38. *SDW v. Church of Jesus Christ of Latter-day Saints* (2008) 222 FLR 84, 94–5 [69]–[76] (Simpson J). This claim was described by Simpson J (at 95 [76]) as "devoid of merit and entirely misconceived" with little reasoning, despite the potentially serious implications of the decision for certain religious groups.

39. Indeed, given that the phrase "free exercise" is used in s 116, such a conclusion would have been difficult to avoid.

40. *Scientology Case* (1983) 154 CLR 120, 135.

Their Honors described religious action in broad terms, noting that in theistic religions it will normally include some ritual observances but that, more broadly, religious actions are "[w]hat man feels constrained to do or to abstain from doing because of his faith in the supernatural."[41] In order to prove that the cannons of conduct that a person has set for him or herself fall within the immunity granted to religion, the believer must show a "real connection" between the conduct and the belief in the supernatural.[42]

Despite this recognition, no successful claim has been made under the free exercise clause. Part of the explanation for this is that religious freedom is generally well respected in Australia. In addition, however, a very restrictive test has been adopted by the High Court, that essentially requires that it be the purpose of the legislation to restrict religious freedom and that this purpose be evident on the face of the legislation in most cases. The test set out by the majority in the *Kruger* case, which is broadly consistent with previous case-law, is that only a law with the purpose of "achieving an object which s 116 forbids" falls foul of the constitutional provision.[43] It is not enough for a plaintiff to show that the *effect* of the law is to restrict or even seriously undermine their capacity to freely exercise their religion of choice.[44] It is thus fairly clear that a law that has the effect of prohibiting or restricting free exercise (and perhaps was even motivated in part by this end), but that does not reveal such a purpose on its face, is unlikely to be struck down for inconsistency with s 116.

C. Limitations on the Right to Free Exercise of Religion

All of the justices who have considered the issue in Australia have recognized that the right to practice a religion is not absolute. The High Court has held that not every interference with religion is a breach of s 116, but only those that are, in the words of Latham CJ in the Jehovah's Witnesses Case, an "undue infringement of religious freedom."[45] The restraints placed on religious freedom have, at times, proved very onerous without a breaching s 116, including the declaration that the Jehovah's Witnesses were a group "prejudicial to the defence of the Commonwealth or the efficient prosecution of the [Second World] war." This declaration led to an officer of the Commonwealth taking possession of the Kingdom Hall in Adelaide (in which the Jehovah's Witnesses met for religious purposes) and refusing to allow the Adelaide Company of Jehovah's Witnesses to use it. While the court found parts of the regulations to be beyond power for other reasons, it unanimously found that they did not breach section 116.[46] In general, the courts have been very sympathetic to government claims about the social need to limit religious freedom.

D. Non-Establishment of Religion

The non-establishment clause of s 116 played little role in public life until a challenge to the constitutionality of a Commonwealth appropriation for education in the early 1980s.[47] In *Attorney-General (Vic) ex rel. Black v. Commonwealth*,[48] there was a challenge to the provision of funds by the Commonwealth to the States for use in subsidizing religious schools. The majority of justices (6:1) rejected the plaintiffs' argument that Australia should follow the United States case-law on establishment. Rather

41. Id.
42. Id.
43. Id. at 40 (Brennan CJ). See also at 60–1 (Dawson J), 86 (Toohey J), 160–161 (Gummow J).
44. Id. at 86.
45. (1943) 67 CLR 116, 131.
46. *Jehovah's Witnesses Case* (1943) 67 CLR 116, 132–4, 147 (Latham CJ), 149 (Rich J), 155 (Starke J), 156–7 (McTierenan J), 160–1 (Williams J). The Company of Jehovah's Witnesses in Adelaide at the time had only around 200–250 members: at 117.
47. See generally Joshua Puls, "The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees" (1998) 26 *Federal Law Review* 139, 143–5. See also a very prescient article, P H Lane, "Commonwealth Reimbursements for Fees at Non State Schools" (1964) 38 *Australian Law Journal* 130.
48. (1981) 146 CLR 559.

than perceiving the clause as creating a right that required a broad interpretation, they held that it was a limitation on governmental power[49] and was therefore not to be construed liberally. Barwick CJ held that the word "for" required that a law must have the objective of establishment "as its express and, as I think, single purpose." Each of the justices came to slightly different definitions of establishment. Barwick CJ held that it involves "the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case the Commonwealth, to patronize, protect and promote the established religion. In other words, establishing a religion involves its adoption as an institution of the Commonwealth."[50] Other justices came to similar conclusions.[51] While the details of each definition differ slightly, the majority justices were in no doubt that the indirect (and almost certainly also direct) funding of religious schools fell far short of what was required for establishment. Given the very high threshold set by the Court, it is highly unlikely that the establishment clause will play much further role in regulating church-state relations.[52]

While the establishment clause of the Constitution and the case-law interpreting it preclude the possibility of a single religion being elevated to the status of a fully established church, the Constitution leaves open a wide range of possible relationships between the Commonwealth and religions. A basic level of secularity is required, but many different varieties of secularism (from a fairly high degree of entanglement with religion to a strict separation) are possible within the parameters of the constitutional requirements.

E. Common Law

Australia is a common law country and thus some protection for rights can be found in case-law, although such protection can always be abolished by an Act of Parliament. While the issue is not completely settled, the common law quite likely does not protect religious freedom. In the *Grace Bible Church Case*,[53] the appellant (an unregistered, non-government Christian school) argued that there was "an inalienable right to religious freedom and that that freedom cannot be abridged by any statute of the South Australian Parliament."[54] The Full Court of the Supreme Court of South Australia unanimously dismissed the appeal, with Zelling J commenting that such a claim would require "a complete rewriting of history," given the numerous examples of intersection between law, government and religion in the United Kingdom at the time at which the common law was received in Australia.[55] White J likewise concluded that "the common law has never contained a fundamental guarantee of the inalienable right of religious freedom and expression."[56]

More recently, however, the Full Court of the Federal Court described "freedom of religious belief and expression" as an "important freedom generally accepted in Australian society," reflected in s 116 of the *Australian Constitution* and art 18 of the *International Covenant on Civil and Political Rights*.[57] This implies that religious freedom has some status in the common law (in the context of this case, as a reasonable basis on which freedom of political communication might be limited) but does not amount to the recognition of religious freedom as a right protected by the common law.[58]

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49. Id. at 603 (Gibbs J), 605 (Stephen J), 652–3 (Wilson J).
50. Id. at 582.
51. Id. at 597, 616, 653, 605-6, 635.
52. For a critique of the decision, see Wojciech Sadurski, "Neutrality of Law towards Religion" (1990) 12 *Sydney Law Review* 420, 447–51.
53. (1984) 36 SASR 376.
54. Id. at 377.
55. Id. at 379.
56. Id. at 388.
57. *Evans v. New South Wales* (2008) 168 FCR 576, 596 [79] (French, Branson and Stone JJ).
58. See also *Aboriginal Legal Rights Movement Inc. v. South Australia [No 1]* (1995) 64 SASR 551 for a discussion of these issues.

V. THE STATE AND RELIGIOUS AUTONOMY AND RELIGIOUS AUTONOMY AND THE STATE

In Australia there is a reasonably high degree of formal separation between religious groups and the State. The government does not usually attempt to interfere with the choice of religious leadership, mode of worship, or teachings of religious organizations.[59] Individuals are free to leave or change their current religion without any notification to or permissions by the government. Australians do not register their religion and the question on the census about religious affiliations is optional.[60] There are no government departments that are devoted to the regulation of religious affairs, although the Commonwealth and State governments generally have some agencies or bodies that are dedicated to good relationships between people of a variety of religious, cultural, racial and ethnic backgrounds.[61]

Similarly, religions play no formal role in government or with respect to issues such as the granting of permission to other religious groups to establish themselves or places of worship and there is no established church or limitations on establishing a new religion. There are some government consultative bodies that include religious representatives[62] and, as with any other social group, religious groups are able to lobby governments with respect to issues that are important to them. Religious groups have played a prominent role in recent public debates, including the national debate over whether Australia should have a Bill of Rights.[63] Whatever their political influence may be, at a formal, legal level they are in no superior or inferior position to any other group of likeminded citizens.

VI. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

With respect to the legal regulation of most aspects of religion as a social phenomenon, legal regulation neither places heavier onus on religious institutions as compared to other groups, nor does it give exemptions for religious groups to most laws. For example, in the area of zoning, religious groups are obliged to go through the same planning application process as anyone else. Applications to build a place of worship may be rejected for secular reasons (e.g., lack of car-parking space or noise) but not for religious reasons (e.g., the religion is considered heretical or is an unpopular minority).[64]

There is no general or constitutional exemption from ordinary laws for religions. As

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59. However, some of these areas may be impacted by ordinary law, e.g. immigration laws may prevent a religious leader from entering the country or zoning laws may interfere with the building of a place of worship. Accordingly, in these cases, the reason for such a rejection must be in terms of the ordinary law rather than religious teachings or official government approval or disapproval of the religion in question.

60. Australian Bureau of Statistics, *Perspectives on Migrants, 2007* (ABS Statistics Series 3416.0, released 25 February 2008), available at http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3416.0Main%20 Features 22007.

61. At the federal level, the relevant department is the Department of Immigration and Citizenship ("DIAC"; http://www.immi.gov.au), which administers the Diverse Australia Program (h ttp://www.harmony.gov.au). A second relevant statutory agency is the Australian Human Rights Commission, formerly the Human Rights and Equal Opportunity Commission (available at http://www.hreoc.gov.au).

62. For example, following the London bombings, in September 2005 the previous Federal Government created a Muslim Community Reference Group (MCRG) which was given a 12 month term and completed its Final Report in September 2006. See Muslim Community Reference Group (MCRG), *Building on Social Cohesion, Harmony and Security, (2006)* http://www.immi.gov.au/living-in-australia/a-diverse-australia/ mcrg_report.pdf. The present Federal Government is considering re-establishing the group. See Richard Kerbaj, "Imams Want Role in Recast Muslim Body," *The Australian* (Sydney), 12 March 2008, at http://www. theaustralian.com.au/news/imams-want-role-in-recast-muslim-body/story-e6frg6no-1111115774332.

63.See, e.g., Australian Bahá'í Community, "Submission to National Human Rights Consultation" (June 2009); Anglican Church of Australia General Synod, "Human Rights Consultation: Submission of the General Synod Standing Committee of the Anglican Church of Australia" (14 June 2009); Australia/ Israel & Jewish Affairs Council, "Submission to the National Human Rights Consultation"; Australian Catholic Bishops Conference, "Submission to the National Human Rights Consultation" (June 2009), all available at http://www.humanrightsconsultation. gov.au/www/nhrcc/submissions.nsf/category.

64. There is reason, however, to believe that sometimes formally neutral planning decisions hide some degree of religious discrimination. There have been public protests about the building of mosques in several parts of Australia, for example, and while public hostility towards Muslims was not formally taken into account by decision-making bodies, it is not clear what role such hostility may have played in the outcomes in such cases.

Griffith CJ put it in the case of a conscientious objector to military service: To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.[65] However, while there is no general exemption for religious beliefs or conscientious objection to Australian laws, a number of laws give particular exemptions for religious groups. For example, in the state of New South Wales slaughter in accordance with religious precepts is a defense to animal cruelty legislation.[66] At a federal level, ministers of religion, theological students and persons whose conscientious beliefs do not allow them to participate in war or war-like operations are exempted from compulsory service in time of war.[67]

The most contentious area of exemptions for religious bodies in Australia in recent years has been with respect to non-discrimination laws. Australia has non-discrimination laws at Commonwealth, State and Territory level. These laws prohibit discrimination on a number of bases including race, ethnicity, sex, sexual orientation, marital status, and pregnancy. Most Australian jurisdictions also prohibit discrimination on the basis of religion, but the main Commonwealth non-discrimination laws do not do so and neither do the laws of New South Wales (the largest Australian State) and South Australia.[68]

Australian non-discrimination laws give certain exemptions for religious bodies to discriminate on at least some bases (including sex, sexual orientation and religion) if they meet certain pre-conditions. It is these exemptions that allow, for example, religious schools to give preference to co-religionists in enrollment or some religious employers to discriminate against same-sex couples in employment. The precise scope of exemptions for religious organizations and individuals from non-discrimination law differs from jurisdiction to jurisdiction.

At the Commonwealth level, for example, under the *Sex Discrimination Act 1984* (Cth) there are a number of religiously based exemptions. For example, in relation to accommodation, discrimination against a person on the basis of that "person's sex, marital status, pregnancy or potential pregnancy" is unlawful, but an exemption is given for "accommodation provided by a religious body."[69]There are also several more general exemptions for religious organizations from many of the prohibitions on discrimination. Thus, the prohibition of discrimination does not apply to the training, ordination or appointment of priests, religious ministers and members of religious orders, or those involved in religious observances.[70] This is relatively confined. More general, however, is the exemption in s 37(d) for "any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion."[71]

There are also particular exemptions for discrimination by a person in the context of "an educational institution that is conducted in accordance with the doctrines, tenets,

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65. *Krygger v. Williams* 1912 15 CLR 366, 369 (Griffith CJ). Barton J also held, "the *Defence Act* is not a law prohibiting the free exercise of the appellant's religion": at 372.

66. *Prevention of Cruelty to Animals Act 1979* (NSW) s 24(1)(c)(i) provides for a defense to a charge under that Act where the slaughter accords with the precepts of the Jewish religion or any other religion prescribed for the purposes of that section. The defense has not yet been extended to any other religions: *Prevention of Cruelty to Animals (General) Regulation 2006* (NSW).

67. *Defence Act 1903* (Cth) s 61A(1)(d), (e), (f), (g), (h), (i). At present, Australia does not have conscription to the armed forces and thus these exemptions are practically irrelevant. However, under s 60 of the *Defence Act 1903* (Cth) the Governor-General can make a proclamation, with the approval of each House of Parliament, in order to bring a scheme of conscription into effect.

68.New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999). South Australian Attorney-General's Department, *Discussion Paper: Proposal for a New Law against Religious Discrimination and Vilification* (2002).

69. *Sex Discrimination Act 1984* (Cth) s 23.

70. *Sex Discrimination Act 1984* (Cth) s 37(a)–(c).

71. *Sex Discrimination Act 1984* (Cth) s 37(d).

beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed."[72] Voluntary organizations are also exempt, both with respect to membership and provision of services.[73] Various state laws also give similar exemptions. A recent Victorian parliamentary inquiry into the current exemptions to the non-discrimination laws generated significant controversy and many religious groups made submissions to the inquiry, strongly opposing any reduction in the current exemptions (and in some cases requesting further exemptions). The Attorney-General pre-empted the results of the inquiry by guaranteeing the continued existence of most of the current exemptions for religious organizations.[74]

VII. State Financial Support for Religion

As discussed with respect to the constitutional challenge to government subsidies of religious schools, there is no prohibition on state funding of religious organizations unless this is part of an establishment of a religion (and the threshold for showing that there has been an establishment is very high). Thus, governments subsidize a wide variety of activities operated by religious groups, including schools, hospitals and welfare agencies. Some details of the funding of religious schools appear below and demonstrate the extent of government financial subsidies for religious organizations. In most cases, organizations that accept government funding must comply with certain terms and conditions for doing so, some of which may limit their autonomy. For example, agencies that receive funding for the provision of some forms of welfare are contractually bound to comply fully with discrimination laws and religious schools must reach certain educational standards. In other areas, however, government funding flows to institutions run by religious organizations that use their exemptions from non-discrimination laws and for which other forms of special provision are made (e.g., religious hospitals are not required to provide contraception or terminations of pregnancies if to do so breaches their religious conscience).

The financial benefits provided to religious institutions tend to be provided on a formally non-discriminatory basis as between majority and minority religions, e.g., there are Christian, Muslim and Jewish schools that are funded by government. Given the very small numbers of non-Christian religions, however, most of the funding to religious organizations flows to Christian groups. There has been relatively little public debate about how this funding should flow as between religious groups or whether it is problematic for those from one religion to be forced to pay for services provided by another religion through the tax system.[75]Taxation law also gives religious institutions substantial benefits. All religions that fulfill the constitutional definition of religion above are entitled to these benefits. The income of religious institutions is exempt from federal income tax,[76] and fringe benefits provided by religious institutions to religious practitioners are exempt from fringe benefits tax.[77] Donations to religious organizations are tax deductible.[78] Land held by a religious body and used for religious purposes is

72. *Sex Discrimination Act 1984* (Cth) s 38.

73. *Sex Discrimination Act 1984* (Cth) s 39.

74.Hon Rob Hulls, Attorney General of Victoria, "Religious Freedom to be Protected under Equal Opportunity Changes" (Press Release, 27 September 2009).

75. As is often the case in Australia, religious schools are something of an exception to this. One of the concerns of those who brought a constitutional challenge to the subsidization of religious schools was the dominance of this sector by Catholic schools (indeed, anti-Catholicism appeared to be one motivating factor for this group). Similarly, there is some public debate about why those whose children attend secular public schools should be forced to subsidize the education of those at religious schools. For now, however, it appears that the public debate has been won by religious groups who claim that they should not be forced to both pay taxes to support the secular state school system and provide the full cost of schooling their children in private religious schools. (While these schools are subsidized, they receive less total government funding per student than religious schools.)

76. *Income Tax Assessment Act 1997* (Cth) s 50–5.

77. *Fringe Benefits Tax Assessment Act 1986* (Cth) ss 57, 58T, 58G(2).

78. *Income Tax Assessment Act 1997* (Cth) s 30–17.

exempt from state land tax in all Australian states.[79] Finally, services supplied by a religious institution which are integral to the practice of that religion are exempt from goods and services tax ("GST").[80]

VIII. Civil Legal Effects of Religious Acts

A. Marriage

The secular law in Australia gives limited recognition to certain religious acts and legal rulings. For example, the Marriage Act 1961 (Cth) governs the legal recognition of marriage in Australia. Part IV Div 1 of that Act defines three categories of authorized celebrants including Ministers of Religion (subdiv A), persons charged with *registering* marriages in a State (subdiv B) and registered marriage celebrants (subdiv C). A minister of religion is defined in section 5(1) to include "a person recognized by a religious body or a religious organization as having authority to solemnize marriages in accordance with the rites or customs of the body or organization." In order to be authorized to perform marriages as a minister of religion, the religion must be an "authorised denomination" as declared by the Governor-General. Although a wide variety of religions have been recognized as authorized denominations, there is no right to be recognized as a minister or for any religion to be accepted as an authorized denomination for the purposes of the Act.[81] In addition, while ministers of authorized denominations are usually entitled to registration as a marriage celebrant, they may be denied registration if there are already sufficient numbers of ministers from that religion in a location, they are not a fit and proper person, or they are unlikely to devote sufficient time to religious duties (section 31). While these exceptions could be used in an onerous way, or the power to recognize religions as authorized denominations could be exercised in a discriminatory manner, there are not many disputes over registration or recognition of religions in practice.

B. Religious Courts and Religious Law

While a small number of religious courts (particular Jewish *battei din*) are active in Australia, they are not recognized as formal courts as such, nor are their decisions automatically enforced by Australian secular courts. Rather, such religious courts or other religious bodies applying religious law may be recognized as arbitral or mediation bodies and their decisions enforced in certain circumstances by secular courts. The courts may also, in some circumstances, enforce provisions requiring the use of religious dispute settlement mechanisms. The Supreme Court of Victoria, for example, has held that a clause in an arbitration agreement that required the parties to refer all claims and counterclaims to three rabbis was enforceable, as long as it complied with the relevant Act, in particular, by ensuring that there was no breach of procedural fairness.[82]

Occasionally, the secular courts may directly apply religious law themselves, for example, where religious law has been incorporated into a contract or other legal document expressly or by implication. Thus, the Full Court of the Supreme Court of South Australia has recognized that the law that governs a contract can be religious law (just as it can be foreign law), but that there must be sufficient certainty as to what that law is and its relevance to the dispute at hand.[83] In these circumstances, the Australian courts have been prepared to make determinations about religious doctrine and practices, while expressing some concern at their competence to do so.

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79. See, e.g., *Land Tax Assessment Act 2002* (WA) s 32; *Land Tax Management Act 1956* (NSW) s 10(1).

80. *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 38-220.

81. *Nelson v. Fish* (1990) 21 FCR 430. French J rejected a claim by an individual who claimed to have started his own religion that he was entitled to registration as an authorized celebrant. French J held that having a limited register of those permitted to carry out marriages did not amount to an establishment.

82. *Mond v. Berger* (2004) 10 VR 534.

83. *Engel v. Adela*Ide *Hebrew Congregation Inc.* (2007) 98 SASR 402. The Court also recognized that it would be inappropriate for a court to grant an order for specific performance that would force a congregation to continue with a rabbi when that relationship had broken down. (That did not preclude other remedies.)

Generally, Australian courts are cautious about becoming involved in intra-religious disputes unless it is necessary to do so.[84] There are cases, however, where intervention by the secular courts in religious disputes is unavoidable. For example, after a schism, a dispute over leadership or an amalgamation of religious groups, there may be disputes over who is entitled to the property or assets owned by the religious body.[85] Similarly, there may be questions over the employment or termination of employment of people by a religious group, including clergy or other religious leaders.[86]

These types of disputes raise complicated issues for courts about the extent to which they should become involved in intra-religious disputes and what type of approach they should take to such cases. On the one hand, there may be disputes that cannot and have not been resolved by internal religious mechanisms (especially when the validity of such mechanisms may be in question) and which have significant, secular aspects to them (such as the ownership of real property or the commission of a tort) that cannot simply be left unresolved. On the other hand, courts are properly reluctant not to intrude too deeply into the internal practices and doctrines of a religious organization for fear of interfering with its autonomy and taking the court outside its area of competence or jurisdiction.[87]

IX. RELIGIOUS EDUCATION OF THE YOUTH

Religious schools make up a significant portion of the education sector in Australia and receive large amounts of government funding. The 2008 figures produced by the Australia Bureau of Statistics shows that last year there were 2729 non-government schools in Australia, comprising 28.5 per cent of the total schools in Australia. Of these 1705 were Catholic schools and 1024 were independent schools (most of which had religious affiliations).[88] In the period of 2005-2008 these independent schools received $489 million in Federal Grants and an additional $126.6 million in grants for capital works.[89] In addition, the States spent hundreds of millions more dollars on independent schools.[90] The fact that such a significant proportion of the education sector and such significant amounts of money are expended on independent schools has long made them socially contentious.[91]

While the precise rules differ from State to State, most public schools are permitted, but not required, to provide an optional form of religious education. In the state of Victoria, for example, schools may provide "general religious education," whereby comparative religion is taught as an academic subject, offering the ability to discuss

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84. *Scandrett v. Dowling* (1992) 27 NSWLR 483. This case remains one of the leading cases with respect to the circumstances in which an enforceable legal obligation is created by church rules.

85. See, e.g., *Macedonian Orthodox Community Church St Petka Inc v. Petar* (2008) 249 ALR 250, and the underlying and long running proceedings in the Supreme Court of New South Wales *Petar v. Mitreski*; *Petros v. Biru* [2006] VSC 383 (Unreported, Morris J, 6 October 2006); aff'd [2007] VSCA 226 (Unreported, Maxwell ACJ, Chernov and Kellam JJA, 7 August 2007); *A-G (Vic) ex rel. Harkianakis v. St John the Prodromos Greek Orthodox Community Inc.* [2000] VSC 12 (Unreported, Mandie J, 12 October 2000).

86. See, e.g., *Ermogenous v. Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; *Engel v. Adela*Ide *Hebrew Congregation Inc* (2007) 98 SASR 402.

87. See, e.g., *Solowij v. Parish of St Michael* (2002) 224 LSJS 5.

88.Australian Bureau of Statistics, *Schools 2008*, ABS Catalogue No 4221.0 (2008) http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/3D1C059F24BE9E80CA2575AE00273795/$File/42210_2008.pdf. This report also records 1,169,737 students attending non-government schools in Australia.

89. Commonwealth, Department of Education, Employment and Workplace Relations, *Capital Grants Program* (2008) Department of Education, Employment and Workplace Relations http://www.deewr.gov .au/Schooling/Funding/CapitalGrantsProgram/Documents/CGPFACTSHEET20082.pdf at1 September 2009.

90. For example, in Victoria in 2007-2008, the Department of Education provided $380 million for non-government schools (under the Financial Assistance Model for non-Government Schools), Victoria, Department of Education and Early Childhood Development, *Annual Report 2007-8* (2008) http://www.eduweb. vic.gov.au/edulibrary/public/govrel/reports/2007deecdannualreport-rpt.pdf 51; in New South Wales, the Department of Education allocated $833.5 million for 2009/10 financial year to independent schools, New South Wales, Department of Education, Fast Facts (2009) Department of Education https://www.det.nsw.edu.au/ reports_stats/fastfacts/ index.htm at 1 September 2009.

91. See *Attorney-General (Vic.) ex rel. Black v. Commonwealth* (1981) 146 CLR 559 for an example of an attempt to contest the legal validity of funding for religious schools.

religion though in a strictly non-sectarian way.[92] Further, they may provide "special religious education," whereby accredited religious representatives come into the classroom and instruct children who have opted in to the classes in the stories and rituals of their faith.[93] In the Christian curriculum, for example, children are taught Bible stories, taught how to pray, and taught that God created the world.[94]

In the State of New South Wales, in contrast, all government schools must set aside time for special religious education, though the instruction itself is not compulsory and parents are given an express right to withdraw their child from both general and special religious education classes.[95] Whereas previously children whose parents removed them from these classes were forbidden from being given any other form of instruction – so as not to disadvantage those in the religious classes – a curriculum developed by the secular Humanist Society of Victoria to deliver "humanist applied ethics" to primary school pupils has been accredited.[96] In Victoria, only accredited outsiders – not classroom teachers – are permitted to teach this subject,[97] and such outsiders are typically volunteers.[98]

X. RELIGIOUS SYMBOLS IN PUBLIC PLACES

The wearing or display of religious symbols is not the subject of much regulation in Australia. Students and teachers may wear religious clothes at public schools (although religious schools may have more restrictive uniform requirements) and generally public servants may also do so. While public buildings and government facilities do not routinely display religious symbols, there will not uncommonly be displays at Christmas time and, particularly at local government level, there may also sometimes be displays or celebrations of other religious celebrations. However, the generally secular attitude of Australians means that there tend not to be routine displays of crucifixes or other symbols of the dominant religion in public buildings.

XI. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

Australia does not restrict religious speech through laws on blasphemy, heresy, or apostasy. The Commonwealth *Criminal Code* (Cth) contains a sedition-based offense of "urg[ing] a group or groups (whether distinguished by race, *religion*, nationality or political opinion) to use force or violence against another group or groups (as so distinguished)" which would threaten the peace, order and good government of Australia.[99]

The most controversial issue surrounding freedom of speech and religion in Australia has been the enacting of religious vilification or hate speech laws in several States. (There is no such law at Commonwealth level, although the Commonwealth prohibition on racial vilification gives protection to some religious groups.)

The States of Queensland, Tasmania and Victoria are the only Australian jurisdictions which have introduced religious vilification laws. The scope of the prohibition of religious vilification is similar in all three jurisdictions, although there are some important differences on the extent to which the alleged vilification must be public.[100] The Victorian law, the *Racial and Religious Tolerance Act 2001* (VIC), has

92. *Education and Training Reform Act 2006* (VIC) s 2.2.10(2). The corresponding provision in the State of New South Wales is *Education Act 1990* (NSW) s 30.

93. *Education and Training Reform Act 2006* (VIC) s 2.2.11. See also *Education Act 1990* (NSW) s 32.

94. Michael Bachelard and Liza Power, "The God Allusion," *The Age* (Melbourne), 14 December 2008.

95. *Education Act 1990* (NSW) s 33.

96.Michael Bachelard, "Religion in Schools to Go God-Free," *The Age* (Melbourne), 14 December 2008.

97. *Education and Training Reform Act 2006* (VIC) s 2.2.10(3).

98. Access Ministries accredits Victoria's 3500 Christian religious instruction volunteers. See *About Access Ministries* Access Ministries http://www.accessministries.org.au/index.php?id=5 at 13 January 2010.

99. *Criminal Code* (Cth) s 80.2(5). For a discussion of this offense, see Simon Bronitt, "Hate Speech, Sedition and the War on Terror" in Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) 129.

100. McNamara, supra n. 82 at 147.

given rise to the most extensive criticism and case-law, so its provisions are set out in more detail here, but similar provisions are included in s 124A of the *Anti-Discrimination Act 1991* (QLD)[101] and s 19 of the *Anti-Discrimination Act 1998* (TAS).

Section 8(1) of Victoria's *Racial and Religious Tolerance Act* provides: "A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons."[102]
It is also prohibited to request, instruct, induce, encourage, authorize or assist another person to contravene s 8(1).[103]

The Victorian Act in section 11 also provides that a person does not amount to religious vilification if the "person's conduct was engaged in reasonably and in good faith" and it was in the course of an artistic performance or work, or if it is made for a "genuine academic, artistic, religious or scientific purpose," or if it is for any other purpose in the public interest. Similar provisions exist in the other Acts, but only in Victoria is a genuine religious purpose included as a defense to religious vilification. Under the Act, a religious purpose "includes, but is not limited to, conveying or teaching a religion or proselytizing." This was included after concerns expressed by some religious groups that ordinary preaching or proselytism could be caught under the Act.

Very few cases have been brought under these religious vilification Acts and most that have been brought have been dismissed relatively quickly. However, the most well-known and legally significant of the religious vilification cases is *Islamic Council of Victoria v. Catch the Fire Ministries Inc* (the "Catch the Fire Ministries Case"),[104] which has created national and international controversy. In this case, the Islamic Council of Victoria ("ICV") lodged a representative complaint against the *Catch the Fire Ministries Inc* ("Catch the Fire"), an evangelical Christian church. The church had conducted a seminar, published a newsletter, and published an article on the church's webpage, each of which the ICV claimed attacked the Islamic faith and breached s 8 of the *Racial and Religious Tolerance Act*. Catch the Fire claimed that its statements were accurate, that its actions were reasonable and undertaken in good faith, and that the seminar and publications were conducted and published for a genuine religious purpose and in the public interest. On this basis, it defended the claims of religious vilification.

The Victorian Civil and Administrative Tribunal upheld the ICV's complaint, finding that the cumulative effect of the statements and publications was hostile, demeaning and derogatory to Muslims and their faith, and that they were likely to incite others to religious hatred, contempt and ridicule. Catch the Fire successfully appealed the decision to the Victorian Court of Appeal, which set aside the orders of the Tribunal and remitted the decision to be heard by a different Tribunal member. Ultimately, the matter was settled by the parties out of court, leaving the key question of whether the conduct amounted to vilification unresolved after many years and a lengthy process of litigation.

The key principles for interpreting the *Racial and Religious Tolerance Act* which emerged from this case included that

- incitement includes words and actions that actually incite others, and also those that are calculated to encourage incitement but do not have that effect in practice."[105]
- the Act does not "prohibit statements concerning the religious beliefs of a person or group of persons simply because they may offend or insult the person or group of

101. *Anti-Discrimination Act 1991* (QLD) s 131A also makes it a criminal offense to engage in "serious" religious vilification, i.e. religious vilification in a way that includes threatening physical harm to person or property or inciting others to do so, but the criminal provisions are almost never used because of difficulties with proof and certain procedural hurdles.

102. *Racial and Religious Tolerance Act 2001* (VIC) s 8(2) provides that conduct can be a single instance or multiple instances.

103. *Racial and Religious Tolerance Act 2001* (VIC) s 15. See also *Anti-Discrimination Act 1998* (TAS) s 21; *Anti-Discrimination Act 1991* (QLD) s 122.

104.[2004] VCAT 2510 (Unreported, Member Higgins V-P, 22 December 2004); (2005) EOC ¶93-377 (digest); appeal allowed (2006) 15 VR 207.

105.*Catch the Fire Ministries Case* (2006) 15 VR 207, 211–12 [14] (Nettle JA), 254 [154] (Neave JA).

persons" – that which incites hatred is distinct from that which is offensive;[106]

- courts may take some account of the audience when determining if a particular statement is likely to incite[107] and the effect of the statement on an ordinary member of the audience is the relevant test;[108]
- for the purposes of the "genuine religious purpose" defense: both proselytism and religious comparativism are religious purposes; conduct is genuine if it is really undertaken for one of these purposes; the requirement that it be in good faith is a subjective test; and the requirement that it be reasonable is an objective test, taking into account the standards of an "open and just multicultural society."[109]

There were areas of disagreement between the judges which have still not been resolved. Perhaps the most significant of these is whether ridicule or contempt expressed towards a *religion*, as compared to religious believers, is sufficient for the purposes of the Act. Nettle JA considered that the two were distinct, while recognizing that there may be circumstances in which attacks on a religion might amount to religious vilification. Neave JA put less emphasis on the distinction. Ashley JA did not decide the issue.[110]

XII. CONCLUSION

The Australian approach to religion in political and legal affairs does not fit neatly into categories of secularity or religiosity. That is probably in part because there are relatively low levels of legal regulation of religious freedom or of religious organizations and practices. While many religious groups in Australia feel threatened by current developments, particularly the move towards a bill of rights and questions over whether they should continue to be granted exemptions from discrimination laws, Australia takes a relatively light touch regulatory approach to religious freedom and religious autonomy. Compromises regarding the role of religion in particular sectors tend to be negotiated through ordinary politics and through the legislative and executive branches of governments rather than through the courts and the approach to regulation of religion can therefore sometimes appear less principled and more ad hoc than in systems where regulation is guided by a constraining set of constitutional principles or guided by a dedicated government department.

106.Id. at 212 [15] (Nettle JA).

107.Id. at 212 [16] (Nettle JA).

108.Id. at 249 [132] (Ashley JA), 254–5 [158]–[159] (Neave JA), though see Nettle JA at 212–13 [16]–[19] that some degree of reasonableness may be assumed for most, although not all, audiences.

109. Id. at 240–2 [90]–[98] (Nettle JA).

110. Id. at 218–19 [32]–[34] (Nettle JA), 249 [132] (Ashley JA), 258 [176] (Neave JA).

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Religion and the Secular State in Belgium
Le fait religieux dans ses rapports avec l'État en droit belge

I. INTRODUCTION

"La liberté de religion dérange," écrivait en 1997 Gérard Gonzalez.[1] Il est vrai que cette liberté navigue aujourd'hui douloureusement entre exigences juridiques, contraintes sociales et crispations politiques. Quiconque y regarde de plus près, est frappé par la formidable recrudescence d'importance que prennent, depuis quelque temps, en particulier dans les sociétés dites sécularisées, les rapports entre le droit positif de l'Etat et ces autres ordres normatifs que constituent les croyances religieuses et philosophiques.[2]

La Belgique, à l'instar de la grande majorité des démocraties contemporaines, a fait le choix de séculariser son droit. Pour autant, les praticiens se voient aujourd'hui inexorablement confrontés à des évolutions rapides au sein de la société – liées, d'une part, au succès croissant de convictions non-confessionnelles et, d'autre part, à la manifestation de nouvelles religions et croyances venues avec les migrations d'après-guerre.[3] Cette double évolution rend la société sans cesse plus complexe et plurielle. Le politique en général et le droit en particulier, pour être son instrument, sont aujourd'hui interpellés à propos de la place des identités - religieuses ou autres - dans le cadre juridique en vigueur, notamment sur la façon dont celui-ci garantit à chaque identité sa place. Le droit en Belgique, n'échappe pas à cette confrontation. C'est cette confrontation qui, très vraisemblablement, est à la base du regain d'intérêt pour la question de la liberté de religion et de conviction en droit. Non seulement en Belgique, mais un peu partout aujourd'hui dans le monde. Elle induit un pluralisme juridique appelé à faire droit aux nouvelles constellations de la société contemporaine.

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1. G. Gonzalez, *La Convention Européenne des Droits de l'Homme et la liberté des religions*, Paris, Economica, 1997, Introduction.

2. Voyez notamment: R. Ahdar, I. Leigh, *Religious Freedom in the Liberal State*, Oxford, Oxford U.P., 2005; V. Bader, *Secularism or Democracy? Associational Governance of Religious Diversity*, Amsterdam, Amsterdam U.P., 2007; M. Mookherjee (ed.), *Toleration and Recognition in an Age of Religious Pluralism.* Wien, Springer, 2009; T. Byrnes, P.J. Katzenstein (eds.), *Religion in an Expanding Europe*, Cambridge, Cambridge U.P., 2006; E. Caparros, L.L. Christians (eds.), *Religion in Comparative Law at the Dawn of 21th Century* (15th Congress International Academy of Comparative Law), Bruxelles, Bruylant, 2002; E.B. Coleman, K. White (eds.), *Negotiating the sacred: Blasphemy and Sacrilege in a Multicultural Society*, Canberra: ANU Press, 2006; S. Ferrari, "Nationalism, Patriotism and Religious Belief in Europe," *2006 U. Det.Mercy L. Rev.* 625-639; J. Fox, *A World Survey of Religion and the State*, Cambridge, Cambridge U.P., 2008; A. Lewis, R. O'dair (eds.), *Law and Religion*, Oxford, Oxford University Press, 2001; J.E. Goldschmidt, M.L.P. Loenen (eds.), *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?*, Antwerp/Oxford: Intersentia, 2007; R. Mehdi, G.R. Woodman, E.R. Sand & H. Petersen (eds.), *Religion and Law in Multicultural Societies*,. Copenhagen, DJØF Publishing, 2008; Pr. Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law*, London, Glass House, 2005; R. Torfs, "Religion, Concord and Disconcord," *Nihon University Tokyo Comparative Law*, 2007, 207-223; J.-P. Willaime, *Le retour du religieux dans la sphère publique. Vers une laïcité de reconnaissance et de dialogue*, Lyon, Ed. Olivétan (coll. "Convictions et sociétés"), 2008.

3. Cf.supra n. 2; Fr. Messner, e.a. (dir.), *Les minorités religieuses en Europe*, Paris, PUF, 2006.

En guise de rapport sur le fait religieux dans ses rapports avec l'Etat en droit belge, nous tentons d'identifier ci-dessous quelques-uns parmi les principaux thèmes que nous voyons jouer, à travers la législation, la jurisprudence et la doctrine et leur développement, relatifs à la protection juridique de la liberté de religion et de conviction, et de conscience. Après avoir reproduit les textes constitutionnels relatifs aux relations entre l'Etat et les religions et convictions philosophiques (I), nous distinguons, dans le souci de présenter les données de la manière la plus systématique possible, deux grandes thématiques.

Un *premier* grand thème renvoie à quatre principes fondamentaux, propres au modèle constitutionnel belge et applicable à toutes les convictions religieuses et philosophiques: la neutralité de l'Etat; les limites posées à la liberté de religion et de conviction; la liberté institutionnelle des différents cultes et leur traitement égalitaire face à l'Etat, et enfin, le droit de n'adhérer à aucune religion ou conviction (II).

Un *deuxième* thème est l'exploration de tout ce qui se rapporte au statut des cultes dits 'reconnus'. Il s'agit du régime de six cultes (le catholicisme, le protestantisme, le culte israélite, l'anglicanisme, l'Islam et l'Eglise orthodoxe) et de la laïcité organisée, qui peuvent se prévaloir de certains droits-créances à l'égard des autorités publiques. La reconnaissance d'un culte met en perspective les rapports institutionnels qu'entretient l'Etat belge avec ces différentes communautés religieuses ou obédiences philosophiques, en se penchant plus particulièrement sur le cadre normatif et juridique mis en place pour régir ces rapports. Nous porterons une attention particulière à la reconnaissance du culte musulman et des convictions non-confessionnelles, qui ne s'identifient à aucune croyance religieuse particulière. (III) Enfin, nous terminerons par une brève esquisse d'une problématique qui semble être devenue emblématique de la liberté religieuse en contexte pluriel, non seulement en droit belge, mais également un peu partout en Europe: la question du foulard islamique. (IV)

II. Les Textes Constitutionnels

En droit constitutionnel belge quatre dispositions régissent les relations entre l'Etat et les diverses religions et convictions représentées au sein de la société. Nous les reproduisons ici dans leur intégralité, cela nous permettra d'y référer plus loin:

> Art. 19: "La liberté des cultes, celle de leur exercice public; ainsi que la liberté de manifester ses opinions en toute matière, sont garanties, sauf la répression des délits commis à l'occasion de l'usage de ces libertés."
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> Art. 20: "Nul ne peut être contraint de concourir d'une manière quelconque aux actes et aux cérémonies d'un culte, ni d'en observer les jours de repos."
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> Art. 21: "L'Etat n'a le droit d'intervenir ni dans la nomination ni dans l'installation des ministres d'un culte quelconque, ni de défendre à ceux-ci de correspondre avec leurs supérieurs, et de publier leurs actes, sauf, en ce dernier cas, la responsabilité ordinaire en matière de presse et de publication.
>
> Le mariage civil devra toujours précéder la bénédiction nuptiale, sauf les exceptions à établir par la loi, s'il y lieu."
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> Art. 181: "par. 1 Les traitements et pensions des ministres des cultes sont à la charge de l'Etat; les sommes nécessaires pour y faire face, sont annuellement portés au budget.
>
> Par. 2 Les traitements et pensions des délégués des organisations reconnues par la loi qui offrent une assistance morale selon une conception philosophique non confessionnelle sont à la charge de l'Etat; les sommes nécessaires pour y faire face sont annuellement portées au budget."

Pour être complet, il faut ajouter à ces principes les droits et libertés constitutionnels se rapportant, directement ou indirectement, au domaine religieux, comme par exemple en ce qui concerne la liberté de l'enseignement (art. 24 de la Constitution belge) ou la liberté de la presse (art. 25 de la Constitution belge). Nous nous concentrerons ici toutefois sur les dispositions constitutionnelles garantissant de manière spécifique la liberté de religion.

III. Quatre Principes Constitutionnels Fondamentaux du Modele Belge de Relations entre Etat et Religions

Les quatre dispositions citées ci-dessus, assurent la liberté religieuse en droit belge au départ de quelques grands principes qui peuvent être résumés de la manière suivante: le principe de la neutralité de l'Etat; le principe que dans certaines circonstances la liberté de religion et de conviction peuvent être limitées; le droit de n'adhérer à aucune religion ou conviction; la liberté institutionnelle des différents cultes; et enfin, le principe de la reconnaissance de certains cultes. Nous les aborderons successivement.

A. La neutralité de l'Etat

Le principe de la neutralité de l'Etat n'est pas inscrit en tant que tel dans la Constitution belge. Dans un avis qu'il rendait en date du 20 mai 2008 le Conseil d'Etat rappelle toutefois qu'il s'agit d'un principe constitutionnel étroitement lié à l'interdiction de discrimination et au principe d'égalité: *"En effet, la neutralité des pouvoirs publics est un principe constitutionnel qui, s'il n'est pas inscrit comme tel dans la Constitution même, est cependant intimement lié à l'interdiction de discrimination en général et au principe d'égalité des usagers du service public en particulier. Dans un État de droit démocratique, l'autorité se doit d'être neutre [4], parce qu'elle est l'autorité de tous les citoyens et pour tous les citoyens et qu'elle doit, en principe, les traiter de manière égale sans discrimination basée sur leur religion, leur conviction ou leur préférence pour une communauté ou un parti»*.[5]

La neutralité de l'Etat et des autorités publiques implique que l'Etat n'adhère à aucune religion ou conviction particulière et que l'Etat n'a même pas de jugement ou évaluation à avoir à propos des religions ou convictions dont se réclament ses citoyens. A la différence d'autres pays qui connaissent l'Eglise d'Etat, tel l'Angleterre, l'Etat en Belgique ne s'identifie avec aucune religion ou conviction particulière. La Cour de cassation belge, à peine quelques années après la proclamation de l'indépendance du pays, donnait à la liberté de religion et de conviction la définition suivante: *"le droit pour chacun de croire et de professer sa foi religieuse sans pouvoir être interdit ni persécuté de ce chef; d'exercer son culte sans que l'autorité publique puisse, par des considérations tirées de sa nature, de son plus ou moins grand caractère de vérité, de sa plus ou moins bonne organisation, le prohiber soit en tout, soit en partie, ou y intervenir pour le régler dans le sens qu'elle jugerait le mieux en rapport avec son but, l'adoration de la divinité, la conversation, la propagande de ses doctrines et la pratique de sa morale."*[6]

Le principe de la neutralité de l'Etat n'est aujourd'hui pas remis en question. Pour autant, d'aucuns depuis quelque temps s'interrogent sur les conséquences du principe, notamment pour ce qui concerne la participation des agents de l'Etat à des cérémonies religieuses (voir A) ci- dessous) et la présence de crucifix dans des bâtiments publics (voir B) ci-dessous). C'est dans un même contexte que se situe le débat sur l'interdiction pour les fonctionnaires publics de porter, dans l'exercice de leur fonction, des signes religieux ou philosophiques. Nous y revenons à la Partie III.

1. La participation des agents de l'Etat à des cérémonies religieuses

Le principe de la neutralité s'applique aux agents et représentants de l'Etat dans l'exercice de leur fonction. Toutefois, l'étendue de cette obligation ne fait pas l'unanimité. L'interprétation qui est actuellement donnée au principe constitutionnel de la neutralité de l'Etat n'empêche pas que des mandataires, dans leur(s) fonction(s) d'agents de l'Etat, puissent participer à des cérémonies à caractère religieux, tel par exemple le 'Te Deum'

4. Voir en ce sens l'avis 44.351/1/2/3/4, rendu le 21 avril 2008 sur un avant-projet de loi portant des dispositions diverses (I), l'observation à propos de l'article 40 de l'avant-projet (Doc. parl. *Chambre*, 2007-2008, n° 52-1200/1, 249).

5. Avis 44.521/AG, 20 mai 2008 sur une proposition de loi visant à appliquer la séparation de l'État et des organisations et communautés religieuses et philosophiques non confessionnelles, Doc. Parl. *Sénat*, 2007-2008, n° 4-351/2.

6. Paragraphe mis en gras par nous. Cass., 7 novembre 1843, *Pas.*, I, 1834, 230.

qui est célébré chaque année à la Cathédral Saint Gudule à Bruxelles et dans diverses autres églises du Royaume.[7] Mais d'aucuns contestent cette participation. Une proposition de loi Mahoux et *csrts*, récemment déposée au Sénat, se rapportant à la séparation de l'État et des organisations et communautés religieuses et philosophiques non confessionnelles, vise à interdire cette participation (ci après: proposition Mahoux et *csrts*).[8] Le Conseil d'Etat rendait toutefois un avis négatif. Nous y revenons. La proposition depuis a été retirée**.** Plus récemment encore, la neutralité du chef de l'Etat belge fit la cible des critiques, à l'occasion de la visite que rendait le roi Albert II de Belgique, son épouse la reine Paola, ainsi qu'une délégation comprenant plusieurs ministres en fonction, en date du 10 octobre 2009, dans le cadre de la canonisation du missionnaire belge Joseph De Veuster dit père Damien, devenu célèbre pour son travail humanitaire pour les lépreux de l'île Molokai à Hawaii. Le chef de l'Etat belge s'est mis à genou pour baiser l'anneau papal. Ce geste à caractère religieux portait, aux yeux de certains, atteinte à la séparation entre l'Eglise et l'Etat en droit constitutionnel belge. Interpellé sur la présence d'une importante représentation ministérielle à cette même canonisation, le premier Ministre Van Rompuy a tenu à préciser qu'il s'agissait en l'occurrence d'un hommage à un compatriote exceptionnel, et qui ne portait en rien atteinte au principe de la séparation de l'Etat et de la religion.[9]

2. Les crucifix dans des bâtiments publics

La neutralité de l'Etat se doit d'être également respectée à travers l'architecture et l'ameublement de bâtiments lui appartenant et qui sont utilisés pour des fonctions officielles, publiques. Les symboles religieux n'y ont pas leur place.[10] A ce propos, le principe de la neutralité de l'Etat fait, dans plusieurs pays européens, objet de vives discussions notamment en rapport à la question de savoir si les crucifix ont leur place dans les écoles publiques et dans les salles d'audience des cours et tribunaux. Dans son récent arrêt Lautsi[11], la Cour européenne des droits de l'homme se positionne en faveur du décrochage. Cet arrêt, on le sait, a suscité beaucoup d'émotions au sein de l'opinion catholique, non seulement en Italie mais également dans d'autres pays en Europe. La

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7. Cette cérémonie de l'Eglise catholique romaine a pour but essentiel de rendre grâce à Dieu pour la vie du pays et soutenir les autorités, dont le Roi. Depuis quelques années, dans diverses paroisses du Royaume, d'autres cultes sont associés au Te Deum.

8. Art. 3 *" Les personnes morales de droit public ne peuvent, directement ou indirectement, organiser ou participer à des cérémonies officielles qui font référence, notamment par des circonstances de temps ou de lieu, à une conception philosophique confessionnelle ou non confessionnelle."* Proposition de loi visant à appliquer la séparation de l'État et des organisations et communautés religieuses et philosophiques non confessionnelles , Doc. Parl. *Sénat*, 2007-2008, nr. 4-351/1. Voyez également: http://.ulb.ac.be/cal/ laiciteAZ/impartialite. html (dernière consultation 07 juin 2010).

9. Ann. Parl., *Chambre*, 2009-2010, 27 octobre 2009, 7-9.

10. Ce principe est rappelé dans une circulaire du Ministre de la Justice du 28 avril 2004 (Circulaire n°25. Bâtiments judiciaires. Neutralité. Symboles religieux, consultable sur http://www.juridat.be/wel3/circf.htm): *"Tous les locaux des palais de justice, en ce y compris les salles d'audience, doivent donner une image d'absolue neutralité en matière de convictions religieuses, philosophiques ou morales."* En conséquence et en vertu du principe de la neutralité, *"toutes les images, reproduction ou œuvres d'art présentes dans les locaux judiciaires ne peuvent représenter des symboles religieux."* Une exception est toutefois prévue, notamment dans le cas où une mesure de classement s'étendrait également au contenu du bâtiment concerné, ou encore, *"dans les locaux où, de longue tradition des oeuvres d'art sont accrochées, dont le thème relèverait de choix religieux ou philosophique précis,"* mais qui *"font partie de la décoration esthétique du prétoire, et participent en cette qualité, à sa majesté."* Échapperont également au décrochage ou au remisage, les symboles religieux ou philosophiques qui peuvent légitimement être considérés comme des œuvres d'art. S. Van Drooghenbroeck, "La neutralité des services publics: outil d'égalité ou loi à part entière? Réflexions inabouties en marge d'une récente proposition de loi," à paraître in: J. Ringelheim (dir.), *Le droit belge face à la diversité culturelle. Quel mode de gestion de la pluralité?*, Bruxelles, Bruylant, 2010 (à paraître).

11. Le 3 novembre 2009, la Cour européenne des droits de l'homme a rendu sa décision dans le cas de *Lautsi c. Italie*, jugeant que l'exposition de crucifix dans les écoles publiques italiennes viole l'article 2 du protocole n° 1 (droit à l'éducation) et l'article 9 (liberté de pensée, de conscience et de religion) de la Convention. Ce faisant, la Cour rejette les affirmations du gouvernement italien que le crucifix est un symbole national de signification culturelle et historique. D'aucuns, notamment les représentants des Eglises, ont aussitôt exprimé leur crainte que cette décision ne vienne remettre en cause les manifestations de symboles religieux dans les écoles à travers l'Europe.

discussion à propos des crucifix est révélatrice d'une sensibilité grandissante auprès d'une franche de l'opinion publique au respect du principe de la neutralité de l'Etat.[12] En Belgique toutefois, le débat sur la question est clos. Le principe veut que tout bâtiment qui sert de lieu où est assuré un service public soit neutre. Cela vaut notamment pour les bâtiments d'écoles publiques. Les écoles du secteur privé ne tombent pas sous cet interdit.[13]

On peut s'interroger sur l'étendue de l'interdit dans le cas des établissements privés se réclamant d'un conviction religieuse ou philosophique particulière et qui assurent différents services de soins de santé. Ces derniers sont pour une part non négligeable à charge des finances publiques. Ces établissements sont-ils autorisés à arborer des signes religieux ou philosophiques? Dans son récent avis sur la proposition de loi Mahoux et *csrts*[14] le Conseil d'Etat estime à ce propos: *"[…] des établissements d'enseignement, hospitaliers et d'aide sociale peuvent avoir un fondement religieux ou philosophique. La circonstance que certains d'entre eux se fondent sur un engagement religieux ou philosophique n'a jamais été considérée comme contraire à la Constitution belge, laquelle doit au contraire être interprétée comme autorisant pareilles initiatives."*[15]

Dans le cas des cours et des tribunaux, il est évident que l'apparence de neutralité est fondamentale, il s'agit effectivement de rendre justice à l'ensemble de la population, sans égard particulier à la religion et surtout, de n'en favoriser aucune. L'époque où la présence dans une salle d'audience d'un symbole religieux ne semblait pas mettre ostensiblement en péril la neutralité des juges, est révolue. Le principe de la neutralité de l'Etat et son application (plus) conséquente ont permis en quelque sorte d'assainir la situation. Sauf dans les cas où le crucifix fait partie intégrante de l'architecture du bâtiment et/ou présente une valeur esthétique, patrimoniale particulière, le crucifix heurte le principe de neutralité des bâtiments publics.[16] Le principe de la neutralité de l'Etat vaut également en matière d'aménagement des cimetières. En Belgique il s'agit d'un service public à charge des communes, ce qui n'exclut pas que des signes religieux ou philosophiques puissent être placés sur les tombes.[17] Il s'agit évidemment d'un choix personnel, qui ne peut être imposé par les pouvoirs publics. Dans une affaire concernant le caractère public du cimetière, le Conseil d'Etat a estimé qu'un règlement communal qui impose aux citoyens, sans égard à leurs convictions philosophiques ou religieuses, le symbole religieux de la croix chrétienne, enfreint le caractère public des cimetières et la

12. Voyez notamment: H. Kalb, R. Potz & Br. Schinkele, *Das Kreuz im Klassenzimmer und Gerichtssaal*, Freistadt, Plöchl, 1996.

13. Cette position est confirmée dans l'avis susmentionné du Conseil d'Etat. Cf.supra n. 5.

14. Cf.supra n. 5.

15. Cf.supra n. 5.

16. Voyez notamment la Circulaire n°25 (2005) du Ministre de la Justice aux Présidents des Commissions des bâtiments judiciaires sur la neutralité des bâtiments judiciaires et les symboles religieux. Cette circulaire abroge un circulaire antérieure du 22 janvier 2001.

17.. En Belgique, la loi spéciale du 13 juillet 2001 (cf.infra n. 59) a transféré diverses compétences aux Régions et Communautés. L'article 4 de cette loi a transmis la compétence en matière de funérailles et sépultures aux Régions. Celles-ci sont donc compétentes pour modifier ou non la loi du 20 juillet 1971 sur les funérailles et sépultures (*Moniteur Belge*, 3 août 1971). Le législateur flamand (par décret du 16 janvier 2004) et le législateur bruxellois (par ordonnance du 18 juillet 2002), adoptaient depuis un décret en la matière. Plus récemment, un décret régional, adopté par le Parlement wallon le 4 mars 2009 en matière de funérailles et sépultures (*Moniteur Belge*, 26 mars 2009), porte diverses dispositions importantes en matière religieuse et philosophique. Ce décret ne vise que la région de langue française, pour laquelle il abroge l'essentiel de la loi du 21 juillet 1971. Pour ce qui concerne les signes de sépulture, l'article 1232-27 prévoit que, "[…] *sauf volonté contraire du défunt ou opposition de ses proches, toute personne a le droit de faire placer sur la tombe de son parent ou de son ami un signe indicatif de sépulture sans préjudice du droit du titulaire de la concession. Le conseil communal, la régie communale autonome ou l'organe compétent de l'intercommunale règle l'exercice de ce droit et, notamment, tout ce qui concerne la dimension des signes de sépulture et la nature des matériaux à utiliser*." Le décret prévoit aussi la possibilité de carrés confessionnels au sein des cimetières publics**:** *"[Le gestionnaire public] peut également aménager une parcelle permettant le respect des rites de funérailles et de sépultures des cultes reconnus. Ces parcelles sont intégrées dans le cimetière; aucune séparation physique ne peut exister entre celles-ci et le restant du cimetière. Toute inhumation ou toute crémation se fait dans le respect des dispositions du présent décret"* (article L1232-2 §4). La possibilité de créer de tels carrés convictionnels ne relevait jusqu'à présent que d'une simple circulaire fédérale du Ministre de l'Intérieur du 27 janvier 2000, sans toutefois être intégrés dans un texte législatif.

nécessite d'impartialité des services publics qui s'ensuit. Ceux-ci doivent être mis également à la disposition de personnes qui ne sont pas attachées à un culte particulier.[18]

B. La liberté de religion et de conviction et ses limites

Un second principe du droit constitutionnel belge est que la liberté des religions et des convictions s'accompagne de certaines responsabilités. La liberté de religion et de conviction n'est pas absolue, le législateur est autorisé à poser des limites à son exercice. L'article 19 de la Constitution stipule effectivement que la liberté des cultes, celles de leur exercice public, ainsi que la liberté de manifester ses opinions en toute matière, sont garanties, "[…] *sauf la répression des délits commis à l'occasion de l'usage de ces libertés."* En d'autres termes: la liberté est le principe et les autorités n'ont pas pouvoir pour intervenir et/ou imposer des contraintes sauf en cas d'abus de la liberté.

Cette préséance donnée à la liberté signifie aussi que les autorités publiques ne sont pas autorisées à prendre des mesures préventives qui limiteraient les risques d'abus de la liberté. Les mesures préventives sont en quelque sorte exclues. L'adage 'mieux vaut prévenir que guérir' ne vaut donc pas en matière de liberté de religion et de conviction. La prévention en ce domaine signifierait p.e. que l'on soumette l'expression concernée à une autorisation préalable, ce qui équivaudrait à une forme de censure. Cela serait contraire à l'esprit avec lequel, en droit belge, la liberté de conviction et sa protection sont conçues. Nous traiterons ici successivement de trois types de mesures - les mesures préventives, les mesures répressives, et enfin, les mesures qui modalisent l'exercice de la liberté - pour montrer comment les principes du droit constitutionnel belge se rapportent à chacun de ces types.

1. L'interdiction de mesures préventives

En droit belge, toute mesure qui serait prise pour empêcher des croyants ou des ministres du culte d'exercer leur liberté de conviction, est à exclure. L'organisation d'une rencontre religieuse dans un lieu de prière ne saurait être soumise à l'obtention de quelconque autorisation émanant de l'autorité publique locale.

Pour autant, les choses se présentent de manière différente pour les rassemblements en plein air. L'article 19 est à lire en lien avec l'article 26, 2ème al. de la Constitution qui prévoit que: *"Les Belges ont le droit de s'assembler paisiblement et sans armes, en se conformant aux lois qui peuvent régler l'exercice de ce droit, sans néanmoins le soumettre à une autorisation préalable."* Le second alinéa prévoit toutefois que "*Cette disposition ne s'applique point aux rassemblements en plein air, qui restent entièrement soumis aux lois de police."* En application du second alinea les processions religieuses en plein air, par exemple, peuvent parfaitement être interdites en vertu d'une loi de police.[19]

La question de la surveillance préventive en matière de conviction a connu une nouvelle actualité lorsque, voici quelques années, s'est posée la question comment réagir face au phénomène des sectes dites dangereuses et comment, en droit belge, gérer au mieux l'inquiétude que celles-ci suscitent. A tort ou a raison, la Belgique s'est démarqué dans les années nonante comme un pays fortement inquiété par les risques que posent certains mouvements dits sectaires.[20] Dans un premier temps , une commission parlementaire fut chargée de mener une enquête visant à *"[…] élaborer une politique en vue de lutter contre les pratiques illégales des sectes et le danger qu'elles représentent pour la société et pour les personnes, particulièrement les mineurs d'âge."*

Le 28 avril 1997, cette commission parlementaire déposa son rapport final, qui comprend une série de mesures à prendre pour lutter contre les agissements des sectes. Ce

18. Conseil d'Etat, 7 juillet 1975, n° 17.114, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 1976, 353. Annoté, notamment par: L.P. SUETENS, *Rechtskundig Weekblad*, 1975-1976, 300.

19. En ce sens: Cass., 23 janvier 1879, *Pas*., 1879, I, 75; Cass., 9 janvier 1882, *Pas.*, 1882, I, 25; Cass., 8 juin 1892, *Pas.*, 1892, I, 286

20. Voyez notamment: L.-L. CHRISTIANS, "Vers un principe de précaution religieuse en Europe? Risque sectaire et conflit de normes," *Il Diritto Ecclesiastico*, 2001, 173-213; R. TORFS, "Sekten en recht," Collationes, 1998, 385-406; R. TORFS, "Sekten, godsdienstvrijheid en de staat," *Ethiek en maatschappij*, 2002, n°1, 69-81.

rapport suscita beaucoup de remous, notamment à la suite de la publication d'une liste, jointe en annexe du document, identifiant les organisations qui avaient été soumises à l'enquête de la commission parlementaire.[21] D'aucuns protestèrent, s'estimant injustement soupçonnés d'appartenir à un mouvement sectaire, sur quoi les auteurs du rapport s'empressèrent de déclarer que la nomination d'un groupe particulier sur cette liste ne signifiait pas nécessairement que ce groupe soit une secte ou, qui plus est, soit dangereuse. Une première mesure proposée par la commission parlementaire qui fut rapidement mise a exécution, fut la création du "Centre d'Information et d'Avis," par loi du 2 juin 1998[22], une agence fédérale indépendante chargée de l'information du public. L'objectif est de prolonger et de compléter le travail de la commission parlementaire, au départ d'une structure permanente, et de poursuivre l'observation du phénomène des groupements sectaires nuisibles et de leurs pratiques. Sont visées en particulier les pratiques qui font appel à des stratégies de persuasion faisant fi de tout libre arbitre, ou qui incitent quelqu'un à rompre avec son entourage, les abus de régimes fiscaux, les châtiments corporels, … pour ne citer que ces exemples, tous repris dans le rapport de la commission. Les activités du Centre et son travail ont conduit en Belgique et à l'étranger à des demandes de précision.

Un recours en annulation introduit contre la loi du 2 juin 1988 fut rejeté par la Cour constitutionnelle. Dans son arrêt du 21 mars 2000 la Cour a estimé que la loi ne contrevient pas à l'interdiction de mesures préventives. La Cour constitutionnelle décida en effet que le Centre n'était pas autorisé à interdire la manifestation d'opinion d'une minorité religieuse ou philosophique. Son mandat est limité à informer le public sur des activités de groupes particuliers afin que le monde extérieur puisse se faire une image plus concrète des opinions éventuellement dangereuses.[23]

2. Les mesures répressives

La Constitution belge permet, par la voie de l'article 19, de réprimer les abus de la liberté de culte. En l'espèce, c'est le droit pénal qui sera d'application. On constatera toutefois que pour tout ce qui se rapporte aux cultes, les dispositions législatives qui traitent de ceux-ci sur le mode d'une disposition de droit pénal explicite, sont rares.[24] Comme nous l'écrivions déjà, en droit belge le principe est que les opinions ne sont, en elles-mêmes, jamais condamnables, ce qui exclut en quelque sorte le délit d'opinion. Ce n'est donc pas l'opinion en tant que telle qui dans ce cas est sanctionnée, mais bien ses effets éventuellement dommageables. L'article 268 du Code pénal offre une illustration de disposition répressive: *"Seront punis […] les ministres d'un culte qui, dans l'exercice de leur ministère, par des discours prononcés en assemblée publique, auront directement attaqué le gouvernement, une loi, un arrêté royal ou tout autre acte de l'autorité publique."* Cet article vise à garantir le respect de l'autorité publique de la part des ministres de cultes, dans la nomination desquels l'autorité publique ne peut intervenir.

La lutte contre les pratiques abusives en matière de convictions et de croyances et les

21. Doc. Parl. *Chambre*, 1995-96, 313/8, 227.

22. Loi du 2 juin 1998 portant création d'un Centre d'information et d'avis sur les organisations sectaires nuisibles et d'une Cellule administrative de coordination de la lutte contre les organisations sectaires nuisibles, *Moniteur Belge*, 25 novembre 1998.

23. Cour Constitutionnelle, n° 31/2000 du 21 mars 2000.

24. Le Code pénal contient également des dispositions visant, au contraire, à protéger le libre exercice du culte. On s'en référera aux articles 142 à 146: en application de ceux-ci, seront punies, notamment, les personnes qui par des actes ou des menaces, auront contraint ou empêché une ou plusieurs personnes d'exercer un culte, d'assister à l'exercice de ce culte, de célébrer certaines fêtes religieuses, d'observer certains jours de repos, et, en conséquence d'ouvrir ou de fermer leur ateliers, boutiques ou magasins, et de faire ou de quitter certains travaux (art. 142); celui ou celle qui, par des troubles ou des désordres, aura empêché, retardé ou interrompu les exercices d'une culte qui se pratiquent dans un lieu destiné ou servant habituellement au culte ou dans les cérémonies publiques de ce culte (art. 143); celui ou celle qui, par faits, paroles, gestes ou menaces, aura outragé les objets d'un culte, soit dans les lieux destinés ou servant habituellement à son exercice, soit dans des cérémonies publiques de ce culte (art. 144); et enfin, celui ou celle qui aura outragé le ministre d'un culte, dans l'exercice de son culte (art. 145). Le coupable qui, par ses coups aurait causé l'effusion de sang, une blessure, voire une maladie sera puni plus sévèrement (art. 146). Toutes dispositions qui, dans le Code pénal, cherchent à assurer le respect de la liberté de conviction et son exercice.

conduites répréhensibles en ce domaine, est une lutte ardue, malaisée à traduire correctement en pratique: d'une part, elle impose de mettre en œuvre les mesures répressives qui s'imposent mais, d'autre part, il y a lieu d'éviter d'encourager inutilement la désapprobation et les préjugés contre certains mouvements, car cela serait contraire à l'obligation de protection des libertés fondamentales en cause.[25] La section législation du Conseil d'Etat a récemment rendu deux avis, un premier avis le 16 mars 2009[26] et un second avis le 2 juin 2009[27] à propos de propositions de loi qui cherchent à combattre, par la voie de la pénalisation, la déstabilisation mentale des personnes et les abus de la situation de faiblesse des personnes. S'inspirant d'avis antérieurs, le Conseil d'Etat estime que s'il n'est pas nécessaire que la loi énumère limitativement tous les moyens de persuasion prohibés, il convient, à tout le moins, de les circonscrire de manière précise, étant entendu que le juge disposera d'une certaine marge d'appréciation pour tenir compte des circonstances concrètes. Le Conseil d'Etat estime également que, sauf à justifier de façon non discriminatoire la volonté de limiter le champ d'application des éléments infractionnels[28] aux associations à caractère religieux, culturel ou scientifique, il n'y a pas lieu d'exclure les associations de type philosophique. Elles aussi peuvent être susceptibles de s'adonner à des pratiques abusives. Enfin, le Conseil d'Etat rappelle l'existence d'infractions pénales, tel l'article 142 du Code pénal[29], enjoignant le législateur à éviter les interférences.

3. Les mesures qui modalisent l'exercice de la liberté

La protection de la liberté de conviction n'empêche pas que des mesures puissent être prises qui, sans enfreindre le principe de la liberté, *modalisent* l'exercice de celle-ci. Un règlement communal par exemple, qui préciserait que à certaines heures de la journée il est interdit de faire sonner les cloches de l'Eglise, n'est pas contraire à la Constitution.[30] On pourrait multiplier les illustrations. Cela vaut également pour les mesures qui seraient imposées par souci de sécurité ou en application d'une réglementation d'aménagement public: si l'établissement et la construction d'un lieu de prière fait partie intégrante de l'exercice de la liberté de culte, cela ne veut pas dire pour autant qu'aucune mesure préventive de sécurité du bâtiment ou contrainte liée au respect de l'environnement ne puisse être imposée à titre de condition préalable à l'établissement/la construction/la rénovation pour lesquels un permis émanant des autorités publiques compétentes est requis. Le tollé que soulevait, en novembre 2009, un peu partout en Europe, le résultat du référendum suisse sur l'interdiction de construction de minarets fut l'occasion pour d'aucuns de rappeler que, en droit belge, seules des mesures qui modaliseraient la construction de bâtiments religieux seraient acceptables, non celles qui viseraient, d'une manière globale, à l'instar du refus suisse, un type de construction caractéristique d'une conviction particulière.

Le texte de la Constitution belge prévoit lui-même une mesure régulatrice de l'exercice de la liberté de conviction. L'article 21, en son dernier alinéa, donne la préséance au mariage civil. La préséance accordée au mariage civil s'explique dans le contexte de l'époque: de nombreuses personnes se mariaient uniquement devant l'Eglise, se croyant ainsi par la même occasion mariées civilement; une pratique qui, si elle est fréquente, tend à entraver le bon fonctionnement des services de l'Etat civil.[31] En imposant l'antériorité du mariage civil, le Constituant a voulu éviter que des personnes puissent se prévaloir d'être

25. Voyez à ce propos, notamment: V. Saraglou, L.-L. Christians, C. Buxant & S. Casalfiore, *Mouvements religieux contestés. Psychologie, droit et pratiques de précaution*, Louvain-la-Neuve , Academia Press, 2005.

26. Avis 46.070/2 à 46.072/2 du 16 mars 2009 de la section législation du Conseil d'Etat.

27. Avis 46.641/2 du 2 juin 2009 de la section législation du Conseil d'Etat.

28. Tel *contraindre* un individu à faire partie ou a cesser de faire partie d'une telle association.

29. Cf.supra n. 24.

30. En ce sens: Cass., 3 février 1879, *Pas.*, 1879, Pas., I, 106.

31. Cet interdit est à lire conjointement avec l'article 164 de la Constitution qui stipule que la rédaction des actes de l'état civil et la tenue des registres sont exclusivement dans les attributions des autorités communales. Le principe de la sécularisation de l'état civil est donc ancré dans le texte de la Constitution.

Voyez également: R. Torfs, "Le mariage religieux et son efficacité civile en Belgique," in: European Consortium for Church-State Research (ed.), *Marriage and Religion in Europe*, Milan, Guiffré, 1993, 221-251

légalement mariées en contractant uniquement un mariage religieux. La préséance accordée au mariage civil offre un exemple de modalisation de l'exercice de la liberté de conviction. Il ne s'agit pas d'une mesure qui ne témoignerait d'aucune compréhension. Ainsi, le mariage religieux qui serait célébré antérieurement au mariage civil, n'est pas pour autant nul. Le Constituant se limite à pénaliser le ministre du culte qui aurait officié, il ne pénalise pas les époux concernés. Pour le surplus, l'interdit ne vaut pas en cas de danger de mort: les mariages religieux qui seraient consacrés au motif qu'un des deux partenaires se trouve en danger de mort, échappent à la pénalisation (art. 267 du Code pénal belge).

La réglementation de droit constitutionnel peut aujourd'hui paraître obsolète. On ne s'y trompera toutefois pas, dans certaines circonstances elle retrouve toute son actualité. Conformément à une logique de respect de la tradition, certaines communautés, notamment d'origine immigrée, maintiennent jusqu'à aujourd'hui cette habitude qui consiste à ne pas se marier au civil et à se limiter à la célébration religieuse, celle-ci jouissant très nettement leur préférence.[32] Cela se fait tantôt de bonne foi, c'est à dire dans l'ignorance de l'interdit constitutionnel, tantôt pour permettre à un couple de se justifier face à la communauté d'appartenance lorsque celle-ci n'accepte pas la cohabitation prénuptiale, mais sans l'intention dans le chef des 'époux' de supporter les responsabilités qui découlent d'un mariage civil. L'on pourrait se demander si le droit à la liberté religieuse ne devrait pas conduire à autoriser les personnes qui ne souhaitent pas contracter un mariage civil, à contracter un mariage religieux.[33] Afin d'éviter que des personnes se trompent sur les effets civils de leur mariage religieux, il suffirait d'imposer aux ministres des cultes officiant l'obligation d'informer dûment les candidats au mariage.

C. La liberté de n'adhérer à aucune religion

Un troisième principe constitutionnel est la liberté de n'adhérer à aucune conviction ou religion. L'article 20 de la Constitution belge protège explicitement cette liberté: *"Nul ne peut être contraint de concourir d'une manière quelconque aux actes et aux cérémonies d'un culte, ni d'observer les jours de repos."* Au XIXe siècle cette disposition constitutionnelle a donné lieu à diverses polémiques, les unes plus vives que les autres, dont certaines ont été portées devant les tribunaux et ont donné lieu à des décisions judiciaires se rapportant notamment à la présence obligatoire de militaires au 'Te Deum'[34] et au serment que doivent prêter les témoins dans les prétoires judiciaires. La liberté de n'adhérer à aucune religion est assurée dans la formulation du serment: il n'est fait aucune référence à quelconque Dieu ou instance suprême qui présenterait un lien avec une conviction religieuse.[35]

La disposition de l'article 20 de la Constitution inclut le droit de ne pas être contraint d'observer le calendrier d'un culte particulier. On remarquera à ce propos que le repos du dimanche n'est pas été inspiré par la volonté du législateur belge de respecter les activités religieuses du culte des communautés chrétiennes coïncidant avec ce jour-là, il s'agit plutôt d'un choix législatif tranché en droit social et qui est lié à l'observation que le dimanche correspondait à cette époque déjà, traditionnellement, au jour de repos hebdomadaire respecté par une large majorité de la population, mais sans que cela n'implique de quelconque façon l'obligation de respecter, à titre religieux, le repos du dimanche. Inversement, la jurisprudence estime qu'une personne qui invoque sa religion ne peut légitimement être exclue du bénéfice des allocations de chômage au seul motif que sa religion lui interdit de travailler certains jours de la semaine.[36]

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32. Voyez notamment: E. Rude-Antoine, *Le mariage maghrébin en France*, Paris, Karthala, 1990; N. DESSING, Rituals of Birth, Circumcision, Marriage, and Death among Muslims in the Netherlands, Leuven, Peeters, 2001. Plus récemment: S. Bano, "Muslim Family Justice and Human Rights: The Experience of British Muslim Women," *Journal of Comparative Law*, 2007, 1-29.

33. C'est la solution pour laquelle optaient plusieurs pays européens, notamment l'Espagne et la Royaume-Uni.

34. Cf.supra n. 7.

35. Voyez notamment: article 934 du Code judiciaire belge et article 75 du Code d'instruction criminelle

36. Commission de recours auprès de l'ONEM, 22 décembre 1962, *Journal des Tribunaux,* 1963, 285 (note

La liberté de n'adhérer à aucune conviction religieuse implique, très logiquement, que chacun est en droit de désapprouver la religion ou les convictions des autres. Ce principe fut rapidement confirmé en droit belge. Farouchement opposés à la mainmise de l'Eglise catholique sur la société, les libéraux s'en sont prévalus dès l'indépendance du pays. La discorde entre les catholiques et les libéraux sur la question amènera finalement la Cour de cassation à se prononcer dans un arrêt du 3 novembre 1863, dans l'affaire Keym. Cette affaire concernait deux lithographies visant certaines mœurs douteuses du clergé de l'époque. La question, en droit, était de savoir si un arrêté remontant à l'époque hollandaise et pénalisant tout écrit et/ou représentation qui ridiculise ou diminue la religion, était encore d'application. La Cour a répondu par la négative au motif que la disposition litigieuse était contraire à la liberté de culte et au statut égalitaire des différents cultes et convictions philosophiques inscrits depuis dans la Constitution belge.[37] En alignement sur ce qui précède le blasphème ne constitue pas un fait punissable en droit belge.

La liberté de religion signifie pour les uns qu'ils sont assurés de pouvoir vivre leur conviction dans le domaine religieux et pour les autres qu'ils ont, non seulement le droit de n'adhérer à aucune conviction, mais également le droit de s'investir dans toute forme d'opposition à la conviction religieuse en essayant de convaincre leur entourage du bien-fondé de cette opposition. Mais cette opposition a ses limites. La loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie pénalise effectivement les incitations à la haine, à la violence ou à la discrimination en raison de l'appartenance à une religion (articles 20 à 28).[38] De l'avis de la Cour constitutionnelle une interprétation conforme à la Constitution requiert toutefois un dol spécial: une condamnation ne se justifie que dans le cas où il est certain que l'incitation était motivée par l'intention de viser un groupe particulier de la population, en faisant de lui la victime de haine, de violence ou de discrimination.[39]

D. La liberté institutionnelle

Le quatrième principe constitutionnel se rapportant à la liberté de religion et de conviction et dont nous traiterons brièvement ici, est inscrit à l'article 21 de la Constitution belge, déjà cité: *"L'Etat n'a le droit d'intervenir ni dans la nomination ni dans l'installation des ministres d'un culte quelconque, ni de défendre à ceux-ci de correspondre avec leurs supérieurs, et de publier leurs actes, sauf, en ce dernier cas, la responsabilité ordinaire en matière de presse et de publication.*

Le mariage civil devra toujours précéder la bénédiction nuptiale, sauf les exceptions à établir par la loi, s'il y a lieu."

Cette disposition de la Constitution couvre l'aspect institutionnel de la liberté. Si la liberté de conviction est, fondamentalement et dans une très large mesure, une liberté individuelle, elle s'exerce très souvent également en communauté. Par conséquent, elle s'accompagne d'une dimension collective, organisationnelle et/ou, institutionnelle.

L'article 21 contient l'interdiction pour l'Etat belge d'interférer dans l'organisation interne d'un culte, en distinguant trois aspects de cette organisation: la nomination et l'installation des ministres du culte; la correspondance échangée entre les ministres du

F.A.).

37. Cass., 3 novembre 1863, *B.J.*, 1863, I, 1554. Lorsque, en 1830, la partie méridionale du Royaume des Pays-Bas s'en sépare pour former la Belgique, les raisons religieuses jouent un rôle important. En effet, la politique du roi Guillaume, un souverain protestant partisan de la soumission de l'Eglise au contrôle de l'Etat, a suscité l'ire: les catholiques revendiquent la liberté d'organiser leur culte et l'enseignement, les libéraux (au sens de l'époque, les forces progressistes) réclament la liberté de conscience et d'expression. De leur union va naître une Constitution extrêmement libérale qui garantit les libertés de culte, de presse, d'enseignement et d'association.

38. Modifiée par loi du 7 mai 2007 (*Moniteur Belge*, 30 mai 2007).

39. Cour d'arbitrage, nr. 157/2004, 6 octobre 2004, annotation: J. VELAERS, "Het Arbitragehof en de anti-discriminatiewet," *Tijdschrfit voor Bestuurswetenschappen en Publiekrecht*, 2004, 601-614; voyez également; D. De Prins, J. Vrielink, " Die Wiederkehr des Gleichen. Het Grondwettelijk Hof en de (federale) discriminatiewetgeving, Id., 2009, 579-614.

culte et leurs autorités hiérarchiques; et enfin, la publication des actes qui seraient produits par ces derniers. La disposition doit être située dans son contexte historique: en 1831, le Constituant visait en premier lieu la lecture par des prédicateurs, de haut de leur chaire de vérité, de lettres pastorales. La doctrine et la jurisprudence ont toutefois donné une interprétation extensive à l'article 21 en estimant que la liste des activités retenues par celui-ci n'est pas exhaustive et que, par voie de conséquence, il s'agit d'un principe général d'autonomie organisationnelle dans le chef des cultes.[40] La Cour européenne des droits de l'homme corrobore par ailleurs ce principe en permettant que des communautés religieuses s'organisent et choisissent leurs propres chefs religieux.[41]

L'autonomie organisationnelle garantit que l'Etat ne se mêle pas des structures internes d'un culte, ni des relations hiérarchiques qui prévalent parfois au sein de certaines communautés et/ou églises. Ainsi, l'Eglise catholique par exemple, maintient son droit de nommer les évêques et de créer de nouveaux évêchés, sans avoir pour ce faire à demander, préalablement, quelconque autorisation aux autorités civiles. Pour autant, les nominations ou l'éventuelle création d'une nouvelle entité ne ressortiront des effets sur le plan civil qu'à la condition que l'Etat, à travers une décision qui devra émaner de l'autorité publique compétente, marque son accord d'assortir la mesure d'effets juridiques (en droit belge).[42] Nous y revenons à la partie suivante à propos du statut des religions dites "reconnues."

Dans un arrêt du 5 octobre 2005, la Cour constitutionnelle belge s'est exprimée sur le principe de l'autonomie organisationnelle dans les termes suivants: " *La liberté de religion comprend, entre autres, la liberté d'exprimer sa religion, soit seul, soit avec d'autres. Les communautés religieuses existent traditionnellement sous la forme de structures organisées. La participation à la vie d'une communauté religieuse est une expression de la conviction religieuse qui bénéficie de la protection de la liberté de religion. Dans la perspective également de la liberté d'association, la liberté de religion implique que la communauté religieuse puisse fonctionner paisiblement, sans ingérence arbitraire de l'autorité. L'autonomie des communautés religieuses est en effet indispensable au pluralisme dans une société démocratique et se trouve donc au coeur même de la liberté de religion. Elle présente un intérêt direct non seulement pour l'organisation de la communauté religieuse en tant que telle mais aussi pour la jouissance effective de la liberté de religion pour tous les membres de la communauté religieuse. Si l'organisation de la vie de la communauté religieuse n'était pas protégée par l'article 9 de la Convention européenne des droits de l'homme, tous les autres aspects de la liberté de religion de l'individu s'en trouveraient fragilisés (Cour européenne des droits de l'homme, 26 octobre 2000, Hassan et Tchaouch c. Bulgarie, § 62). La liberté de culte garantie à l'article 21, alinéa 1er, de la Constitution reconnaît cette même autonomie d'organisation des communautés religieuses.*"[43]

Chaque religion est donc libre d'avoir ses propres structures et de s'organiser comme elle l'entend.

E. Le statut des différents cultes "reconnus"

1. La reconnaissance de cultes

Le régime belge des cultes est celui d'une indépendance réciproque des cultes et de l'Etat, tempérée par l'existence d'un financement public des religions reconnues. Il remonte à l'indépendance. Accédant aux vœux de l'archevêque de Malines-Bruxelles, le congrès national qui rédige la Constitution accepte d'y inscrire le principe du financement public, par le biais de la prise en charge des traitements des ministre du culte: l'article 181 prescrit que *"Les traitements et pensions des ministre des cultes sont à charge de l'Etat; les sommes nécessaires pour y faire face sont annuellement portées au budget."* Se trouve

40. En ce sens: avis 36.134/3 du 13 janvier 2004 de la section législation du Conseil d'Etat.

41. Voyez notamment: *Hassan & Tchaouch c. Bulgarie*, arrêt du 26 octobre 2000, Grande Chambre, de la Cour européenne des droits de l'homme, Rec. 2000-XI.

42. Conseil d'Etat (section législation), avis du 4 janvier 1962, Doc. Parl., session 1961-62, 296/1, 3.

43. *Cour d'arbitrage*, arrêt 152/2005 du 5 octobre 2005, cons. B.4.

ainsi inscrite dans la Constitution une pratique instaurée sous le régime français, après la révolution française, pour compenser la nationalisation des biens du clergé et la suppression de la dîme.[44] Le Constituant belge décide de faire bénéficier de ce financement les cultes officiellement organisés sur son territoire. Ainsi naît le concept de 'culte reconnu' qui réfère à un acte législatif qui permet à un culte d'accéder au financement public.[45]

La reconnaissance d'un culte n'implique toutefois pas que l'autorité publique approuve la doctrine de ce culte.

En droit constitutionnel belge, le principe de l'égalité des cultes n'implique donc pas qu'un régime unique soit appliqué à tous les cultes. Les principes constitutionnels relatifs aux cultes distinguent les cultes reconnus des cultes non reconnus. Toutes les religions ont, indistinctement, recours aux libertés inscrites aux articles 19, 20 et 21 de la Constitution et à l'article 9 de la Convention européenne des droits de l'homme, mais les cultes reconnus bénéficient pour le surplus de plusieurs avantages, notamment sous forme de divers financements: la prise en charge des traitements et pensions des ministres du culte (art. 181, Constitution) et autres avantages matériels; le subventionnement de l'enseignement d'une des religions reconnues dispensé dans les écoles organisées pas les communautés; la gestion du temporel du culte[46]; les émissions télévisées et radiophoniques des cultes reconnus; ou encore, la rétribution des services d'aumôniers qui assurent le libre exercice des cultes dans les établissements dont les pensionnaires ou usagers ne peuvent pratiquer leur culte à proximité de leur domicile (hôpitaux ou hospices, asiles, prisons , armée, …).

Six confessions bénéficient actuellement de ce statut: le catholicisme[47], le protestantisme[48], le culte israélite[49], l'anglicanisme[50], l'Islam[51], et enfin l'Eglise orthodoxe (grecque et russe).[52] La reconnaissance des cultes catholique, protestant et israélite découle d'actes antérieurs à l'indépendance de l'Etat belge et qui furent prorogés au moment de la promulgation de la nouvelle Constitution. La laïcité - sans que le mot

44. Voyez notamment: H. Van Goethem, "Het beginsel van verdraagzaamheid in de Belgische Grondwet: een historische duiding," in: J. Velaers (ed.), *Recht en verdraagzaamhe*Id *in de Belgische samenleving, Anvers*, Maklu, 1993, 33-63.

45. Loi du 4 mars 1870 sur le temporel des cultes, *Moniteur Belge*, 9 mars 1870. Cette loi fut amendée, complétée à plusieurs reprises depuis. Le groupe religieux doit (a) regrouper un nombre relativement élevé de membres (plusieurs dizaines de milliers; (b) être structuré; (3) être établi sur le territoire depuis plusieurs années; (d) ne pas être impliqué de quelconque manière dans des activités qui menaceraient l'ordre public.

46. En vertu de la loi du 4 mars 1870 sur le temporel des cultes, Id.

47. La reconnaissance du catholicisme est une conséquence du concordat de 1801 et qui fut ensuite confirmée par une loi du 18 Germinal X (8 avril 1802).

48. Le protestantisme trouve également sa reconnaissance dans la loi du 18 Germinal X (8 avril 1802). En février 1871, en application de la loi du 4 mars 1870 sur le temporel des cultes, un arrêté royal confirma l'existence de conseils d'administration auprès de onze temples protestants Arrêté royal du 23 février 1871 concernant l'organisation des Eglises protestantes et israélites, *Moniteur Belge*, 27 février 1871). Cinq ans plus tard, un arrêté royal détailla la composition et le mode d'élection des membres des conseils d'administration auprès des temples protestants (Arrêté royal du 7 février 1876 concernant le culte évangélique, *Moniteur Belge*, 15 février 1876).

49. Le culte israélite a été reconnu par décret du 17 mars 1818. En application de la loi du 4 mars 1870 sur le temporel des cultes, un arrêté royal confirma, en février 1871, l'existence de conseils d'administration auprès de quatre synagogues et confia le rôle exercé par l'évêque dans l'Eglise catholique au Consistoire central israélite. Cf.supra n. 56. En 1876, un arrêté royal détailla la composition et le mode d'élection des membres des conseils d'administration auprès des synagogues (Arrêté royal du 7 février 1876 concernant le culte israélite, *Moniteur Belge*, 15 février 1876).

50. L'anglicanisme a été reconnu par les décrets des 18 et 24 avril 1835. La reconnaissance des cultes catholique, protestant, israélite et anglican fut confirmée par Loi du 4 mars 1870 sur le temporel des cultes, (*Moniteur Belge*, 9 mars 1870). En 1875, un arrêté royal fut pris en ce qui concerne l'organisation du culte anglican (Arrêté royal du 17 janvier 1875, Eglise anglicane – organisation (*Moniteur Belge*, 24 janvier 1876).

51. Loi du 19 juillet 1974 portant reconnaissance des administrations chargées de la gestion du temporel du culte islamique (cette loi porte amendement de la loi du 4 mars 1870, *Moniteur Belge*, 23 août 1974).

52. La reconnaissance du culte orthodoxe en 1985 pris la forme d'une nouvelle modification de la Loi de 1870 introduisant à son tour le culte orthodoxe dans l'article 19*bis* de la loi sur le temporel des cultes (Loi du 17 avril 1985 portant reconnaissance des administrations chargées de la gestion du temporel du culte orthodoxe, *Moniteur Belge*, 11 mai 1985).

apparaisse dans la Constitution - est considérée, depuis 1993, comme l'une des composantes idéologiques de la société belge et ce, au même titre que les différentes autres confessions. Elle est considérée comme une conception non religieuse de l'homme et du monde, soit une option philosophique particulière traitée comme l'équivalent d'une religion. En conséquence, en 1993 un paragraphe second a été ajouté à l'article 181 de la Constitution élargissant les aides financières de l'Etat aux "[…] *délégués des organisations reconnues par la loi qui offrent une assistance morale selon une conception philosophique non confessionnelle* […]."

L'ensemble des critères auxquels un culte doit répondre pour être reconnu en droit belge n'est nulle part inscrit dans un texte législatif. Pour qu'un culte puisse jouir de la reconnaissance légale, il doit selon une déclaration du ministre de la Justice[53] (a) regrouper un nombre relativement élevé (plusieurs dizaines de milliers) d'adhérents; (b) être structuré; (c) être établi dans le pays depuis une assez longue période; (d) présenter un certain intérêt social; et enfin, (e) ne pas être impliqué de quelconque manière dans des activités qui menaceraient l'ordre public.[54] Pour pallier au caractère inévitablement discrétionnaire de la reconnaissance des cultes en droit belge, le gouvernement fédéral s'engagea par voie d'un accord de coopération daté du 27 mai 2004 à fixer en termes de texte législatif les critères de reconnaissance.[55]

La reconnaissance officielle entraîne, comme nous l'indiquions, des avantages conséquents comme la prise en charge des traitements et des pensions des ministres du culte, l'organisation des cours de religion dans l'enseignement officiel, l'attribution de temps d'antenne sur la chaîne publique de radio et de télévision, ou encore, la désignation d'aumôniers à l'armée, aux hôpitaux et dans les prisons.[56] Elle permet d'accorder la personnalité de droit public aux administrations chargées de gérer le 'temporel' du culte concerné, c'est-à-dire l'ensemble des biens appartenant à l'Eglise ou la communauté religieuse. En outre, les bâtiments destinés à l'exercice d'un culte sont exonérés d'impôts. En contrepartie, une tutelle sera organisée sur la compatibilité et les opérations civiles des administrations précitées. La reconnaissance implique également la reconnaissance des communautés religieuses locales (temples, églises, etc.) qui peuvent dès lors bénéficier de fonds publics pour les travaux d'entretien et de rénovation.

2. Les cultes reconnus et leur autonomie

La reconnaissance d'un culte par les autorités publiques et les bénéfices financiers et matériels qui s'ensuivent n'est pas sans conséquence pour l'autonomie des cultes. Nous précisons ci-dessous divers éléments de ces conséquences.

a. La désignation d'un porte-parole auprès des autorités publiques

Le principe d'autonomie organisationnelle (interne) d'un culte auquel nous référions plus haut et qui est inscrit à l'article 21 de la Constitution n'empêche pas que l'Etat puisse exiger que le culte désigne un interlocuteur reconnu par les pouvoirs publics et auquel ceux-ci peuvent avoir recours, le cas échéant, pour traiter des effets civils liés à l'existence et à la reconnaissance du culte. Dans son arrêt du 4 mars 1993 la Cour constitutionnelle pose clairement qu'un législateur décrétal peut " *[…] raisonnablement […] exiger de la part des religions dont l'enseignement peut faire l'objet d'une subvention-traitement qu'elles*

53. Pour les critères concrets relatifs à la reconnaissance v. *Questions et réponses*, Chambre, 1990-2000, 4 septembre 2000, 5120 (question n° 44, Borginon); *Questions et réponses*, Chambre, 1996-1997, 4 juillet 1997, 12970 (question n° 631, Borginon).

54. L.-L. Christians, "Une mise en perspective du concept de culte reconnu en droit belge," in: *L'Islam en Belgique*, Bruxelles, Luc Pire, 1998, 23-39.

55. Un nouvel accord de coopération est intervenu le 2 juillet 2008 (*Moniteur belge*, 23 juillet 2008), il prend en compte les compétences nouvelles en matière de temporel des cultes, que la Communauté germanophone de Belgique exerce depuis le 1er janvier 2005, sur le territoire de langue allemande. Cet Accord vient élargir l'accord de coopération du 27 mai 2004 entre l'Autorité fédérale, la Communauté germanophone, la Région flamande, la Région wallonne et la Région de Bruxelles-Capitale en ce qui concerne la reconnaissance des cultes, les traitements et pensions des ministres des cultes, les fabriques d'église et les établissements chargés de la gestion du temporel des cultes reconnus.

56. Pour une énumération fouillée de ces avantages, voyez notamment: C. Sägesser, V. De Coorebyter, *Cultes et laïcité en Belgique*, Bruxelles, Cahiers du C.R.I.S.P., 2000.

présentent une structure minimum en vue de la désignation d'une instance susceptible d'être reconnue compétente pour intervenir notamment en matière de recrutement d'enseignants appelés à fournir l'éducation religieuse visée."[57] Nous traiterons ci-dessous, séparément, du culte islamique (*cf. infra* d. 'La représentation et le financement du culte islamique'). La reconnaissance de celui-ci s'est accompagnée de plusieurs interventions de la part des autorités publiques qui trahissent un certain embarras de la part des autorités quant aux effets de cette reconnaissance. Nous y prêtons de ce fait une attention particulière.

b. La gestion du temporel du culte

Une autre conséquence de la reconnaissance se rapporte à la gestion du temporel du culte. *"Même si elle ne concerne que le temporel des cultes, c'est-à-dire leurs dimensions matérielles et financières,"* rappellent Caroline Sägesser et Vincent de Coorebyter, *"l'organisation des cultes reconnus met inévitablement deux principes en tension: d'une part l'autonomie des cultes, d'autre part les possibilités de contrôle du temporel dont l'Etat doit se doter dans la mesure où il finance ces cultes."* [58]

La réglementation de la gestion du temporel des cultes s'est davantage compliquée en droit belge depuis 2001. Une loi spéciale du 13 juillet 2001 a effectivement profondément modifié le régime des cultes reconnus en Belgique, en transférant aux Régions une partie des compétences relatives au temporel des cultes.[59] La reconnaissance des dénominations, la détermination des traitements et pensions des ministres et le nombre de ceux-ci demeurent de compétence fédérale. La complexité de cet éclatement des attributions de chaque pouvoir appelait un effort particulier de coopération des Régions et du Fédéral. Tel était l'objet de l'accord de coopération de 2004, étendu en 2008 aux compétences germanophones.

Dans un arrêt daté du 5 octobre 2005 la Cour constitutionnelle s'est prononcée sur l'étendue des possibilités de contrôle du temporel dont dispose l'autorité régionale. La Cour rappelle que la liberté de religion et la liberté de culte ne s'opposent pas à ce que les autorités publiques prennent des mesures positives permettant l'exercice effectif de ces libertés. La volonté du législateur de créer des institutions de droit public chargées des aspects matériels des cultes reconnus et de la gestion du temporel est susceptible de contribuer à la jouissance effective de la liberté de culte. A partir de quand une mesure doit-elle être considérée comme une ingérence dans le droit des cultes reconnus de régler de manière autonome leur fonctionnement? L'autorité publique compétente dispose en l'espèce d'une marge d'appréciation. Aussi, la Cour peut être amenée à vérifier si cette ingérence se justifiait. A cet effet l'autorité veillera à ce que les mesures qu'elle prend soient compatibles "[…] *avec la liberté de religion et avec la liberté de culte, il est donc requis que les mesures fassent l'objet d'une réglementation suffisamment accessible et précise, qu'elles poursuivent un objectif légitime et qu'elles soient nécessaires dans une société démocratique, ce qui implique que l'ingérence doit répondre à 'un besoin social impérieux' et qu'il doit exister un lien raisonnable de proportionnalité entre le but légitime poursuivi, d'une part, et la limitation de ces libertés, d'autre part."*[60]

En l'espère, la mesure décrétale (du Gouvernement flamand) attaquée imposait la limite d'âge de 75 ans aux membres des conseils d'église. Le but étant d'assurer un rajeunissement de ces membres, en imposant le remplacement des membres qui ont atteint la limite d'âge. La modification de la composition des conseils d'église qui en découle devait contribuer à la rationalisation et à la modernisation de la gestion du culte, dont les déficits sont à charge des autorités publiques. La Cour a estimé que la mesure n'implique pas une limitation injustifiée de la liberté de religion et de la liberté de culte.

Toutefois, elle a également examiné la mesure incriminée à la lumière des articles 10 et 11 de la Constitution, qui interdisent notamment la discrimination fondée sur l'âge. De

57. Cour constitutionnelle, arrêt n° 18/93 du 4 mars 1993, cons. B.5.4.

58. C. Sägesser, V. De Coorebyter, supra n. 56 at 7.

59. Art. 6, § 1, VIII, alinea 1, 6°, Loi spéciale de réformes institutionnelles, remplacé par l'article 4 de la loi spéciale du 13 juillet 2001, *Moniteur Belge*, 4 août 2001.

60. Cour constitutionnelle, arrêt n° 152/2005 du 5 octobre 2005, cons. B.5.

l'avis de la Cour, l'imposition d'une limite d'âge aux membres des 'conseils d'église', même si celle-ci se fonde sur un critère objectif, à savoir l'âge des membres des conseils d'église, constitue en l'occurrence une discrimination: *"Il faut toutefois constater que la mesure entreprise part du présupposé que les personnes qui ont atteint l'âge fixé par le législateur décrétal ne peuvent plus du tout disposer des qualités requises pour assurer une telle gestion. Même si, en dépit de leur âge, elles ne disposaient pas d'un état de services dans les fabriques d'église et si elles étaient associées pour la première fois à l'administration, elles ne seraient pas jugées en état d'assurer une gestion rationnelle et moderne des possessions matérielles de leur communauté religieuse, conformément aux dispositions du décret relatif à l'organisation matérielle et au fonctionnement des cultes reconnus.L'instauration d'une limite d'âge qui s'applique sans exception exclut toute une catégorie de croyants âgés, toujours plus importante dans la communauté religieuse, de toute cogestion des biens de cette communauté. La mesure est donc disproportionnée à l'objectif poursuivi par le législateur décrétal."* [61]

c. La désignation de ministres du culte

La tension à laquelle réfèrent C. Sägesser et V. de Coorebyter[62] est également perceptible en matière de désignation des ministres des différents cultes reconnus. Les droits garantis à l'article 181 de la Constitution et les bénéfices qu'en tirent les ministres des cultes reconnus sont effectivement des droits civils au sens de l'article 144 de la Constitution. Par conséquent, les tribunaux civils sont seuls compétents pour connaître d'éventuels litiges qui se rapporteraient à ces droits. Toutefois, le principe de l'autonomie institutionnelle tel que fixé à l'article 21 de la Constitution pose des balises. Ainsi par exemple, le traitement ou la pension, ou tout autre avantage, auxquels peut prétendre un ministre du culte en vertu de la reconnaissance de celui-ci, est un droit conditionné et accessoire: il ne vaut que dans la mesure et aussi longtemps que la personne concernée est employée comme ministre ecclésiastique dans le sens où l'entend l'article 181 de la Constitution. C'est au culte, à l'exclusion de toute autre autorité, qu'il appartient de désigner ses ministres à la fonction d'ecclésiastique. Lorsqu'une personne conteste la décision qui lui retire son statut de ministre du culte, le litige sera du ressort du juge civil. Tenu par l'interdit constitutionnel d'immixtion dans les affaires de cultes, celui-ci ne pourra rien faire d'autre que constater, c'est-à-dire prendre acte de la décision de l'autorité religieuse. Il n'est pas compétent pour se prononcer sur l'opportunité de la décision entreprise, il n'est pas autorisé à s'immiscer dans des débats théologiques et/ou internes intervenant au sein d'un culte. Le contrôle du juge est limité à un contrôle strictement formel, il lui est permis de constater si l'autorité (ecclésiastique) qui prenait la décision controversée était compétente pour ce faire, et si elle respectait ce faisant les règles de comportement du culte en question, mais son contrôle ne va pas au-delà.[63]

A plusieurs reprises la Cour de cassation rejetait la thèse, soutenue par certains, que les droits de la défense et les autres principes posés à l'article 6, alinéa 1, de la Convention européenne des droits de l'homme seraient à prendre en compte dans cette matière: *"En vertu du principe de l'autonomie organisationnelle de chaque confession, il se déduit que, d'une part, la nomination et la révocation des ministres d'un culte ne peuvent être décidées que par l'autorité religieuse compétente, conformément aux règles du culte et, d'autre part, la discipline et la juridiction ecclésiastique ne peuvent s'exercer sur ces ministres du culte que par la même autorité et conformément aux mêmes règles*».[64]

L'article 21 de la Constitution belge est donc toujours à voir comme une base juridique qui donne une solide autonomie aux religions et aux convictions. Mais il est vrai aussi que seules les activités ecclésiastiques dans le sens strict bénéficient de cette

61. Id., cons. B.8.

62. Cf.supra n. 56.

63. Cass., 20 octobre 1994, *Rechtskundig Weekblad*, 1994-1995, 1082; *Rec. Cass.* 1995, 57 note H. Vuye; Cass., 3 juin 1999, *Chronique de droit public*, 2000, 214. Voyez également: K. Martens, "Het Hof van Cassatie en de interpretatie van artikel 21 G.W." (note sous Cass., 3 juin 1999), Id., 2000, 215-218.

64. Id.

autonomie. Dès lors que ces activités s'étendent à d'autres domaines, comme par exemple à celui de l'enseignement ou des soins de santé, elles sont soumises au respect de la législation civile étatique valant dans ces domaines. Toute activité ecclésiastique portant un caractère public est donc soumise au dispositif législatif civil, le respect de celui-ci constitue la condition sine qua non pour pouvoir déployer certaines activités.[65]

d. La désignation de professeurs de religion

Le principe constitutionnel de non immixtion dans les affaires de cultes trouve également application en matière d'enseignement. Par révision constitutionnelle du 15 juillet 1988, le secteur de l'enseignement en Belgique a été transféré aux communautés. Depuis, les communautés flamande, française et germanophone organisent l'enseignement. Elles sont toutefois liées par l'article 24 de la Constitution qui, dans le domaine de l'enseignement, assure une protection à toutes les tendances idéologiques, philosophiques et religieuses des parents et des élèves. Cette protection est explicitée au premier paragraphe de l'article qui précise que la communauté assure le libre choix des parents et organise un enseignement neutre, non lié à une idéologie particulière: *«[…] La communauté organise un enseignement qui est neutre. La neutralité implique notamment le respect des conceptions philosophiques, idéologiques ou religieuses des parents et des élèves."* En application de cette garantie constitutionnelle, les écoles organisées par les pouvoirs publics offrent, pour la durée de la période scolaire obligatoire, le choix entre l'enseignement d'une des religions reconnues et celui de la morale non confessionnelle. Le coût de cet enseignement ainsi prodigué est à charge de l'Etat.

L'Etat soutient donc positivement l'enseignement de la religion et/ou de la morale à l'école, mais sans intervenir dans l'indépendance des cultes sur le plan du contenu des cours. Cela fait partie de l'interdit d'immixtion, comme le précisa la Cour constitutionnelle dans un arrêt du 4 mars 1993: *" […] la possibilité pour la Communauté de contrôler la qualité de l'enseignement est limitée en cette matière par la liberté constitutionnelle des cultes et l'interdiction d'ingérence qui en résulte articles 19 et 21 de la Constitution."*[66]

Toujours en application du principe de l'autonomie des cultes reconnus, les professeurs de religion sont désignés par les autorités compétentes au sein du culte, et non par l'autorité publique. Par conséquent, un professeur de religion déchu de sa fonction ne pourra contester le retrait de son statut que devant celles-ci, il n'a aucun autre recours. Par ailleurs, la question de savoir s'il dispose effectivement d'un tel recours, dépendra également du culte.[67] Il est évident que le principe d'autonomie ne vaut que pour les retraits pour motifs lies à la conviction religieuse ou philosophique, telle la fiabilité de l'enseignant ou la qualité de son enseignement, ou encore, l'aptitude personnelle à prodiguer cet enseignement.

3. La représentation et le financement du culte islamique

Nous traitons ici, sous un titre séparé, du culte islamique dans ses rapports avec l'Etat en droit belge. L'application des règles de représentation et de financement de cultes reconnus soulève, dans le cas de l'Islam, quelques difficultés particulières que nous brossons succinctement ci-dessous.

Une critique souvent formulée à l'égard du modèle belge de reconnaissance des cultes et des religions est le reproche que le statut juridique des cultes et tendances philosophiques en droit belge est inspiré historiquement de la structure et du mode de fonctionnement de l'Eglise catholique-romaine. Le temporel du culte islamique a été reconnu en Belgique par la loi du 19 juillet 1974[68], qui s'insérait dans le cadre plus global

65. En ce sens: R. Torfs, *Congregationele gezondhe*Id*sinstellingen. Toekomstige structuren naar profaan en kerkelijk recht*, Louvain, Peeters, 1992.

66. Cour constitutionnelle, arrêt n° 18/1993 du 4 mars 1994.

67. Conseil d'Etat, arrêt du 29 avril 1975, Van Grembergen, n° 16.993, avec note R. Verstegen, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 1976, 237; Conseil d'Etat, 20 décembre 1985, Van Peteghem, n° 25.995.

68. Cf.supra n. 51. Loi du 19 juillet 1974 portant reconnaissance des administrations chargées de la gestion du temporel du culte islamique, *Moniteur Belge*, 23 août 1974.

de la loi suscitée du 4 mars 1870 sur le temporel des cultes.[69] Depuis, l'Islam jouit du statut de confession officiellement reconnue par l'Etat belge. En mai 1987, un arrêté royal détermina les modalités concrètes de la gestion du temporel du culte islamique.[70] Il prévoit la reconnaissance par l'Etat de communautés islamiques à l'échelon provincial. Durant des années, cet arrêté ne donna lieu à aucune reconnaissance de communautés islamiques, et donc à aucun financement de traitements d'imams auprès des mosquées ni à aucune prise en charge provinciale des déficits des mosquées et des logements des imams. La difficulté est liée à une des conditions préalables posées au paiement effectif des ministres d'un culte: celui-ci doit pouvoir désigner un organe représentatif qui puisse conférer avec l'Etat.[71] Pour le culte musulman, cette condition pose problème.

En réalité, les facteurs de blocages se sont accumulés avec le temps, à ce point que depuis quelques années un nombre croissant de personnes s'intéressant à la position juridique du culte musulman en Belgique - non seulement des musulmans - n'hésitent plus à qualifier la situation de discriminatoire.[72] Le processus de reconnaissance et d'institutionnalisation de l'Islam en droit belge se heurte à deux difficultés majeures, elles se tiennent.[73] Une première difficulté se rapporte à la constitution d'un 'organe chef de culte' qui puisse tenir de rôle de interlocuteur des pouvoirs publics, et se charger de la nomination et la révocation des ministres du culte islamique. Une seconde difficulté découle de la première et se rapporte au financement du culte islamique.

La première difficulté est sans nul doute la plus délicate à résoudre, car elle pose au culte islamique qui ne connaît ni de structure préétablie et universellement reconnue ni de clergé une condition étrangère à celui-ci, à savoir l'obligation d'organiser et d'assurer sur un plan institutionnel sa représentativité, à travers la mise en place d'un interlocuteur auprès des autorités belges et de gérer, à travers des délégués, le temporel du culte. Dans un premier temps, la gestion du culte fut laissée au Centre islamique et culturel de Belgique (mieux connu sous l'intitulé "Grande Mosquée de Bruxelles."[74] Mais celui-ci n'est pas parvenu à acquérir la légitimité suffisante au sein de la communauté musulmane. Plusieurs tentatives, de la part des autorités belges, visant à mettre en place un organe plus représentatif, notamment par un processus électif, se sont depuis succédées.[75] Du fait que celles-ci se heurtent, tantôt à la désapprobation du gouvernement, tantôt à une faible légitimité religieuse au sein de la communauté des croyants, le culte islamique en Belgique a traversé une longue période d'instabilité, caractérisée par d'innombrables négociations et nominations successives de représentants. D'une part, les autorités publiques belges entendent garder un moyen de contrôle sur l'organisation de l'Islam belge, d'autre part, la communauté dénote une attitude d'ingérence de la part de l'Etat, en lui reprochant d'enfreindre ainsi l'autonomie institutionnelle du culte. La controverse vise plus particulièrement les deux élections, organisées en décembre 1998 et en mars 2005, pour une Assemblée générale des musulmans de Belgique qui à son tour devait assurer la constitution d'un 'Exécutif des musulmans de Belgique'. Bien que la Cour constitutionnelle ait accepté la loi organisant l'élection de l'organe représentatif[76], le

69. Cf.supra n. 45.

70. Arrêté Royal du 3 mai 1987 portant organisation des comités chargés de la gestion du temporel des communautés islamiques reconnues, *Moniteur Belge*, 6 mai 1987.

71. Cf.supra n. 45.

72. Nous ne traiterons pas ici de certains problèmes concomitant, se rapportant notamment aux inégalités salariales entre les différents cultes, ou encore, à la faible protection juridique du statut social des ministres du culte.

73. Sur les différentes crises et événements qui ont accompagné les premières années de cette institutionnalisation, voyez notamment: L. Panafit, *Quand le droit écrit l'Islam. L'intégration jur*Idique *de l'Islam en Belgique*, Bruxelles, Bruylant, 1999.

74. Sur cette première phase de l'institutionnalisation de l'Islam en Belgique, voyez notamment: F. Dassetto, A. Bastenier, *L'Islam transplanté. Vie et organisation des minorités musulmanes de Belgique*, Bruxelles/Anvers, EPO, 1984.

75. Sur ces tentatives, voyez notamment: C. Sägesser, V. De Coorebyter, supra n. 56 at 15.

76. Dans un arrêt du 28 septembre 2005, la Cour constitutionnelle a rejeté le recours en annulation introduit par l'équipe sortante de l'Exécutif des musulmans de Belgique contre les élections de mars 2005. De l'avis de la Cour, l'élection comme mode de désignation de l'organe qui représente le culte islamique auprès des autorités publiques belges ne constitue pas une ingérence disproportionnée dans la liberté des cultes: *"Compte tenu du*

processus électoral n'est vraisemblablement pas la voie appropriée pour désigner un interlocuteur comme représentant du temporel du culte islamique: les élections de mars 2005 ont été boycottées par la majeure partie des musulmans d'origine marocaine. Le gouvernement a passé outre ces protestations et a désigné par arrêté royal daté du 7 octobre 2005 les membres titulaires d'un mandat au sein de l'Exécutif.[77] Mais celui-ci n'a pas été en mesure de fonctionner en tant qu'organe représentatif. La situation s'est à ce point détériorée - un nombre de membres de l'Exécutif ayant obtenu un vote de défiance de la part de l'Assemblée générale et d'autres ayant présenté volontairement leur démission - que le Gouvernement a estimé nécessaire, en mars 2008, de suspendre l'attribution d'une subvention à l'Exécutif.[78] Depuis, l'Assemblée générale des Musulmans de Belgique a pu dégager un nouvel accord permettant une prorogation, temporaire, de la situation. [79] Mais l'avenir reste incertain.

La seconde difficulté découle de la première et se rapporte au financement du culte islamique. Pour rappel: la Constitution belge prévoit en son article 181 la prise en charge des traitements et des pensions des ministres du culte (reconnu).[80] Le système de financement est un système de financement des ministres des cultes et non un système de financement direct des cultes. Pour le culte islamique, à l'instar des autres cultes reconnus, la prise en charge des traitements des imams est liée à la reconnaissance des communautés locales (comités islamiques). Les difficultés susmentionnées et l'incapacité dans le chef de l'Exécutif de jouer son rôle d'interlocuteur auprès des autorités publiques ont durant de nombreuses années empêché la reconnaissance des comités islamiques. L'Exécutif des Musulmans de Belgique bénéficie, il est vrai, d'une subvention à charge de l'Etat fédéral[81] - elle permet de financer un secrétaire général, son adjoint, un comptable et un traducteur[82]- mais celle-ci n'est pas destinée à prendre en charge les traitements d'imams. La situation est restée bloquée durant des années. Aujourd'hui, après la réforme de l'Etat de 2001 et le transfert aux Régions de la compétence sur les

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fait que l'élection a été retenue par la communauté musulmane comme une méthode appropriée de désignation, et compte tenu de la valeur démocratique fondamentale dont est investi un tel processus, il ne saurait être reproché au législateur d'avoir prévu que les membres de l'assemblée générale des musulmans de Belgique soient élus par les membres de cette communauté, ni a fortiori d'avoir entouré cette élection de garanties destinées à en assurer la régularité" (cons. B.5.8). Et de poursuivre: *"Compte tenu des spécificités du culte musulman, qui ne connaît ni de structure préétablie et universellement reconnue ni de clergé, ainsi que du choix du processus électif par les représentants des différents courants de la communauté musulmane, le législateur a pu raisonnablement recourir à l'élection de l'organe qui représente ce culte auprès des autoritéspubliques"* (cons. B.6.2.). Cour d'Arbitrage, arrêt n° 148/2005 du 28 septembre 2005.

77. *Moniteur Belge*, 14 octobre 2005.

78. Arrêté royal du 27 mars 2008, *Moniteur Belge*, 11 avril 2008.

79. Arrêté royal du 9 mai 2008 portant reconnaissance des membres, titulaires d'un mandat au sein de l'Exécutif des Musulmans de Belgique, *Moniteur Belge*, 19 mai 2008. Depuis, plusieurs arrêtés royaux ont été pris, prorogeant à chaque fois le mandat des membres, titulaires d'un statut au sein de l'Exécutif. Voyez notamment: l'Arrêté royal du 30 mars 2009 modifiant l'arrêté royal du 9 mai 2008 portant reconnaissance des membres, titulaires d'un mandat au sein de l'Exécutif des Musulmans de Belgique, *Moniteur belge*, 21 avril 2009**.** Le dernier arrêté en date est celui du 30 décembre 2009 (*Moniteur Belge*, 12 janvier 2010). La structure comportant une assemblée générale et un exécutif reste à ce jour maintenue. Mais il semble désormais inévitable que les modalités de composition représentative soient revues, les structures actuelles n'étant pas suffisamment représentatives.

80. Et depuis 1993 également des délégués laïques. *Cf* infra *C.* "Les convictions non confessionnelles."

81. Parmi diverses dispositions, l'Arrêté Royal du 3 juillet 1996 relatif à l'Exécutif des Musulmans de Belgique instaure une subvention couvrant notamment *"[…] la rémunération du personnel, le coût d'achat, de location et d'aménagement des locaux, le coût d'acquisition des équipements et fournitures nécessaires ainsi que tous les autres frais de fonctionnement, directs et indirects, se rapportant à la structuration de l'activité de l'Exécutif."* Cet arrêté a été modifié à plusieurs reprises depuis. Le Conseil Central Laïque, dont nous traiterons plus loin, bénéficie également de semblable subvention, instaurée à l'origine par la Loi du 23 janvier 1981 (*Moniteur belge*, 8 avril 1981) et pérennisée ensuite par la loi du 22 juin 2002 relative aux délégués et aux établissements chargés de la gestion des intérêts matériels et financiers des communautés philosophiques non confessionnelles. La question qui se pose est de savoir si, à l'avenir, la subvention au bénéfice de l'Exécutif des Musulmans de Belgique - qui était provisoire - doit être maintenue dès lors que le traitement des imams est pris en charge par les Services Publics Fédéraux Justice et les mosquées reconnues, c'est-à-dire que leur déficit est couvert par les provinces.

82. Source: J.-Fr. Husson (dir.), *Le financement des cultes et de la laïcité: comparaison internationale et perspectives*, Namur: Les éditions namuroises / Presses universitaires de Namur, 2005.

établissements cultuels, tant en Wallonie qu'en Flandre et à Bruxelles, désormais en charge de l'organisation matérielle et du fonctionnement des cultes, plusieurs mosquées ont été reconnues, ce qui permet de prendre en charge leur entretien et le salaire et la retraite des imams desservant celles-ci. Si les premières reconnaissances de mosquées étaient attendues en 2002, les procédures ont finalement été plus longues, notamment en raison d'un contrôle renforcé de la Sûreté de l'Etat, s'ajoutant à l'obligation pour les mosquées de satisfaire à diverses normes notamment en matière de sécurité , d'espace et de salubrité. Certains refus d'agrément résulteraient des conclusions de la Sûreté de l'Etat, soit parce qu'elles pratiquent un Islam trop 'dur', soit parce qu'elles bénéficient d'un financement direct d'Etats étrangers qualifiés d'intégristes.[83] Au total, plusieurs dizaines de mosquées bénéficient aujourd'hui d'une reconnaissance officielle: 43 en Wallonie, 7 en Flandre et 5 à Bruxelles. L'évolution de la situation dans les années à venir dépendra, conclut J.-Fr. Husson, *"[…] du nombre des mosquées reconnues et du rythme de reconnaissance. Diverses questions seront aussi à régler comme la propriété des lieux de culte, l'importance du soutien financier demandé aux provinces, les question des mosquées financées par des pays étrangers, l'avenir du don des fidèles, …."* [84]

La conclusion peut apparaître sévère, mais elle semble inéluctable: seules une réorganisation concrète et un renouvellement des structures disposant d'une capacité suffisante pour gérer les dossiers permettront la poursuite du développement du culte islamique dans le cadre belge.

4. Les convictions non confessionnelles

Comme nous l'écrivions plus haut déjà, par révision du 5 mai 1993, un paragraphe second fut inséré à l'article 181 du texte de la Constitution qui impose à l'Etat de prendre en charge les traitements et pensions des délégués qui offrent une assistance morale non confessionnelle.[85] Cette révision constitutionnelle fait bénéficier les convictions non confessionnelles reconnues d'un régime analogue que celui réservé aux six autres cultes déjà reconnus. Le texte de l'article 181 de la Constitution réfère à des 'organisations'. Pour l'heure seule une organisation – celle de la laicité organisée - est reconnue par la loi du 21 juin 2002[86]. Il s'agit de l'asbl 'Conseil central des Communautés philosophiques et non confessionnelles de Belgique' ou Conseil central laïque (CCL), qui comprend les deux organisations flamande "de Unie van vrijzinnige verenigingen") et francophone ("Centre d'action laïque").[87]

Empruntant à un rapport parlementaire datant de 1991 C. Sägesser et V. de Coorebyter donnent la définition suivante de la laïcité organisée: il s'agit d'une communauté non confessionnelle, reconnue et organisée par la loi, *"qui s'adresse à ceux qui ne participent pas un à un culte quelconque, qui ne veulent pas établir dans leurs conceptions de vie un rapport privilégié avec une divinité, et qui, dès lors, veulent organiser en excluant toute référence aux cultes certaines manifestations de la vie qui d'ordinaire sont réglées par une religion."* [88] La loi du 21 juin 2002 non seulement reconnaît le Conseil central, mais elle fixe également les modalités concrètes d'organisation des communautés philosophiques, le mode de composition des conseils d'administration chargés de la gestion des intérêts matériels et financiers et des services d'assistance.

A l'instar de ce qui est le cas pour les autres cultes reconnus, l'Etat prend à charge les traitements et pensions des personnes désignées par l'organe représentatif, qui *"offrent une*

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83. Source: J.-P. Stroobants, "Le système belge de financement des cultes est étendu aux musulmans," *Le Monde*, 27 juin 2007.

84. J.-Fr. Husson, *Le financement du culte islamique en Belgique*, http://www.cil.be/files.

85. Voir Ch. Bricman, "L'article 181, par. 2, de la Constitution: l'irrésistible puissance des symboles," *Rev. B. Dr. Const*., 1995, 21-31; W. Verougstraete, "De vrijzinnigheid: een nieuwe kerk, een levensbeschouwelijke strekking of een ongebonden aanbod?" in *Liber Amicorum Paul De Vroede*, Diegem, Kluwer, 1994, 1513-1524.

86.Loi du 21 juin 2002 relative au Conseil central des Communautés philosophiques non confessionnelles de Belgique, aux délégués et aux établissements chargés de la gestion des intérêts matériels et financiers des communautés philosophiques non confessionnelles reconnues, *Moniteur Belge*, 22 octobre 2002

87. Voir déjà la loi du 23 janvier 1981 relative à l'octroi de subsides aux communautés philosophiques non confessionnelles de Belgique, *Moniteur Belge*, 8 avril 1981.

88. C. Sägesser, V. De Coorebyter, supra n. 56 at 11.

assistance morale selon une conception philosophique non confessionnelle," tandis que les Communautés prennent à charge les traitements des professeurs de morale non confessionnelle dans l'enseignement officiel.[89] C'est à l'organe représentatif, à l'exclusion de toute autre instance, qu'il appartient de constater si un professeur offre les garanties nécessaire, de crédibilité, tant pédagogique et personnelle que sur le plan de la morale, pour pouvoir enseigner la morale non confessionnelle. Le Conseil d'Etat sur cette question réserve aux convictions non confessionnelles un régime identique à celui appliqué dans les arrêts Van Grembergen et Van Pethegem[90], en précisant que seuls des motifs basés sur le manque de crédibilité sur ces trois aspects peuvent être invoqués.[91]

On remarquera toutefois que la mise en parallèle des convictions non confessionnelles, sous le chapeau de laïcité organisée, et des autres cultes reconnus, n'a pas fait l'unanimité dès le départ au sein du monde laïque. Pour d'aucuns, le système de financement public des cultes tel que historiquement agencé en droit belge requiert aujourd'hui une réforme approfondie. Le système, à leurs yeux, est dépassé. Par conséquent, ils se sont durant longtemps opposés au principe de l'inscription de la laïcité dans le système de financement des cultes.[92] Les organisations laïques ont cependant préféré adopter une position plus pragmatique en s'inscrivant dans le système existant ce qui leur a permis, avec le temps, de bénéficier des mêmes facilités budgétaires que les autres cultes reconnus, en prenant pour motif l'égalité de traitements des différentes familles confessionnelles et philosophiques. L'alternative aurait été le choix de ne pas s'inscrire dans le système actuel, ce qui est le sort réservé aux cultes et tendances philosophiques non reconnus.

5. Les confessions et cultes non reconnus

Le paysage religieux et philosophique en Belgique s'est profondément modifié depuis les années 1960. A la sécularisation issue de la baisse de la pratique religieuse a répondu l'émergence de nouvelles convictions et pratiques. A côté de cela, d'importants mouvements migratoires ont amené le développement de l'Islam, mais également de nouvelles églises orthodoxes et protestantes évangéliques, dont de nombreuses églises africaines. Cette évolution se heurte à un système de reconnaissance et de financement des cultes qui n'a pas été conçu pour cette nouvelle réalité. Parallèlement aux cultes reconnus, un grand nombre de cultes sont aujourd'hui non reconnus: après les témoins de Jehovah et les mormons, se sont vraisemblablement les bouddhistes qui viennent en tête en termes de nombre de membres. Sans reconnaissance, ces mouvements ne bénéficient pas des nombreux avantages susmentionnés, tous liés à la reconnaissance par les pouvoirs publics. Il est vrai que les cultes non reconnus peuvent prendre la forme d'une ASBL, ce qui leur permet notamment de pouvoir bénéficier de dons et legs. Mais encore faut-il que l'administration ou, le cas échéant, le juge appelé à statuer sur l'exonération fiscale sollicitée, acceptent qu'ils ont affaire à une 'religion'. En droit belge, il n'existe pas de définition légale du terme 'religion', cette appréciation ressort par conséquent de la compétence des juridictions. En application de la liberté de religion, mais surtout du principe constitutionnel de séparation de l'Etat et des Eglises auquel nous avons déjà fait référence, et tel qu'il prévaut en Belgique, un tribunal ou une cour qui auraient à qualifier un mouvement de 'confession' ou de religion, ne sont pas autorisés à se fonder sur des arguments concernant le contenu de la confession concernée.[93] Ils se feront donc une opinion en se basant sur des signes extérieurs tels l'existence de lieux de culte, la mise à la disposition des croyants de textes de prières, ou encore, la pratique d'actes rituels.[94] A

89. G. Brausch, "La laïcité à l'épreuve de ses usages. Le cas d'une certaine forme de sélection des professeurs de morale non confessionnelle," in M. Jacquemain, N. Rosa-Rosso (dir.), *Du bon usage de la laïcité*, Eden Editions, 2008, 159-171.

90. Cf.supra n. 67.

91. Conseil d'Etat, arrêt Van Butsele, n° 135.938 du 12 octobre 2004.

92. Voyez à ce propos: C. Sägesser, J.-Fr. Husson, *La reconnaissance et le financement de la laïcité*, Bruxelles, Crisp (n° 1756), 2002.

93. En ce sens: G. VAN HAEGENDOREN, "Sekte of Kerk: de niet erkende erediensten in België," *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 1986, 390

94. Voyez la jurisprudence sur cette question: P. Mahillon, S. Fredericq, "Het regime van de minoritaire erediensten" , *Rechtskundig Weekblad*, 1961, 2376 à laquelle analyse réfère R. Torfs, in "Etat et églises en

défaut de pouvoir répertorier les éléments qui permettraient de conclure à l'existence d'une religion, le juge et/ou l'administration vont nécessairement devoir procéder à un examen du contenu de la confession. De l'analyse que faisait Rik Torfs de la doctrine et de la jurisprudence, il conclut que, à tout le moins *"[…] un culte théiste doit exister pour que l'on puisse parler de religion."*[95] Pour autant, le fait d'être qualifié de 'religion' ou 'confession', ne suffira pas pour faire bénéficier celle-ci des avantages auxquels les cultes reconnus peuvent prétendre.

IV. LA QUESTION DU FOULARD ISLAMIQUE

En Belgique, comme dans plusieurs autres pays en Europe, la question du port du foulard islamique semble mettre en jeu des sentiments profonds. Il est pratiquement impossible de résumer en quelques lignes les différentes opinions émises sur ce signe distinctif. Fait est que le nombre de musulmanes qui portent le foulard va croissant depuis quelques années et que la détermination de celles qui le portent semble se renforcer. La question du port du foulard islamique illustre à sa façon particulière comment le contenu du concept de liberté de religion s'est transformé parallèlement à l'évolution de la société. Elle illustre également les problèmes que soulève l'insertion de cette évolution sur le plan religieux dans un cadre constitutionnel qui, d'une part, dicte la neutralité de l'Etat et régule les relations entre l'Etat et les cultes et, d'autre part, garantit la liberté de religion. Ces difficultés sont apparues récemment, à propos du port du foulard par des agents de la fonction et à l'école. Les deux situations ont donné lieu à des débats houleux.

La manière dont est abordée la question du foulard islamique en Europe dépend dans une large mesure des termes constitutionnels qui s'appliquent à la relation entre l'Etat et les convictions religieuses. En Belgique, la situation de ce point de vue est différente de celle de la France: le principe de la laïcité de l'Etat excluant toute référence religieuse au niveau des autorités publiques et de l'organisation du pouvoir, comme cela est la cas en France, n'est pas contenu comme telle dans la Constitution belge. Celle-ci garantit la liberté religieuse qui inclut le droit d'exprimer publiquement ses convictions. L'exercice public du culte et la liberté de manifester ses opinions en toute matière sont garanties. En outre, il est permis de dire que, traditionnellement, l'Etat et ses institutions adoptent, en droit belge, une attitude positive, de soutien aux cultes et à la laïcité reconnus.[96] Dès lors, le port du foulard ou d'autres signes traduisant une conviction, semble ne pas pouvoir être interdit de manière générale par la loi, ni pour les écoles, ni pour la fonction publique. Comme nous tenterons de la démontrer ci-dessous, en Belgique à ce jour, la position par rapport à la question du foulard n'est pas une position doctrinale, qui donnerait une préséance de principe à l'interdiction, mais la tendance générale est une position plus pragmatique, on pourrait la qualifier de fonctionnelle, qui prend pour critères d'évaluation les problèmes que cause le port du foulard; l'interdit ne se justifie que dans le cas où ces problèmes sont réels.[97]

A. Le port du foulard et la fonction publique

L'étendue de l'obligation de neutralité dans le chef des agents de l'Etat fait l'objet de discussion se rapportant aux prescrits vestimentaires qu'il y a lieu de faire valoir dans leur cas.[98] Dans une analyse très fine qu'il faisait de la question, Sébastien Van Drooghenbroeck répertorie les initiatives réglementaires et législatives qui, en Belgique,

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Belgique," http://www.uni-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/ Staat_und_ Kirche_in_der_EU/01-Belgique.pdf 16.

95. Id. at 17.

96. Art. 24, §3, 2ème al. et 181 de la Constitution.

97. En Belgique, depuis 2004, plusieurs communes flamandes et certaines communes bruxelloises, ont inclus dans leur règlement de police l'interdiction du port du foulard intégral sur la voie publique pour le motif que toute personne circulant sur la voie publique doit pouvoir être identifiée. A ce jour, aucune interdiction ne faisait l'objet d'une demande d'avis au Conseil d'Etat ni d'un recours en justice.

98. Voyez notamment, F. Gosselin, "Les droits et devoirs des fonctionnaires," *Administration publique*, 2005, vol. 3-4, 212 sq.

ont récemment cherché à trancher la question.[99] Il rappelle notamment les réglementations communales adoptées par les villes d'Anvers, de Gand et de Lier qui interdisent, soit à tous, soit à certains agents communaux, le port de signes religieux ou politiques distinctifs. D'autres villes et communes ont depuis suivi l'exemple. Une autre initiative récente est la reformulation des "droits et devoirs des agents" contenus dans l'Arrêté Royal du 2 octobre 1937 portant statut des agents de l'État, par un Arrêté Royal datant du 14 juin 2007.[100] Désormais, en application de l'article 8, § 1er, *"L'agent de l'Etat […] respecte strictement les principes de neutralité, d'égalité de traitement et de respect des lois, règlements et directives. Lorsqu'il est, dans le cadre de ses fonctions, en contact avec le public, l'agent de l'Etat évite toute parole, toute attitude, toute présentation qui pourraient être de nature à ébranler la confiance du public en sa totale neutralité,* en sa compétence ou en sa dignité." La disposition est plus explicite que ne le fut la version précédente.[101] Enfin, une circulaire ministérielle du 17 août 2007 relative au cadre déontologique des agents de la fonction publique administrative fédérale précise que *"Dans le respect de leurs droits constitutionnels, (les agents) font en sorte que leur participation à ou leur implication dans des activités politiques ou philosophiques ne porte pas atteinte à la confiance de l'usager dans l'exercice impartial, neutre et loyal de leur fonction."*[102] Pour le surplus, il peut être utile de faire mention ici - une xième fois il est vrai - de la proposition de loi Mahoux et *csrts*[103] qui vise à imposer non seulement la neutralité dans l'exercice des fonctions mêmes, mais également à l'égard des manifestations extérieures des agents publics concernés. Sur la question du code vestimentaire pour les agents de l'Etat, la proposition suggère de prévoir une disposition législative édictant que *"les agents des pouvoirs publics s'abstiennent, dans l'exercice de leurs fonctions, d'une quelconque manifestation extérieure de toute forme d'expression philosophique, religieuse, communautaire ou partisane."* La proposition a pour effet de restreindre, pour les agents des pouvoirs publics, la liberté d'exprimer leur préférence par des manifestations extérieures.

Dans l'avis déjà cité que rendait le Conseil d'État sur cette proposition[104], le Conseil rappelle la portée des obligations qui découlent du respect des articles 9 et 10 de la Convention européenne des droits de l'homme, ceux-ci font selon lui obstacle à l'approche *in abstracto* et "particulièrement exigeante" de l'obligation de neutralité des services publics avancée par les auteurs de la proposition de loi. Après avoir scrupuleusement examiné la jurisprudence de la Cour Européenne des droits de l'homme, le Conseil d'Etat affirme en effet qu'il résulte de cette jurisprudence que: *"il ne s'agit pas d'une appréciation in abstracto, mais bien d'une appréciation in concreto, à l'occasion de laquelle il faut tenir compte des circonstances particulières dans lesquelles l'interdiction du port du voile a été édictée, telles par exemple, la fonction à laquelle s'applique l'interdiction et le contexte constitutionnel, politique et religieux de la société dans laquelle elle est mise en œuvre."* Et de poursuivre: *"[…] Il paraît résulter en outre de la jurisprudence de la Cour européenne […] qu'une législation en la matière ne peut régler l'équilibre à assurer entre la liberté de religion et les impératifs liés aux motifs légitimes d'ingérence de l'État, tels qu'ils sont envisagés par les paragraphes 2 des articles 9 et 10 de la Convention européenne des droits de l'homme, que dans l'hypothèse où se trouvent en jeu, de manière non pas éventuelle mais réelle et convaincante, des difficultés liées par exemple à une mise en danger de la neutralité de l'État au sens large et de ses organes."*

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99. S. Van Drooghenbroeck, supra n. 10 (à paraître).

100. *Moniteur Belge*, 22 juin 2007.

101. L'article 8, § 1er, ancien, de l'arrêté Royal du 2 octobre 1937 précisait: *"Les agents de l'État traitent les usagers de leurs services avec compréhension et sans aucune discrimination."*

102. *Moniteur belge*, 27 août 2007.

103. Cf.supra n. 8. Dans son aperçu, S . Van Drooghenbroeck (cf.supra n. 10) tire la parallèle avec une proposition de loi déposée à l'Assemblée nationale française et visant à interdire le port de signes ou de vêtements manifestant ostensiblement une appartenance religieuse, politique ou philosophique à toute personne investie de l'autorité publique, chargée d'une mission de service public ou y participant concurremment (http://www.assemblee-nationale.fr/13/propositions/pion1080.asp).

104. Cf.supra n. 5.

C'est dans cette optique que le Conseil d'Etat a estimé que les auteurs de la proposition de loi Mahoux et *crsts*. ne justifient pas suffisamment le champ d'application très générale que leur proposition donne à l'obligation de neutralité des agents publics. Notamment, les développements ne contiennent pas de justification suffisante de l'obligation qui est faite à tout agent des pouvoirs publics d'observer une même neutralité stricte dans son apparence extérieure, quelle que soit la nature de sa fonction et indépendamment de la circonstance que cette fonction soit exercée en contact ou non avec le public.

Le Conseil estime de surcroît que *"Compte tenu du principe de proportionnalité, cette justification s'impose d'autant plus que l'obligation inscrite à l'article 5 [de la proposition] peut conduire à l'exclusion de citoyens de la fonction publique pour le seul motif qu'ils exercent un droit fondamental, sans qu'il ne soit démontré adéquatement que cet exercice représente un danger pour la sécurité publique, [...] la protection de l'ordre, de la santé ou de la morale publiques, ou [...] la protection des droits et libertés d'autrui (article 9, paragraphe 2, de la Convention européenne des droits de l'homme) ou pour la sécurité nationale, [...] la sûreté publique, [...] la défense de l'ordre et [...] la prévention du crime, [...] la protection de la santé ou de la morale, [...] la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire (article 10, paragraphe 2, de la Convention européenne des droits de l'homme)."* Pour le Conseil, la justification doit également répondre aux exigences résultant du principe d'égalité et de non-discrimination. Il ressort de cet avis que, de l'avis du Conseil d'Etat belge, seule une approche fonctionnelle et pragmatique puisse faire droit au respect de la liberté de religion dans la fonction publique.

B. Le port du foulard et l'enseignement

Mais la controverse à propos du foulard en droit belge ne se limite pas à la fonction publique. On la retrouve en également dans le secteur de l'enseignement, tant pour ce qui concerne le port du foulard par des professeurs que par des élèves. Le débat a soulevé beaucoup d'émoi ces derniers temps au point qu'il est permis de parler d'une actualité brûlante. Sauf revirement, qui reste bien évidemment possible, à ce jour il est permis de dire que la position majoritaire, ici également, tend à être fonctionnelles, voire pragmatique, ce qui est à l'opposé d'un refus dogmatique et de principe.[105]

Un bel exemple de cette attitude fut celle qu'adopta la Cour d'appel d'Anvers, dans un arrêt rendu le 14 juin 2005. De l'avis de la Cour, le port du foulard islamique entre dans le champ d'application de la liberté de religion, en conséquence toute limite posée à son exercice est tenue par le respect des conditions édictées à l'article 9, §2 de la Convention européenne des droits de l'homme. Cela veut dire que l'interdiction de porter le foulard doit être prévue par une loi dont le texte et posé en des termes clairs et qui est accessible, qui a pour dessein la protection d'un intérêt général (par exemple, la protection des droits et libertés d'autrui) et enfin, que la mesure soit proportionnée (respect du principe de la proportionnalité). Le respect de ces conditions doit être examinée dans le contexte concret de chaque situation qui se présente, la situation dans une école n'étant pas nécessairement comparable à celle dans un autre établissement scolaire. En l'espèce, l'interdiction de porter le foulard au sein d'une école provinciale à Hasselt, la Cour a estimé que les conditions étaient rencontrées. Le règlement scolaire était posée en des termes généraux, ceux-ci étaient clairs et compréhensibles. L'interdiction avait été introduite en réaction au comportement militant d'une minorité au sein du groupe d'élèves musulmanes, qui par ses agissements avait perturbé l'ordre au sein de l'établissement: en défiant notamment les professeurs, ou encore, en les accusant de racisme. Pour le surplus, la Cour a pris en considération que l'interdiction valait uniquement en classe, dans la salle d'étude et au réfectoire et que son but principal était le maintien du vivre ensemble

105. Voyez notamment: M.-C. Foblets, J. Velaers, 'De hoofddoek, het onderwijs en de antidiscriminatiewet', *Rechtskundig Weekblad*, 2006-07, 122-132; J. VELAERS, M.-C. FOBLETS, '"Wijze voorzichtigheid" of "ideologische verbetenheid"'? Over het hoofddoekje in het onderwijs," in *Vriendenboek Raf Verstegen. Ad Amicissimum amici scripsimus*, Bruges, Die Keure, 2004, 335-341.

pacifique entre différentes cultures et convictions philosophiques et religieuses à l'école.[106] La même année, dans son rapport final, la Commission sur le Dialogue Interculturel soulignait, dans un même esprit que *"[…] enseigner la tolérance et la pluralisme ne peut raisonnablement se faire dans l'hypocrisie d'un système éducatif qui empêcherait à ses membres d'exprimer leurs identités."*[107]

Plus récemment, le Conseil d'Etat a eu à se prononcer, dans deux arrêts, sur l'interdiction de porter le foulard à l'école. Dans les deux cas, il s'agissait d'une interdiction de porter le foulard dans une école du secteur de l'enseignement public. La Constitution belge prévoit, explicitement à l'article 24, que l'enseignement public en Belgique est neutre. Il appartient au Conseil central de l'enseignement communautaire, et non pas au conseil d'une école en particulier, de fixer l'étendue du principe de neutralité. Le premier arrêt est l'arrêt n°195.044 du 2 juillet 2009. [108] Le Conseil d'Administration d'un groupe d'écoles de l'enseignement communautaire en Flandre avait licencié une maîtresse de religion islamique pour motifs impérieux parce qu'elle avait refusé, en violation du règlement de l'école, d'ôter son foulard en dehors du local de classe. Le Conseil d'Etat a annulé cette décision. Le Conseil constate tout d'abord que l'interdiction en question ne résulte pas des circonstances spécifiques, propres à l'école, ni du comportement de l'enseignante concernée. Le licenciement se fonde uniquement sur le non-respect d'une interdiction de principe générale du port du foulard en dehors du cours de religion qui, selon le groupe d'écoles de l'enseignement communautaire, doit se concevoir comme une 'mise en œuvre' de la déclaration de neutralité dans l'enseignement communautaire. Le Conseil d'Etat constate que le Décret spécial du 14 juillet 1998 relatif à l'enseignement communautaire a expressément habilité le Conseil central de l'enseignement communautaire à rédiger une déclaration de neutralité et n'a pas délégué aux divers groupes d'écoles le pouvoir de fixer des règles générales en la matière. Le Conseil d'Etat examine ensuite les termes de la déclaration de neutralité. Il en conclut qu'en signant cette déclaration, la maîtresse de religion concernée ne devait pas en inférer qu'elle était supposée ôter son foulard en dehors des cours de religion. De l'avis du Conseil, le règlement de l'école émane par conséquent d'une autorité incompétente pour l'arrêter.

Le second arrêt concerne une affaire qui suscitait beaucoup de remous, surtout en Flandre, à la suite de la décision que prenait en juin 2009 l'athenée royal d'Anvers d'interdire, à dater du 1 septembre 2009, le port de symboles religieux au sein de l'établissement scolaire. La décision a soulevé d'autant plus l'émoi que l'athenée était l'une des dernières écoles du réseau communautaire, à Anvers, à introduire l'interdiction. De nombreuses élèves portant le foulard et cherchant à échapper à l'interdiction déjà en vigueur dans d'autres écoles, s'y étaient de ce fait inscrites. Désormais, elles seraient également tenues de respecter l'interdiction. Début septembre 2009, une étudiante inscrite à l'athenée demande en extrême urgence la suspension de l'interdiction. Dans son arrêt n° 196.092 du 15 septembre 2009[109] le Conseil d'Etat rejette toutefois la demande. La Conseil d'Etat constate que la direction prenait sa décision "*en fonction des circonstances spécifiques dans lesquelles se trouve l'école*" en référant plus particulièrement au nombre croissant de jeunes filles portant le foulard. La situation est toutefois différente de dans la précédente affaire: l'interdit du port du foulard ne s'appuye pas sur le principe général de neutralité, mais à la lumière des circonstances spécifiques estimé justifié pour deux motifs: premièrement, parce que la pression exercée sur les jeunes filles ne portant pas le foulard devient forte et ensuite, pour éviter que les parents n'inscrivent leur filles pour la bonne raison que le port du foulard y est autorisé, mais non en raison du projet pédagogique, ce qui met ce dernier en péril . La question de la légalité de l'interdiction n'a toutefois pas été tranchée dans cette seconde affaire, le délai de recours en extrême

106. Cour d'appel d'Anvers, 14 juin 2005, 2004/AR/2811.

107.Commission sur le Dialogue Interculturel, Rapport et témoignages, Bruxelles, mai 2005, http://www.diversiteit.be.

108. Conseil d'Etat, x. c./ la Communauté flamande, arrêt n° 195.044 du 2 juillet 2009.

109. Conseil d'Etat, x. c./Gemeenschapsonderwijs Scholengroep 1, arrêt n° 196.092 du 15 septembre 2009.

urgence étant expiré. Mais le raisonnement est intéressant, car il est l'illustration du souci de concrétisation qui, dans la jurisprudence belge, est le fil conducteur des raisonnements tenus par les tribunaux. En l'espèce, ce qui est recherché est la protection de la liberté religieuse, incluant également le droit de ne pas exprimer publiquement ses convictions.

Les deux décisions semblent confirmer qu'il n'appartient pas à une école de l'enseignement communautaire neutre d'introduire un interdit du port du foulard, sauf à pouvoir justifier les circonstances spécifiques. Il n'appartient pas à une école d'édicter un interdit en vertu du principe de neutralité. Seul le Conseil central de l'enseignement communautaire est compétent pour donner du principe de neutralité une définition concrète. On notera que, depuis, ce Conseil approuvait un interdit général et de principe du port du foulard[110], contre lequel par ailleurs un recours a été introduit. Le Conseil d'Etat aura donc à se prononcer sur la question de savoir si la Conseil est autorisé à faire ce que les écoles n'ont pas pouvoir de faire, à savoir édicter un interdit de principe pour l'enseignement communautaire. On saura alors si le Conseil adhère à la position fonctionnelle-pragmatique, en accord avec la Constitution, ou au contraire, à l'instar de la France, se montre davantage favorable à une position de principe, plus dogmatique.

D'une manière générale, le port du foulard interpelle. Le débat sur le foulard fait voir le clivage entre, d'une part, ceux qui considèrent que dans un Etat sécularisé tout signe distinctif religieux ou philosophique doit être banni de l'espace public et, d'autre part, ceux qui considèrent que, au contraire, arborer des signes distinctifs notamment à travers le comportement vestimentaire fait partie intégrante de la liberté religieuse et/ou philosophique. En ce sens, la question du foulard est symptomatique du débat sur le pluralisme religieux et philosophique en contexte contemporain. Elle est en outre symptomatique du flou que fait planer sur la nature et le caractère de 'l'espace publique' le débat sur la sociéte plurireligieuse. *"L'espace public est bien l'espace nécessaire pour apparaître en public, mais il est issu d'un interaction historique particulière entre un Etat en construction et une Eglise dominante qui a abouti à un compromis quant à leur relations et sphères 'influence,"* écrit Corinne Torrekens à propos de la Belgique.[111] Pour elle, le défi aujourd'hui consiste à intégrer les croyances et expressions philosophiques nouvelles à la définition de l'espace public. Sa position va à contrecourant de la conception qui rejette le fait que l'espace public est un lieu de reconnaissance pour les identités, et donne préférence au refus de toute visibilité religieuse.

V. CONCLUSION

Nous arrêtons ici l'esquisse des principes constitutionnels régissant, en droit belge, les relations entre l'Etat et les religions et convictions, voire tendances philosophiques présentes dans la société. Pour bien faire, il eut fallu couvrir dans cette contribution également d'autres facettes du fait religieux dans ses rapports avec l'Etat en droit belge: l'objection de conscience, la place du religieux dans le vaste domaine du droit de la famille, du droit des contrats, la référence à la croyance en droit pénal, etc. Cela aurait permis d'offrir à la fois une présentation d'ensemble et les différentes clés de la régulation normative du phénomène religieux en droit belge. Mais tout cela nous aurait fait déborder les limites assignées. Un examen, même rapide, du cadre constitutionnel belge se rapportant à la liberté religieuse fait apparaître qu'il est tout à fait important aujourd'hui d'étudier scrupuleusement les conflits dont le nombre va croissant et qui opposent, d'une part, le droit de l'Etat sécularisé et, d'autre part, le droit des citoyens d'exercer leur droit à la liberté de religion. Ces conflits renvoient à une question fondamentale: celle de la légitimité des normes édictées par le droit d'un Etat. Dans un contexte où les revendications identitaires – incluant les convictions religieuses - reviennent en avant-plan

110. *"In elke instelling van het Gemeenschapsonderwijs van de Vlaamse Gemeenschap is het leerlingen, cursisten en personeelsleden voortaan niet meer toegelaten om levensbeschouwelijke kentekens te dragen. Een uitzondering wordt toegestaan aan leerkrachten levensbeschouwelijke vakken, die wel dergelijke kentekens mogen dragen, maar dan uitsluitend tijdens het levensbeschouwelijke vak. Tijdens de levensbeschouwelijke vakken mogen ook de aanwezige leerlingen levensbeschouwelijke kentekens dragen."* (à compléter: source).

111. C. Torrekens, "Le pluralisme religieux en Belgique," *Diversité canadienne*, vol. 4, 2005, n°3, 57.

de la scène,[112] il est impératif que le cadre juridique mis en place pour régir ces revendications soit adapté, de sorte à pouvoir offrir les réponses adéquates. Ces réponses doivent, de préférence, embrasser la diversité sous l'angle de la liberté de religion ou de pensée, garantie à titre de droit fondamental des individus. Le défi est d'autant plus énorme que, sur le plan empirique, la diversité religieuse et philosophique va indéniablement croissant et que les revendications religieuses s'apparentent visiblement, très souvent, à des revendications identitaires qui tendent à se radicaliser si elles ne sont pas 'saisies' avec empathie et dans le respect de l'enjeu qu'elles représentent pour les intéressés.[113] L'analyse des relations entre l'Etat et les religions et convictions philosophiques et de la protection de la liberté de religion et de conviction fait voir combien le défi est grand, mais aussi qu'il est pris à cœur, même si cela ne se passe pas sans heurts ni déceptions.

112. O. Roy, *La sainte ignorance: Le temps de la religion sans culture*, Paris, Seuil, 2008.

113. F. Dassetto, *Paroles d'Islam: indiv*Id*us, societiés et discours dans l'Islam européen contemporain*, Paris: Maisonneuve, 2000; A.H. Sinno (ed.), *Muslims in Western Politics*, Bloomington, Indiana U.P., 2009; N. Tietze, *Islamische* I*dentitäten: Formen muslimischer Religiosität junger Männer in Deutschland und Frankreich*, Hamburg, HIS Verlag, 2001.

EVALDO XAVIER GOMES

Religion and the Secular State in Brazil

I. SOCIAL CONTEXT

Segundo dados fornecidos pelo último recenseamento geral realizado no Brasil, o censo demográfico do ano 2000, o país contava naquele ano com uma população total de aproximadamente cento e setenta milhões de habitantes[1]. Como os recenseamentos gerais são feitos a cada 10 anos a previsão para o censo do ano de 2010 é de que o contingente populacional chegue a aproximadamente duzentos milhões de habitantes na próxima década[2]. Em termos religiosos o Brasil foi e continua a ser uma nação em que predomina o catolicismo romano, muito embora seja baixa a frequência à missa por parte dos fiéis católicos. Existe também um acentuado sincretismo religioso, pelo qual fiéis frequentam simultaneamente cultos de mais de uma confissão religiosa. Nas últimas décadas constata-se entretanto um forte fenómeno de diversificação religiosa com uma significativa redução do percentual de católicos na composição geral da população brasileira[3], ao qual corresponde o crescimento de outros grupos religiosos, especialmente das chamadas igrejas evangélicas ou pentecostais[4]. Um recente estudo do Centro de Políticas Sociais da Fundação Getúlio Vargas, demonstra todavia, que nos últimos anos há uma tendência à estabilização desses percentuais, observando-se a tendência do numero de católicos romanos[5]. Ainda assim, as mudanças ocorridas nas últimas décadas na composição da população brasileira criaram um panorama religioso diverso e competitivo[6]. Ainda que seja um grupo cuja presença é relativamente recente no cenário brasileiro, a Igrejas evangélicas exercem uma forte influência na sociedade[7] e na política, como demonstra a Bancada Evangélica do Congresso Nacional.

Um fenómeno relativamente recente no contexto religioso e social brasileiro é o da intolerância religiosa. Nos últimos anos foram registrados episódios sobretudo envolvendo principalmente adeptos de igrejas neo-pentecostais e evangélicas contra membros de religiões afro-brasileiras. Houve uma forte condenação a esses conflitos tanto

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1. Exatamente 169.799.170,00 habitantes. Fonte: *Censo demográfico* 2000. *Estatísticas do século XX*. IBGE, Rio de Janeiro 2007.

2. A última contagem geral da população brasileira, que não se reveste da exactidão e rigorosidade dos Censos, realizada no ano de 2007 estimava um contingente total da população brasileira em cerca de 183 987 291 (*População recenseada e estimada, segundo as Grandes Regiões e as Unidades da Federação – 2007*, IBGE. **"**Contagem da População 2007 - Resultados da publicação divulgada em 21/12/2007").

3. Em 1890 em uma população total de 14.333.915 habitantes, declaravam-se de religião católica 14.179.615, ou seja 98,9%. O declínio do percentual de católicos na população brasileira, continuou até chegar aos 73,89% no ano 2000.

4. Somente na década de 90 os chamados crentes evangélicos de 9% em 1991 passaram a constituir 16,2% da população no ano 2000 (dos quais as três maiores igrejas são: Assembleia de Deus - 47%, Congregação Cristã do Brasil - 14, 04% e Igreja Universal do Reino de Deus - 11,85%). Os chamados Evangélicos de Missão (segundo a nova denominação utilizada pelo Censo do ano 2000 para designar as igrejas protestantes tradicionais) de origem predominantemente europeia, correspondem a aproximadamente 5% da população brasileira (dos quais os maiores grupos são: Batistas - 37,31%, Adventistas - 14,27% e Luteranos - 12,53%). A presença de grupos não cristãos na população brasileira é pouco significativa, como exemplifica, considerando-se o total da população, o percentual dos seguintes grupos segundo os dados do senso do ano 2000: Budismo 0,126; Candomblé 0,075; Judaísmo 0,051; Islamismo 0,016. (fonte: *Tabela 2.1 - População presente, segundo o sexo, os grupos de idade, o estado conjugal, a religião, a nacionalidade e a alfabetização - 1872/1996* - IBGE (http://www.ibge.gov.br/seculoxx/arquivos_xls/palavra_chave /populacao/religiao.shtm (10/10/2009)).

5. Esse estudo mostrou que a percentagem de católicos no Brasil passou a dar sinais de estabilidade a partir do ano 2000. Cortês Neri, Marcelo (coord.). *Economia das Religiões: mudanças recentes*. Ed. FGV IBRE CPS, Rio de Janeiro 2007.

6. AA.VV. *Atlas da Filiação Religiosa e Indicadores Sociais no Brasil*, Edições Loyola, 2003.

7. Existe inclusive uma proposta de lei, já aprovada na Câmara dos Deputados que instituí o Dia do Nacional do Evangélico. Projeto de Lei 3541/08, deputado Cleber Verde, do PRB-MA.

por parte do Estado, quanto da parte de grupos religiosos e da sociedade brasileira em geral[8]. São episódios esporádicos e pouco numerosos, mas ainda assim suscitam grande preocupação, visto que apesar das denúncias oferecidas por defensores dos direitos humanos e por entidades de representação das religiões afro-brasileiras, falta a adoção de medidas eficazes por parte das autoridades publicas. A legislação anti-discriminação não é um instrumento eficaz por si só para combatê-lo, considerando que em muitas áreas geográficas do imenso território brasileiro e presença do Estado é débil e inoperante. Grupos de fiéis afro-brasileiros têm ameaçado responder a esse ataques também por meio de violência. Esse novo fenómeno deve ser eficazmente combatido pelas autoridades nacionais afim que se possam conviver pacificamente em um mesmo território diferentes denominações e crenças religiosas.[9]

II. THE PREDOMINANT VIEW OF STATE AND RELIGION RELATIONS

A concepção atual das relações entre Igreja e Estado no Brasil, ainda hoje reflecte as concepções da filosofia secular que regeu o nascimento da República. Um de seus principais teóricos foi o jurista brasileiro Rui Barbosa (1849-1923), para o qual a separação entre Igreja e Estado era um dos fundamentos do Estado moderno. Foi esse jurista um dos principais responsáveis pela separação entre Igreja Católica e Estado, e pela consequente extinção do regime do padroado na nascente República. Rui Barbosa não era um anti-clerical, muito menos um anti-católico. Segundo sua teoria, a aliança entre "a soberania e o altar" era um aliança de mútua servidão, que fazia mal tanto para a Igreja, quanto para o Estado[10]. Segundo essa visão, por outro lado a liberdade de religião, considerada como a liberdade por excelência, passa a ser considerada um elemento fundamental da organização politica e social do pais[11]. Dentro da concepção brasileira de separação entre Igreja e Estado não se considera ofensa à laicidade do Estado, por exemplo, a criação de uma capela ecuménica nas dependências do Senado Federal[12].

Uma síntese da síntese da concepção jurídica brasileira do conceito de separação entre igreja e estado foi dada pelo Tribunal Regional Federal da 4ª região. Considerando a laicidade do estado sob a rubrica de "princípio da não-confessionalidade," afirma que o mesmo se fundamenta em 4 pilares: "a) o Estado não adota qualquer religião, nem se pronuncia sobre questões religiosas; b) nos atos oficiais e no protocolo do Estado não serão observados símbolos religiosos; c) o Estado não pode programar a educação e a cultura segundo diretrizes religiosas; d) o ensino público não pode ser confessional."[13]

III. STATE AND RELIGION RELATIONS: CONSTITUTIONAL PROVISIONS AND PRINCIPLES

Ao contrário da grande maioria das demais nações latino-americanas, o território brasileiro foi colonizado pelo Reino de Portugal e não pela coroa espanhola. A colonização portuguesa implica em elementos de distinção, mas também de afinidade com as demais nações da mesma área geográfica. No aspecto religiosos o mais significativo ponto em comum com os países vizinhos é a forte presença e influência do catolicismo romano seja na formação da nação, seja na composição religiosa da população. Assim é que rompidos os laços coloniais com Portugal, o Brasil independente adotou o mesmo

8. Vagner Gonçalves da Silva, org. *Intolerância Religiosa: Impactos do Neopentecostalismo no Campo Religioso Afro-brasileiro*, EDUSP, São Paulo 2007.

9. Adam KOWALIK. Problemas actuais da liberdade religiosa no Brasil - Intolerância Religiosa no Brasil, 2008. In www.*libertareligiosa. blogspot.com/2008/07/umbanda-intolerncia-religiosa.html - 59k -(en 10/11/2008).*

10. "O pacto de aliança entre a soberania e o altar é, foi, e há de ser sempre, pela força das coisas, um pacto de mútua e alternativa servidão. A religião, apoiada no monopólio civil, não pode senão adulterar-se, enfraquecer-se, decair." in BARBOSA, Ruy., *Teoria Política*, W.M. Jackson, Rio de Janeiro, p. 214-215.

11. "Por isso, entre outros motivos, é que sobre todas as liberdades está para nós a liberdade religiosa". in BARBOSA, Ruy., *Teoria Política*, W.M. Jackson, Rio de Janeiro. p. 220.

12. *Resolução do Senado Federal* – "cria capela ecuménica em dependências do Senado Federal", 18 de Abril de 2001, pub. DOU-E 09 04 2001 (*Projeto de Resolução do Senado*, nº 25 de 1999), pag 03.

13. TRF4 - *Apelação em Mandado de Segurança*. AMS 17703 PR 2003.70.00.017703-1, Julg.: 16/10/2007, pub.: D.E. 07/11/2007.

regime de relações privilegiadas entre Estado e Igreja Católica, vigente durante o período colonial[14].

Pouco depois da proclamação da Independência de Portugal, o recém-criado Império do Brasil solicitou à Santa Sé a manutenção do regime do padroado, fazendo com que o Imperador do Brasil passasse a ocupar o papel que até então cabia ao monarca português. Por essa razão o catolicismo romano foi declarado na primeira constituição brasileira, a Constituição Imperial de 1824[15], como "religião do império" [16]. De forma explicita o texto constitucional imperial referindo-se ao catolicismo romano, usava a expressão "continuará a ser a religião do Império". A Constituição Imperial previa que o Imperador antes de ser aclamado, perante o parlamento, deveria jurar o compromisso de: "manter a Religião Catholica Apostolica Romana…" (art.103). Ainda em matéria religiosa, a Carta Constitucional Imperial de 1824, restringia o direito de voto dos clérigos e dos religiosos (art.92) e limitava também os direitos políticos dos que não professavam a religião oficial do Estado, aos quais não se reconhecia o direito de serem votados (art.95). O primeiro texto constitucional brasileiro esteve em vigor por sessenta e sete anos, até 1891. Dom Pedro I, o proclamador da independência e o primeiro imperador, desejava obter para o Brasil os mesmos privilégios concedidos pela Santa Sé a outras monarquias católicas da Europa, como Lisboa, Madrid, Paris ou Viena. A resposta da Santa Sé veio somente em 1827, por meio da bula "Praeclara Portugaliae Algarbiorunque Regnum," de 27 de Maio de 1827, concedida pelo Papa Leão XII que estabelecia o regime do padroado no Brasil independente[17]. Esse foi o regime que regeu as relações entre Estado e Igreja durante todo o período imperial brasileiro que vai desde a independência em 7 de Setembro de 1822, até a proclamação da Republica em 15 de Novembro de 1989.

Com a proclamação da República em 15 de Novembro de 1889 foi adotado o regime de separação entre Igreja e Estado. Aproximadamente dois meses depois da instauração do regime republicano[18], o novo governo aprovou o Decreto N° 119-A[19] que extinguia o regime do padroado, instaurava a liberdade de religião e reconhecia a personalidade jurídica das confissões religiosas. Esse decreto é um instrumento basilar das relações entre Estado e Igreja no Brasil[20]. Seu texto proíbe ao poder publico em todas as suas esferas, o estabelecimento de uma religião ou sua proibição, como também a prática de discriminação ("crear diferenças") por motivos de "de crenças, ou opiniões philosophicas ou religiosas" (art. 1). Por meio desse decreto foi concedida liberdade de culto a todas as confissões religiosas.

O passo decisivo para a definitiva separação entre Estado e Igreja ocorreu com a promulgação da primeira constituição republicana, a Carta Constitucional de 1891 que assegurava em todo o território brasileiro o direito à liberdade de religião[21]. A Carta

14. Reza a Constituição Imperial de 1824: " Art. 5. A Religião Catholica Apostolica Romana continuará a ser a Religião do Imperio. Todas as outras Religiões serão permitidas com seu culto domestico, ou particular em casas para isso destinadas, sem fórma alguma exterior do Templo." *Constituição Politica do Imperio do Brazil de 1824.*

15. "Artigo 5 - A Religião Catholica Apostolica Romana continuará a ser a Religião do Imperio. Todas as outras Religiões serão permitidas com seu culto domestico, ou particular em casas para isso destinadas, sem fórma alguma exterior do Templo". *Constituição Politica do Imperio do Brazil*, em http: //www.presidencia.gov.br /ccivil_03/ Constituicao/ Constitui%C3%A7ao24.htm (en 09/08/2009).

16. IGLÉSIAS, Francisco. *História Geral e do Brasil*, Ed. Ática, 1989, p.114.

17. O privilégio do Padroado foi inicialmente concedido ao Império do Brasil logo após a independência pelo período de quatro anos, por meio do Breve *Carissime Quam Intima* do Papa Leão XII, de 15 de Abril de 1826 (ARCHIVO SECRETO VATICANO – *Epistolae ad Principes*, indice n.1146, nº1, reg. 254, anno 1825-1827, p. 86-90). Posteriormente foi reconfirmado pela Bula *Praeclara Portugalia*, de 15 de maio de 1827 (*Jus Pontificium de Propaganda Fide*. "Pars I, Complaetgens Bullas, Brevia", *Acta S. Sedis*, vol. IV, Roma 1888, p. 685).

18. A Republica foi proclamada em 15 de Novembro de 1889 e o *Decreto N° 119-A*, foi aprovado em 7 de Janeiro de 1890.

19. PUB, *Coleção de Leis do Brasil*, Rio 1890, vol. 1, col. 1, pag. 010.

20. Sua vigência foi restabelecida pelo Decreto nº 4.496 de 2002.

21. "Art. 72 - A Constituição assegura a brasileiros e a estrangeiros residentes no País a inviolabilidade dos direitos concernentes à liberdade, à segurança individual e à propriedade, nos termos seguintes:.. § 3º - Todos os indivíduos e confissões religiosas podem exercer pública e livremente o seu culto, associando-se para esse fim e adquirindo bens, observadas as disposições do direito comum. .. § 7º - Nenhum culto ou igreja gozará de subvenção oficial, nem terá relações de dependência ou aliança com o Governo da União ou dos Estados.

Constitucional de 1891 traz poucas disposições de natureza religiosa. Além do direito à liberdade de religião, consagra também o carácter secular do ensino público[22] e o matrimónio civil[23]. Todas as cartas constitucionais seguintes, as Constituições de 1934[24], 1937[25], 1946[26], 1967[27] e 1988, consagraram com poucas variações de forma a tutela do direito à liberdade de religião. A norma constitucional em vigor consagra o direito à liberdade de religião no paragrafo VI do artigo 5, nos seguintes termos:

Art. 5º Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:

VI - é inviolável a liberdade de consciência e de crença, sendo assegurado o livre exercício dos cultos religiosos e garantida, na forma da lei, a proteção aos locais de culto e a suas liturgias; O mesmo artigo 5 garante o direito à assistência religiosa (inciso VII), à inviolabilidade dos direitos políticos por razões de ordem religiosa (inciso VIII) e adopta também o principio da não discriminação em matéria de religião (inciso XLI). Outro aspecto importante é o fato da norma constitucional tutelar o direito de associação das comunidades religiosas, conforme as disposições dos artigos 5 e 19, I, os quais se de um lado proíbem o financiamento das igrejas e confissões religiosas, de outro veta ao poder público a imposição de restrições injustificadas às suas actividades. Uma excepção ao

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Constituição da República dos Estados Unidos do Brasil (24 de fevereiro de 1891) http://www.presidencia.gov.br /ccivil_03/Constituicao/ Constitui%C3%A7ao91.htm (en 24/09/2009).

22. "Art. 72 - A Constituição assegura a brasileiros e a estrangeiros residentes no País a inviolabilidade dos direitos concernentes à liberdade, à segurança individual e à propriedade, nos termos seguintes: § 6º - Será leigo o ensino ministrado nos estabelecimentos públicos," em *Constituição da República dos Estados Unidos do Brasil* (24 de fevereiro de 1891).

23. Art. 72, § 4º - A República só reconhece o casamento civil, cuja celebração será gratuita, em *Constituição da República dos Estados Unidos do Brasil* (24 de Fevereiro de 1891).

24. Art. 17 - É vedado à União, aos Estados, ao Distrito Federal e aos Municípios: II - estabelecer, subvencionar ou embaraçar o exercício de cultos religiosos. Art. 113 - A Constituição assegura a brasileiros e a estrangeiros residentes no País a inviolabilidade dos direitos concernentes à liberdade, à subsistência, à segurança individual e à propriedade, nos termos seguintes: 1) Todos são iguais perante a lei. Não haverá privilégios, nem distinções, por motivo de nascimento, sexo, raça, profissões próprias ou dos pais, classe social, riqueza, crenças religiosas ou idéias políticas. *Constituição da República dos Estados Unidos do Brasil* (16 de Julho de 1934).

25. Art. 32 - É vedado à União, aos Estados e aos Municípios: b) estabelecer, subvencionar ou embaraçar o exercício de cultos religiosos. Art. 122 - A Constituição assegura aos brasileiros e estrangeiros residentes no País o direito à liberdade, à segurança individual e à propriedade, nos termos seguintes: 4º) todos os indivíduos e confissões religiosas podem exercer pública e livremente o seu culto, associando-se para esse fim e adquirindo bens, observadas as disposições do direito comum, as exigências da ordem pública e dos bons costumes. *Constituição dos Estados Unidos do Brasil* (10 de Novembro de 1937).

26. Art. 31 - A União, aos Estados, ao Distrito Federal e aos Municípios é vedado: II - estabelecer ou subvencionar cultos religiosos, ou embaraçar-lhes o exercício; III - ter relação de aliança ou dependência com qualquer culto ou igreja, sem prejuízo da colaboração recíproca em prol do interesse coletivo. Art. 141 - A Constituição assegura aos brasileiros e aos estrangeiros residentes no País a inviolabilidade dos direitos concernentes à vida, à liberdade, a segurança individual e à propriedade, nos termos seguintes: § 7º - É inviolável a liberdade de consciência e de crença e assegurado o livre exercício dos cultos religiosos, salvo o dos que contrariem a ordem pública ou os bons costumes. As associações religiosas adquirirão personalidade jurídica na forma da lei civil; § 8º - Por motivo de convicção religiosa, filosófica ou política, ninguém será privado de nenhum dos seus direitos, salvo se a invocar para se eximir de obrigação, encargo ou serviço impostos pela lei aos brasileiros em geral, ou recusar os que ela estabelecer em substituição daqueles deveres, a fim de atender escusa de consciência. *Constituição dos Estados Unidos do Brasil* (18 de setembro de 1946).

27. Art. 9º - A União, aos Estados, ao Distrito Federal e aos Municípios é vedado: II - estabelecer cultos religiosos ou igrejas; subvencioná-los; embaraçar-lhes o exercício; ou manter com eles ou seus representantes relações de dependência ou aliança, ressalvada a colaboração de Interesse público, notadamente nos setores educacional, assistencial e hospitalar. Art. 150 - A Constituição assegura aos brasileiros e aos estrangeiros residentes no Pais a inviolabilidade dos direitos concernentes à vida, à liberdade, à segurança e à propriedade, nos termos seguintes: § 1º - Todos são iguais perante a lei, sem distinção, de sexo, raça, trabalho, credo religioso e convicções políticas. O preconceito de raça será punido pela lei; § 5º - É plena a liberdade de consciência e fica assegurado aos crentes o exercício dos cultos religiosos, que não contrariem a ordem pública e os bons costumes; § 6º - Por motivo de crença religiosa, ou de convicção filosófica ou política, ninguém será privado de qualquer dos seus direitos, salvo se a invocar para eximir-se de obrigação legal imposta a todos, caso em que a lei poderá determinar a perda dos direitos incompatíveis com a escusa de consciência. *Constituição do Brasil* (24 de janeiro de 1967).

financiamento de igrejas e organizações religiosas contemplada pelo texto constitucional é a cooperação com essas instituições em caso de interesse público (art. 19)[28]. Em resumo a Carta Constitucional brasileira em vigor garante o exercício de direitos como, liberdade de religião e consciência; proteção dos lugares de culto e suas liturgias; reunião pacifica e de criação de igrejas; assistência religiosa em estabelecimentos de internamento colectiva, civis e militares; colaboração entre estado e as comunidades religiosas de acordo com a conveniência e o interesse público, e finalmente o reconhecimento dos efeitos civis do matrimónio. Simultaneamente proíbe que o poder público estabeleça uma religião de estado; financie igrejas ou confissões religiosas; crie obstáculos às atividades das Igrejas e à realização de seus cultos; mantenha relações privilegiadas ou aliança com qualquer grupo religioso; e a cobrança de impostos ou taxas sobre templos e cultos religiosos.

IV. LEGAL CONTEXT: LEGISLATION AND JURISPRUDENCE ON STATE AND RELIGION

Pela organização política do Brasil, tanto a União, ou seja o governo federal, quanto os estados e os municípios têm poder de legislar. Por essa razão existe um grande numero de instrumentos legais que tratam de matéria religiosa em âmbito nacional, mas também nos diversos Estados da Federação e nos milhares de municípios.

Nos últimos anos se nota uma maior influência de grupos religiosos na sociedade brasileira, não somente com relação às novas religiões e igrejas, mas também com relação aos cultos afro-brasileiros como a Umbanda e o candomblé. Um exemplo desse fenómeno é o denominado Código de Limpeza Urbana do Município de Porto Alegre[29], que foi alterado pela Lei Complementar nº 602/2008 a fim de excetuar expressamente de sanção a deposição em lugares públicos de animais mortos utilizados em cultos de religiões de matriz africana e da Umbanda[30]. Prática que é ordinariamente objeto de sanção, mas que por razões de ordem religiosa passa a ser permitida.

A. Jurisprudence

Existe uma farta jurisprudência nos tribunais brasileiros em matéria de liberdade de religião. São decisões que tratam de temas como o ensino religioso confessional nas escolas públicas[31], a tributação das igrejas e associações religiosas[32], o envolvimento das igrejas e grupos religiosos no processo eleitoral[33], a assistência religiosa às forças

28. Art. 19. É vedado à União, aos Estados, ao Distrito Federal e aos Municípios: I - estabelecer cultos religiosos ou igrejas, subvencioná-los, embaraçar-lhes o funcionamento ou manter com eles ou seus representantes relações de dependência ou aliança, ressalvada, na forma da lei, a colaboração de interesse público *Constituição da República Federativa do Brasil* (5 de Outubro de 1988).

29. Art. 43 da Lei Complementar nº 234 (Código Municipal de Limpeza Urbana).

30. Essa legislação anteriormente à sua alteração pela Lei Complementar nº 602/2008, fez com que, considerando-a violação da liberdade religiosa dos cultos afro-brasileiros, fosse impetrada acção Ação Direta de Inconstitucionalidade com fundamento na sua tutela constitucional. Ver TJRS. *Ação Direta de Inconstitucionalidade*. ADI 70024938946 RS, julg.: 13/04/2009, pub.: DJ, 30/04/2009.

31. Em 2001 o Tribunal de Justiça do Rio de Janeiro julgou uma Representação de Inconstitucionalidade contra dispositivos da Lei Estadual n.º 3459/2000 de 14 de Setembro de 2000, do Estado do Rio de Janeiro que "dispõe sobre ensino religioso confessional nas escolas da rede pública de ensino do Estado do Rio de Janeiro". O tribunal considerou que o uso pela legislação da palavra "confessional" não implicava em ofensa à liberdade religiosa. Segundo a interpretação da corte no contexto da lei estadual a "expressão confessional nada mais significa do que crença religiosa" e que a legislação em questão não constituía violação ao principio da liberdade de religião, visto que não discriminava adeptos de religiões diversas. Seguindo a legislação estadual, também o município do Rio de Janeiro aprovou por meio de lei municipal uma lei que regula o ensino religioso nas escolas publicas de rede municipal (Lei Municipal nº 3228, de 26 de Abril de 2001, Rio de Janeiro – "dispõe sobre ensino religioso confessional nas escolas da rede pública de ensino do município do Rio de Janeiro"). Tanto a lei estadual como a municipal se propõem disciplinar o ensino religioso "confessional". *Tribunal de Justiça do Rio de Janeiro* – AÇÃO DIRETA DE INCONSTITUCIONALIDADE: ADI 141 RJ 2000.007.00141, Julgamento: 02/04/2001.

32. O Tribunal de Justiça do Estado do Espírito Santo, considerou que também as associações religiosas, ainda que sem fins lucrativos devem pagar direitos autorais quando realizem eventos em locais de frequência coletiva. In *Tribunal de Justiça do Estado do Espírito Santo* - APELAÇÃO CÍVEL: AC 24020188538 ES 24020188538, Julgamento: 26/09/2006, **A**pelante: Escritório Central de Arrecadação e Distribuição ECAD. Apelado: Mitra Arquidiocesana de Vitória.

33. TRE-PA - Recurso Eleitoral: RE 4092 PA, 09/12/2008, Diário Oficial do Estado, Volume CE4, pág. 14.

armadas[34] e outros. Em alguns casos nota-se uma evidente contradição e falta de uniformidade na aplicação do direito à liberdade religiosa por parte dos tribunais brasileiros. Um bom exemplo dessa postura jurisprudencial contraditória pode ser constatado nos casos envolvendo o pleito de se poder observar o dia de guarda segundo os preceitos da própria fé religiosa. Muitos desses casos envolvem membros da Igreja Adventista do Sétimo Dia que pedem a faculdade de poder realizar exames de concurso público, em dia diverso do dia de sábado, considerado dia de guarda para os membros daquela religião, mas também para judeus[35] e membros de outras religiões. Alguns tribunais, inclusive o Supremo Tribunal de Justiça[36], negam o gozo desse direito. Segundo algumas decisões a concessão do beneficio de realizar exame em um dia diferente daquele determinado para os demais candidatos configuraria uma injustificada discriminação. Segundo essa posição o direito à liberdade de religião, tutelado pelo art. 5 da Constituição Federal de 1988 (CF - 88) não pode ser invocado como fundamento para a isenção de obrigação legal todos imposta e para a correlata recusa de cumprir prestação alternativa prevista em lei[37]. Outros tribunais diferentemente consideram, que um preceito de ordem religiosa, pode sob o palio do artigo 5 da CF-88, justificar a realização de exames de concurso público em data diversa daquela estabelecida para os demais candidatos.[38]

Em matéria tributária, uma consolidada jurisprudência, confirmada pelo Supremo Tribunal Federal, considera que a imunidade tributaria prevista no artigo 150, VI, b da Constituição Federal de 1988, abrange não apenas os edifícios destinados ao culto religioso propriamente dito, mas também todo o património da instituição, incluindo suas rendas e os serviços destinados às suas finalidades essenciais.[39] Outras questões abordadas pelos tribunais brasileiros em matéria de liberdade de religião são: religião e liberdade de

34. Uma das raras vezes em que o poder judiciário brasileiro se interveio em matéria de assistência religiosa às forças armadas for por meio do Informativo Nº 546 do Supremo Tribunal Federal, que estabelece a competência da justiça militar para julgar um capelão em caso de crime de apropriação indevida. Conforme a decisão **(***Informativo Nº 546*, Brasília, 11 a 15 de Maio de 2009. Título: Competência da Justiça Militar e Capelania Castrense. Processo: RHC – 96814. rel. Min. Eros Grau).

35. Decidindo sobre a imposição a um professor judeu que não aderiu ao movimento grevista, da obrigação de repor aulas em dia de sábado, o Tribunal de Justiça do Distrito Federal considerou a ilegal. Considerando o direito à liberdade de culto, um direito natural, segundo o entendimento dessa Corte não pode o poder público negar seu direito de respeitar o "direito ao dia reservado à profissão de fé". (TJDF - *Apelação Cível* : AC 3910196 DF, Julg.: 19/08/1996, Pub.: DJU 09/10/1996, p. : 17.912).

36. STJ - *Recurso Ordinário em Mandado de Segurança*: RMS 16107 PA 2003/0045071-3, 30/05/2005, DJ 01/08/2005 p. 555.

37. TRF1 - *Apelação em Mandado de Segurança*: AMS 6643 RO 1997.01.00.006643-4, 25/02/2003, DJ, p.96. Também negando a um membro da igreja Adventista do Sétimo Dia, o direito a um tratamento diferenciado segundo suas convicções religiosas, por considerá-lo ofensa ao princípio da isonomia e da impessoalidade: TRF2 - *Apelação em Mandado de Segurança*. AMS 69012, ES 2005.50.01.012623-0, julg.: 19/09/2007, pub.: DJU, 08/10/2007, p.: 201 / TRF2 - *Agravo de Instrumento*: AG 167044 RJ 2008.02.01.010237-7, julg.: 16/07/2008. pub.: DJU, 28/07/2008, p.119.

38. TRF 1 - Remessa Ex Officio: REO 68143 PR 2002.70.00.068143-9, 22/06/2004, DJ 11/08/2004, p.: 419. Também no sentido de que um membro de um grupo religioso minoritário tem direito a tratamento diferenciado foi o pronunciamento do TRF4, segundo o qual o principio da igualdade, alem da "proibição de diferenciação", implica também em uma "obrigação de diferenciação", correspondente às "desigualdades fácticas existentes, decorrente, no caso das convicções religiosas, de as instituições políticas e sociais incorporarem as necessidades e interesses da confissão majoritária". TRF4 - Apelação em Mandado de Segurança: AMS 17703 PR 2003.70.00.017703-1, julg.: 16/10/2007, pub.: D.E. 07/11/2007. Uma curiosa decisão foi a do Tribunal de Justiça do Maranhão segundo o qual entre a aplicação do principio da liberdade religiosa e os da administração pública, prevalecem estes últimos. No caso concreto, considerando que a inadmissibilidade da prática de tratamento diferenciado por parte da administração publica, não se pode admitir a concessão de tratamento diferenciado em concurso publico por motivos de ordem religiosa a um Adventista do Sétimo Dia que pleiteava a realização de provas em outro dia que não sábado **(**TJMA - *Agravo de Instrumento*. AI 236972006 MA, julg.: 04/10/2007). O STF concedeu tutela antecipada à União negando eficácia a uma decisão do TRF 3ª Região que obrigava a União a marcar data alternativa ao dia de sábado, para a realização das provas de um concurso publico para um candidatos de fé judaica. (STF - *Suspensão de Tutela Antecipada*. STA/389 – MG).

39. AI-AgR 651138 / Rio de Janeiro - AG.REG. Agravo de Instrumento, 26/06/2007 **(**DJe-082, Divulg. 16-08-2007, Public. 17-08-2007, DJ 17-08-2007 PP-00085). Ementário: vol-02285-18 PP-03636, RT v. 96, n. 866, 2007, p. 130-131 // AI-AgR-AgR 389602 / Paraná -AG.REG. Agravo de Instrumento, 22/03/2005 **(**DJ 15-04-2005 PP-00030). Ementário: vol-02187-05 PP-00902 // RE 325822 / SP - São Paulo**,** Recurso Extraordinário**,** 18/12/2002 **(**DJ 14-05-2004 PP-00033). Ementário: vol.-02151-02 PP-00246.

ir e vir;[40] anti-semitismo e crime de racism,[41] liberdade de culto e de locomoção por razões de natureza religiosa.[42]

B. Religion and Propaganda

O risco do uso indevido da influência política das igrejas e comunidades religiosas para fins eleitorais levou o Tribunal Superior Eleitoral em 2008 a emanar a Resolução nº 22.718[43] que proíbe a propaganda de natureza religiosa em por meio de alto-falantes ou amplificadores de som a uma distância inferior a duzentos metros de uma igreja (art. 12, § 1º, III). A mesma Resolução considera os "templos" como bens de uso comum, à semelhança de "postes de iluminação pública e sinalização de tráfego, viadutos, passarelas, pontes, paradas de ônibus e outros equipamentos urbanos," nos quais é proibida propaganda "de qualquer natureza," inclusive "pichação, inscrição a tinta, fixação de placas, estandartes, faixas e assemelhados" (art. 13, § 2º)[44].

C. The Service of Religious Assistance in Armed Forces - SARFA

Uma das poucas provisões do ordenamento jurídico brasileiro concernente a criação de um órgão dentro do aparelho estatal referente a matéria religiosa é a que se refere ao SARFA (Serviço de Assistência Religiosa nas Forças Armadas), cuja configuração atual é dada pela Lei Federal n° 6.923, de 29 de Junho de 1981. Segunda essa norma jurídica o SARFA tem como finalidades a prestação de assistência "Religiosa e espiritual" aos militares e aos civis que trabalhem em organizações militares e suas famílias; e também conceder assistência às actividades de "educação moral" realizadas nas Forças Armadas (artigo 2). O SARFA atua nas unidades militares, navios, hospitais, bases e outros estabelecimentos militares (artigo 3, I). Podem integrá-lo na qualidade de Capelães Militares, sacerdotes, ministros religiosos ou pastores de qualquer religião, desde que o credo professado não atente contra a disciplina, a moral e a legislação em vigor (artículo 4). O candidato deve ser brasileiro nato, voluntario, idade entre 30 e 40 anos, formação teológica regular de nível universitário, um mínimo de 3 anos de experiencia pastoral, autorização expressa da sua autoridade religiosa e um parecer favorável emitido por um dos oficiais superiores da ativa das Forças Armadas. A lei determina que o SARFA deve espelhar a diversidade religiosa do povo brasileiro. Com essa finalidade o texto legal determina que as capelanias militares devem espelhar a "justa proporção entre o número dos capelães e as concepções religiosas dos membros das forças armadas (artigo 10).

D. The Agreements between Brazil and the Holy See

A Igreja Católica Romana é a única confissão religiosa que possui acordos com o Brasil. Atualmente existem, em vigor, três acordos com a Santa Sé. O primeiro é o

40. Analisando se a cobrança de ingresso para o acesso ao Corcovado ("Cristo Redentor"), no Rio de Janeiro, pela autoridade pública, constituiria ou não ofensa à liberdade de religião. TRF2 - *Apelação em Mandado de Segurança*, AMS 24778 99.02.06197-4, julg.: 30/11/2004, pub.: DJU, 16/12/2004, p. 231.

41. Nos termos do artigo 20 da Lei 7716/89 (alterada pela Lei nº 9.459, de 13 de Maio de 1997). Escrever, editar, divulgar e comerciar livros "fazendo apologia de ideias preconceituosas e discriminatórias" contra a comunidade judaica constitui crime de racismo sujeito às cláusulas de inafiançabilidade e imprescritibilidade. A aplicação e o alcance dessa legislação foram objetos da atenção do Supremo Tribunal Federal que negou o beneficio do remédio do habeas corpus em caso de condenação por apologia do anti-semitismo por meio de obra literária. Ver: STF. *Habeas Corpus*. HC 82424 RS, julg. 16/09/2003, pub. DJ 19-03-2004, p. 17.

42. O Supremo Tribunal Federal - STF em julgamento de Recurso Extraordinário, considerou violação da liberdade religiosa uma sentença de instância inferior que proibia o beneficiário do recurso de "frequentar, auxiliar ou desenvolver cultos religiosos que forem celebrados em residências ou em locais que não sejam especificamente destinado ao culto" *STF*- RECURSO EXTRAORDINÁRIO: RE 92916 PR, 18/05/1981, DJ 26-06-1981 PP-06307 EMENT VOL-01218-02 PP-00391 RTJ VOL-00100-01 PP-00329.

43. Resolução TSE nº 22.718, de 28.2.2008 - Propaganda eleitoral.

44. Uma boa definição da *mens legis* dessa Resolução foi dada pela Tribunal Regional Eleitoral do Pará, segundo o qual: "O art. 13, § 2º da Resolução TSE nº. 22.718, ao vedar a propaganda eleitoral em templos religiosos, por considerá-los bens de uso comum, para fins eleitorais, tem como propósito evitar o acesso privilegiado do candidato a local de grande fluxo de pessoas, onde os fiéis possam ser induzidos a cerrar fileiras em favor daquele que professa a mesma religião, violando a liberdade de escolha. TRE-PA - Recurso Eleitoral: RE 4092 PA, 09/12/2008, Diário Oficial do Estado, Volume CE4, pág. 14.

"Acordo Administrativo para a Troca de Correspondência Diplomática em Malas Especiais," celebrado em 2 de Outubro de 1935[45], que trata da correspondência de carácter diplomático. O segundo e o "Acordo sobre Assistência Religiosa às Forças Armadas," de 23 de Outubro de 1989, que entrou em vigor no mesmo da sua assinatura. Finalmente o ultimo Acordo com a Santa Sé foi assinado em 2008. De todos os três, o Acordo de 2008 é o mais amplo visto que disciplina um grande numero de diferentes matérias e por isso é o único que se aproxima do modelo clássico das concordatas ainda que as partes contratantes tenham optado pelo uso da denominação "acordo."

1. O Acordo sobre a Assistência Religiosa às Forças Armadas

No dia 23 de Outubro de 1989, o governo brasileiro assino com a Santa Sé o "Acordo entre a República Federativa do Brasil e a Santa Sé sobre Assistência Religiosa às Forças Armadas". Já no seu preambulo o texto do Acordo declara a intenção das partes contratantes de promover um serviço de assistência religiosa de carácter "estável e conveniente" aos católicos membros das forças armadas. Esse tratado garante o exercício de um direito garantido pela norma do artigo 5, VII da Constituição Federal de 1988. Por meio desse acordo foi erigido um "Ordinariado Militar," com sede no próprio "Estado-Maior das Forças Armadas"[46]. Até a entrada em vigor desse acordo a cura espiritual dos católicos membros ou prestando serviço nas forças armadas esteve organizada em torno ao Vicariato Castrense do Brasil, erigido pelo Papa Pio XII, em 6 de Novembro de 1950. Aplicando as disposições do acordo de 1989, a Congregação para os Bispos em 2 de Janeiro de 1990 transformou o até então existente Vicariato Castrense em Ordinariado Militar do Brasil. Segundo o Acordo de 1989 suas principais características e competências são: é canonicamente assimilado a uma diocese (artigo, 2); é dirigido por um Ordinário com dignidade de Arcebispo, com os mesmos direitos e deveres dos bispos diocesanos (artigo I, 2) e vinculado administrativamente ao Estado Maior das Forças Armadas (artigo III, 1); o serviço é realizado por sacerdotes do clero secular ou do por religiosos (artigo VII, 1); os capelães militares são sacerdotes, designados de forma estável para o serviço religioso nas Forças Armadas e são admitidos na carreira militar, segundo as disposições da legislação brasileira (artigo VIII)[47]; o número de capelães militares católicos deve ser proporcional ao numero de fiéis católicos (artigo XI)[48]; a Cúria do Ordinariado Militar é mantida pelo Estado-Maior das Forças Armadas, que provede suas necessidades materiais, orçamentarias e de pessoal (artigo XIII).

2. O "Acordo entre a República Federativa do Brasil e a Santa Sé relativo ao estatuto jurídico da Igreja Católica no Brasil" (Acordo de 2008)

No dia 13 de Novembro de 2008, durante sua primeira visita oficial ao Vaticano o

45. Com entrada em vigor no dia 2 de Dezembro de 1935.

46. O texto do Acordo entre Brasil e a Santa Sé sobre assistência religiosa nas forças armadas utiliza a terminologia Ordinariado Militar em correspondência as disposições da Constituição Apostólica "*Spirituali Militum Curae*". Cfr. PP. John Paul II, *Constitución Apostólica "Spirituali Militum Curae"*, 24 april 1986.

47. Como determina a Constituição Federal de 1988, o acesso aos cargos e empregos públicos dependem de previa aprovação em concurso público de exames e de títulos. "Art. 37, "II - a investidura em cargo ou emprego público depende de aprovação prévia em concurso público de provas ou de provas e títulos, de acordo com a natureza e a complexidade do cargo ou emprego, na forma prevista em lei, ressalvadas as nomeações para cargo em comissão declarado em lei de livre nomeação e exoneração" (Constituição Federal de 1988 – redacção dada pela Emenda Constitucional nº 19, de 4 de Junho de 1998).

Sendo uma republica federativa, seja o governo federal, sejam os Estados, cada um na sua esfera específica de competência têm competência sobre seus corpos militares. Um exemplo da regulamentação estatal das capelanias militares é a Lei Nº 1672, de 25 de Junho de 1990 do Governo do Estado do Rio de Janeiro, que estabelece os critérios de ingresso e cria o quadro de Capelão Evangélico na Policia Militar e no Corpo de Bombeiros do Estado do Rio de Janeiro. Em âmbito federal, a Lei nº 9.519, de 26 de Novembro de 1997, que dispõe sobre os quadros dos oficiais da Marinha, determina em seu art. 7, § 4º que "Ingressarão no Quadro de Capelães Navais os candidatos aprovados em processo seletivo, Curso de Formação e Estágio de Aplicação de Oficiais."

48. O mesmo critério de proporção pode ser encontrado já no artigo 10 da Lei Federal n° 6.923, de 29 de Junho de 1981. O artigo 8 do mesmo instrumento legal, fixa o efectivo máximo de Capelães Militares da activa para cada Força Armada.

Presidente Luiz Inácio Lula da Silva assinou na biblioteca vaticana o "Acordo entre a República Federativa do Brasil e a Santa Sé relativo ao estatuto jurídico da Igreja Católica no Brasil". Já na década de oitenta por iniciativa da "Conferencia Nacional dos Bispos do Brasil" (CNBB) iniciou-se o processo que conduziu à elaboração desse acordo.

Por disposição da Constituição Federal de 1988 (art. 49, I), os tratados devem ser aprovados exclusivamente e definitivamente pelo Congresso Nacional.[49] Por essa razão, o Acordo com a Santa Sé de 2008, teve de ser aprovado pelas duas casas do Congresso Nacional, a Câmara dos Deputados e o Senado Federal para que finalmente pudesse entrar definitivamente em vigor. A assinatura de um acordo tão amplo com uma confissão religiosa específica suscitou uma série de debates seja no Congresso Nacional, seja na imprensa e na sociedade em geral. Alguns setores da sociedade se opunham à sua aprovação considerando-o uma ofensa à laicidade do Estado e uma violação da já consolidada separação entre Igreja e Estado introduzida desde a proclamação da República no distante ano de 1989. Ainda que o processo de aprovação no Congresso Nacional tenha sido relativamente célere, os diversos adiamentos das sessões de aprovação são uma evidencia existência resistência à sua aprovação.[50] Como grande parte da resistência à aprovação do Acordo com a Santa Sé era provocada por grupos e parlamentares evangélicos, que consideravam-no ilegítima concessão de privilégios à Igreja Católica, foi necessária uma solução de compromisso que permitisse sua aprovação no Congresso Nacional. Assim chegou-se a um compromisso segundo o qual paralelamente à aprovação do acordo de 2008 com a Santa Sé, foi apresentado um projeto de Lei, o PLC 160/09, imediatamente batizado de Lei das Religiões, com semelhante teor e que estende iguais direitos a outras confissões religiosas.[51]

Considerando-o em termos gerais o Acordo de 2008 não significou a introdução de novas garantias para a Igreja Católica no Brasil[52]. Seu significado maior foi o de reunir em um único instrumento direitos já garantidos e reconhecidos no direito interno.[53] Em

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49. "Art. 49. É da competência exclusiva do Congresso Nacional: I - resolver definitivamente sobre tratados, acordos ou atos internacionais que acarretem encargos ou compromissos gravosos ao patrimônio nacional." *Constituição da República Federativa do Brasil* – 5 de Dezembro de 1988.

50. Inicialmente a votação na Câmara dos Deputados estava marcada para o dia 15 de Julho de 2009, por falta de quórum foram estabelecidas como nova data o dia 5 de Agosto e novamente para o dia 12 de Agosto de 2009. Todos esse adiamentos ocorreram ainda que estivesse acompanhado de uma declaração de urgência aprovada pela Comissão de Relações Exteriores da Câmara dos Deputados. Finalmente o Acordo foi aprovado nessa casa da Congresso pelo plenário reunido em sessão extraordinária na noite da quarta-feira, dia 26 de Agosto de 2009. (*Câmara dos Deputados - Projeto de Decreto Legislativo* nº 1.736/2009 – "Aprova o Acordo entre a República Federativa do Brasil e a Santa Sé relativo ao Estatuto Jurídico da Igreja Católica, assinado na Cidade-Estado do Vaticano, em 13 de novembro de 2008". Relator: Deputado Chico Abreu) Em seguida o projeto aprovado pela Câmara dos Deputados foi enviado para o Senado Federal, onde foi aprovado no dia 7 de Outubro de 2009 por unanimidade em uma votação simbólica (O relator do projecto foi o ex-presidente da Republica e actual senador Fernando Collor de Mello - *Parecer favorável, sob o nº 1.657, de 2009, da Comissão de Relações Exteriores e Defesa Nacional*) / PDS - *Projeto de Decreto Legislativo* (SF), nº 716/2009 - Discussão, em turno único, do Projeto de Decreto Legislativo nº 716, de 2009, que aprova o texto do Acordo entre a República Federativa do Brasil e a Santa Sé relativo ao Estatuto Jurídico da Igreja Católica no Brasil, assinado na Cidade-Estado do Vaticano, em 13 de Novembro de 2008").

51. *À semelhança do Acordo com a Santa Sé, o* PLC 160/09 *regulamenta disposições da Constituição Federal de 1988, garantindo entre outros direitos o livre exercicio do culto religioso, a proteção dos lugares de culto, de suas liturgias, a inviolabilidade de crença e a liberdade de manifestação religiosa em espaços públicos. De autoria do* Deputado George Hilton, que é evangélico, f*oi a*presentado no dia 02 de Setembro de 2009. (Projeto de Lei da Câmara (PLC) nº 160/2009 – *Dispõe sobre as Garantias e Direitos Fundamentais ao Livre Exercício da Crença e dos Cultos Religiosos, estabelecidos nos incisos VI, VII e VIII do art. 5º e no § 1º do art. 210 da Constituição da República Federativa do Brasil).*

52. A atribuição da denominação "acordo", ao invés de "concordato", termo esse último mais afinado com a tradição jurídica eclesiástica e mais adequado para a designação de um instrumento dessa portada, foi propositado. Com o uso termo "acordo", desejou-se afastar qualquer possível confusão com o instituto do "concordato", próprio do direito comercial brasileiro. A principal razão foi, contudo, a de considerar "acordo", um termo mais moderno, em maior sintonia com o conceito de laicidade e por isso mesmo, mais palatável no complexo contexto das relações entre Igreja e Estado do Brasil.

53. A proposta inicial do texto do acordo apresentada pela parte eclesiástica mencionava um mais amplo reconhecimento de direitos, e foi rechaçada pelo governo brasileira. Essa proposta previa a garantia do respeito das festividades religiosas como o Natal e a festa de Nossa Senhora Aparecida, padroeira do Brasil que se celebra dia 12 de Outubro. Essa proposta de assegurar por meio do instrumento concordatário o respeito dessas

seus 20 artigos, o texto praticamente reproduz as disposições em matéria religiosa já estabelecida pela Constituição Federal de 1988 e pela legislação de direito eclesiástica em vigor.[54]

O primeiro fundamento da assinatura do Acordo, como reza o Preâmbulo, são as "relações históricas entre a Igreja Católica e o Brasil."[55] Outro fundamento declarado é o reconhecimento da responsabilidade recíproca do Estado e da Igreja em relação à sociedade e ao bem integral da pessoa humana[56]. Chama atenção no conteúdo do acordo o reconhecimento de que as dois partes "são, cada uma na própria ordem, autónomas, independentes e soberanas e cooperam para a construção de uma sociedade mais justa, pacífica e fraterna." A afirmação da recíproca autonomia da Igreja e do Estado goza também de uma sólida doutrina.[57] No prefacio as partes contratantes declaram que o Acordo de 2008 se fundamenta no ordenamento jurídico brasileiro, nos documentos do Concilio Vaticano II e no Código de Direito Canónico. Finalmente as partes declaram sua adesão ao principio da liberdade religiosa, "internacionalmente reconhecido."

3. Principais elementos do Acordo de 2008

Como demonstra a nome do Acordo de 2008 "… relativo ao *estatuto jurídico da Igreja Católica no Brasil,"* o elemento principal do Acordo de 2008, foi a reafirmação do reconhecimento da personalidade jurídica da Igreja Católica, já garantida desde 1890 pelo Decreto n° 119-A de 7 de Janeiro de 1890 e que foi agora explicitada pelo novo Acordo que estende-a a todas as instituições eclesiásticas, conforma as disposições do direito canónico. Sendo um instrumento jurídico de ampla abrangência, o Acordo de 2008 disciplina outros variados aspectos das relações entre Estado e Igreja Católica.

a. Ensino da religião nas escolas publicas

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festividades como dia feriado foi rechaçada pelo governo com fundamento na soberania do Estado. Outra proposta, também rejeita foi a de se garantir o livre acesso de missionários e religiosos católicos a todo o território nacional, inclusive a áreas indígenas protegidas. Segundo a legislação brasileira em vigor, o acesso às áreas indígenas esta sujeito a especial controle por parte do Estado.

54. O Acordo de 2008 entretanto se limita a tratar das principais questões em matéria de direito eclesiástico, deixado de fora do texto temas menos relevantes. Esse é o caso por exemplo da normativa em matéria de direito penal que prevê a concessão de cela especial em caso de prisão de um ministro de confissão religiosa, conforme a disposição do art. 295 do Código de Processo Penal e o pronunciamento do Supremo Tribunal de Justiça (STJ - *Habeas Corpus*: 4386 MG 1996/0007824-6, Quinta Turma, pub.: 05 de Agosto de 1996, RSTJ vol. 90, p. 307.).

55. Nesses 500 anos de história, desde a descoberta pelos portugueses, a Igreja Católica tem exercido um importante papel na sociedade brasileira. (PITA, Sebastião da Rocha. *História da América Portuguesa*. Itatiaia; Belo Horizonte 1976; Afonso E. DE TAUNAY. *IV Centenário da Fundação da Cidade de São Paulo*, Gráfica Municipal da Cidade de São Paulo, 1954). Os primeiros missionários fundaram algumas das mais importantes cidades brasileiras como São Paulo e Salvador da Bahia, tiveram participação decisiva na expansão e manutenção do território (LEITE, Serafim. *História da Companhia de Jesus no Brasil*, Civilização Brasileira, Rio de Janeiro 1938).

56. A expressão "bem integral da pessoa humana" é frequente nos meios eclesiásticos, como demonstram alguns pronunciamentos dos pontífices e alguns documentos. E. g.: BENTO XVI, *Discurso del Papa Benedicto XVI a los participantes en la XXXIV Conferencia de la FAO*, 22 de Novembro de 2007; BENTO XVI, *Mensaje Urbi et Orbi*, Natal, 25 de Dezembro de 2006; JOÃO PAULO II, *Discurso del Santo Padre Juan Pablo II con ocasión del XXIII Congreso Internacional de la Sociedad de Trasplantes*, 29 de agosto de 2000; n. 19 - BENTO XVI, Carta Encíclica, *Deus Caritas Est*, "del Sumo Pontífice Benedicto XVI a los obispos, a los presbíteros y diáconos, a las personas consagradas y a todos los fieles laicos sobre el amor cristiano", 25 de diciembre de 2005; n. 4 - CONGREGAÇÃO PARA A DOUTRINA DA FÉ, *Nota Doctrinal sobre las cuestiones relativas al empeño y al comportamiento de los católicos en la vida política*, 24 de Novembro de 2002.

57. Proximamente no tempo essa doutrina da soberania e da independência dos dois poderes eclesiástico e civil, cada uno em sua própria ordem foi fortemente enfatizada durante o pontificado de Papa Leão XIII. O qual trata da natureza própria destas relações, em suas encíclicas *Diuturnum illud* (1881), *Immortale Dei* (1885) e *Sapientiae christianae* (1890) nas quais afirma que tanto a autoridade eclesiástica, quanto o poder do Estado são igualmente soberanos, cada um na sua ordem. A mesma doutrina aparece também na Constituição Pastoral *Gaudium et spes, do* Concílio Vaticano II, segundo a qual: "a comunidade política e a Igreja são entre si independentes e autónomas em seu próprio âmbito" (N. 76), e nos pronunciamentos dos últimos pontífices (*Discurso del Santo Padre Juan Pablo II a los miembros del Cuerpo Diplomático acreditado ante la Santa Sede*, 16 de Janeiro de 1982; *Discurso de su Santidad Juan Pablo II a una delegación croata con motivo del intercambio de los instrumentos de ratificación de tres acuerdos estipulados entre la Santa Sede y la República de Croacia*, 10 de Abril de 1997).

Por meio do acordo foi garantido o direito ao ensino de religião nas escolas da rede pública. Visando rechaçar a configuração de discriminação de natureza religiosa, o Acordo de 2008, afirma que essa garantia é estendida a outras confissões religiosas. Em termos de educação religiosa o texto do Acordo praticamente reproduz a normativa da tradição jurídica brasileira[58] e repete as disposições do parágrafo 1° do artigo 210 da Constituição Federal de 1988 e no artigo 33 da *Lei de Diretrizes e Bases da Educação* (LDB)[59], que estabelecem o direito individual dos estudantes a terem à sua disposição a disciplina facultativa do ensino religioso nas escolas públicas. No que diz respeito à educação religiosa, o Acordo de 2008, referindo-se a "ensino religioso católico" e de "outras confissões religiosas," não confere privilégios ou vantagens à Igreja Católica, nem cria distinção entre o catolicismo e outros credos. Em termos práticos o texto do Acordo de 2008 traduz de forma sucinta o artigo 33 da LDB, segundo o qual o ensino religioso é de matricula facultativa, é disciplina obrigatória da grade curricular das escolas públicas, deve respeitar a diversidade religiosa do Brasil e não pode configurar proselitismo.[60]

b. A extensão à Igreja Católica dos benefícios concedidos às entidades filantrópicas

O artigo 5 do Acordo de 2008, concede isenção tributária para templos e para as atividades de natureza religiosa. Esse benefício é já objeto de previsão legal no ordenamento jurídico brasileiro. Além de tutelar o exercício da liberdade de culto deixando a confissão religiosa, livre do ónus representado da carga tributária, o escopo dessa disposição é o de garantir o desenvolvimento do trabalho humanitário e social realizado pela Igreja Católica no Brasil.

c. Homologação das sentenças dos tribunais eclesiásticos em matéria matrimonial.

Uma das maiores inovações introduzidas pelo Acordo de 2008, é a possibilidade da homologação das sentenças dos tribunais eclesiásticos em matéria matrimonial. O texto do artigo 12, contempla essa possibilidade. No sistema judiciário brasileiro o Superior Tribunal de Justiça (STJ)[61] é o órgão competente para a homologação das sentenças estrangeiras.

d. Direito à assistência espiritual nos estabelecimentos de internação coletiva

O artigo 8º assegura o direito da Igreja Católica prestar assistência espiritual em estabelecimentos de internação coletiva, como hospitais, cárceres, asilos e outros similares. Esse direito, previsto genericamente na Constituição Federal de 1988 que garante a "prestação de assistência religiosa nas entidades civis e militares de internação coletiva,"[62] é agora reconhecido especificamente como um direito da Igreja Catolica.

A Lei Federal n° 9982, de 14 de Julho de 2000, trata da matéria determinando que aos religiosos "de todas as confissões" é assegurado o acesso aos estabelecimentos carcerários civis e militares. Essa mesma lei garante a concessão de assistência espiritual por parte de um ministro de seu próprio credo àqueles que se acham privados da liberdade. A Assistência Espiritual em estabelecimentos de internação colectiva é também regulada por norma legal em vários estados[63] e municípios brasileiros.[64]

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58. Ver: art. 48. "Lei Orgânica do Ensino Agrícola". DECRETO-LEI nº 9.613, 20 de Agosto de 1946.

59. Lei Nº 9.394, de 20 de Dezembro de 1996 - *Estabelece as diretrizes e bases da educação nacional*. Modificada pela Lei Nº 9.475, de 22 de Julho de 1997 - *Dá nova redação ao art. 33 da Lei n° 9.394, de 20 de Dezembro de 1996, que estabelece as diretrizes e bases da educação nacional.*

60. O proselitismo como tal não é proibido explicitamente no direito brasileiro. Existem contudo normas específicas que vetam essa prática em determinados casos, como ocorre por exemplo com a proibição da prática do proselitismo na programação das emissoras de radiodifusão (art. 3º - Lei nº 11.652, de 7 de Abril de 2008 e art. 4 - Lei Federal nº 9.612, de 19 de Fevereiro de 1988).

61. Segundo a norma do art. 102, I, da Constituição Federal de 1988, o processo de homologação era originariamente competência do Supremo Tribunal Federal. Posteriormente por efeito da Emenda **Co**nstitucional nº 45, de 30 de Dezembro de 2004, essa competência originaria passou a ser do STJ.

62. Numero VII, Art. 5 (Constituição da República Federativa do Brasil de 5 de outubro de 1988).

63. No Estado do Rio de Janeiro existem normas que regulam a assistência religiosa nas plataformas de extração de petróleo "off-shore". Lei nº 4.712, de 23 de Janeiro de 2006, do Estado de Rio de Janeiro.

e. A exclusão do vínculo trabalhista entre a Igreja Católica e seus membros

Afirmando o "caráter peculiar religioso e beneficente da Igreja Católica e de suas instituições," o artigo 16 do Acordo de 2008 excluí da alçada da justiça trabalhista as relações entre as instituições católicas e os religioso e também aqueles nelas realizam qualquer tipo de trabalho voluntário. Dessa forma essa relações passam a ser regulamentadas exclusivamente pelas normas do direito canónico.

V. SOCIAL INSURANCE AND RELIGIONS

Aos religiosos, padres, pastores e ministros de qualquer culto é assegurada a assistência previdenciaria. Estes são considerados "contribuintes individuais"[65] (na legislação precedente eram equiparados a "trabalhadores autónomos"[66]) e devem ser necessariamente inscritos na previdência social.[67] Além disso somente para fins previdenciários, existe em âmbito nacional o "Cadastro de Entidades Religiosas – CER"[68], no qual todas as entidades religiosas devem se inscrever sob pena de perda de sua inscrição na previdência social.

A. Outros direitos reconhecidos pelo Acordo de 2008

Existem outros importantes disposições do Acordo de 2008, são: a destinação de espaços para fins religiosos nos projetos de planejamento urbano e nos Planos Diretores; reconhecimento dos efeitos civis do matrimónio católico; o reconhecimento do direito da Igreja Católica exercer publicamente sua missão apostólica e sua missão; a proibição de que uma circunscrição eclesiástica brasileira dependa de um bispo cuja sede episcopal se encontre fora do território nacional; a declaração de que o património histórico, artístico e cultural da Igreja Católica é parte do património cultural brasileiro; o dever do Estado de proteger os lugares de culto da Igreja Católica, bem como suas "liturgias, símbolos, imagens e objetos de culto," contra toda forma de violação, falta de respeito e uso ilegítimo (art.7); a proibição de demolir, ocupar, transportar ou expropriar edifícios de culto católico; o reconhecimento recíproco dos títulos e qualificações a nível de Graduação e de pós-graduação (art. 9); o reconhecimento do direito da Igreja construir e administrar os seminários e outras instituições eclesiásticas de formação (§1º, art.10); o reconhecimento para efeitos civis dos títulos e graus emitidos pelos seminários e outras instituições de formação religiosa; a garantia do respeito do segredo de oficio sacerdotal, especialmente em relação à confissão sacramental; a possibilidade de concessão de visto consular para missionários estrangeiros.

VI. RELIGION AND THE AUTONOMY OF THE STATE

Em termos religiosos é significava á existência de um grupo de membros do Congresso Nacional em Brasília que formam a chamada "Frente Parlamentar Evangélica,"[69] conhecida também como "bancada evangélica." Seus integrantes são

64. Lei nº 1310, de 12 de Julho de 2004, de Palmas – "dispõe sobre o acesso de ministros de cultos religiosos e seus prepostos nas dependências e entidades que menciona no município de Palmas".

65. Lei nº 9.876/99, de 26 de Novembro de 1999 – "Dispõe sobre a contribuição previdenciária do contribuinte individual, o cálculo do benefício, altera dispositivos das Leis nos 8.212 e 8.213, ambas de 24 de julho de 1991, e dá outras providências".

66. Lei nº 6.696, de 8 de Outubro de 1979 – "Equipara, no tocante a previdência social urbana, os ministros de confissão religiosa e os membros de institutos de vida consagrada, congregação ou ordem religiosa aos trabalhadores autônomos e dá outras providências".

67. Art. 6 - DECRETO nº 611, de 21 de Julho de 1992, DOU, de 22 de Julho de 1992 (derogado). DECRETO nº 2.172, 5 de Março de 1997, DOU, de 6 de Março de 1997. DECRETO nº 3.048, de 6 de Maio de 1999, DOU, de 7 de Maio de 1999. DECRETO nº 4.079, de 9 de Janeiro de 2002, DOU de 10 de Janeiro de 2002.

68. *Ordem de Serviço - Diretor do Seguro Social do Instituto Nacional do Seguro Social* - Dir. SS - INSS nº 536 de 10 de Junho de 1996, D.O.U.: 10 de Junho de 1996 – "Institui o Cadastro de Entidades Religiosas". Director: Ramon Eduardo Barros Barreto. Essa Ordem de Serviço (ODS) complementa a disposição da ODS nº INPS/SB-052.7, de 13 de Fevereiro de 1980, que tratava das Ordens e Congregações Religiosas.

69. O Estatuto da Frente Parlamentar Evangélica define-a como "…uma associação civil, de natureza não-governamental, constituída no âmbito do Congresso Nacional e integrada por Deputados Federais e Senadores da República Federativa do Brasil." (Artigo 1º - Estatuto da Frente Parlamentar Evangélica, setembro de 2003).

deputados e senadores, membros de diferentes denominações religiosas evangélicas. Em 1986 foram eleitos para o Congresso Nacional, os primeiros pastores evangélicos. Inicialmente eram pastores da Assembleia de Deus, mas hoje o grupo é constituído por evangélicos de diferentes denominações. A banca evangélica não constitui um partido politico, visto que seus integrantes pertencem a diferentes correntes politicas e distintas afiliações partidárias. Seus membros são congregados pela pertença religiosa e guiados por esses princípios decidem juntos sobre temas de interesse comum. O Estatuto da Frente Parlamentar Evangélica declara dentre seus objectivos o de influir no processo legislativo "segundo seus objetivos, combinados os propósitos de Deus, e conforme Sua Palavra"[70]. O número de membros da bancada evangélica que já chegou a ser de cerca de 70 congressistas, sofreu uma grande redução nas últimas eleições para a legislatura 2007/2011 quando passou a contar com 45 deputados e 4 senadores[71]. Essa redução é atribuída em grande parte à não reeleição de seus integrantes e às várias denúncias de corrupção envolvendo seus membros. Ainda assim esse grupo continua sempre a exercer uma forte influencia no Congresso Nacional. Além da influência direta no Congresso Nacional a Frente Parlamentar Evangélica, promove também eventos de reflexão e debate sobre temas considerados relevantes, como a Jornada Nacional em Defesa da Vida e da Família.

VII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

Existe uma ampla jurisprudência nos tribunais brasileiros relativa ao reconhecimento dos direitos trabalhistas de religiosos, pastores, padres e ministros religiosos em geral. Boa parte da magistratura trabalhista[72] e da doutrina,[73] considera que o trabalho do religioso não configura vinculo laboral. A questão, entretanto, não é pacífica, constatando-se uma nutrida jurisprudência que contrariamente considera que o trabalho do religioso é tutelado pela justiça trabalhista.[74]

Muitos municípios brasileiros[75] determinam a previsão de espaços reservados para cultos religiosos nos projetos de planejamento urbano. Como é o caso do município de Ribeirão Preto no Estado de São Paulo, que por meio de lei específica proíbe a imposição de restrições administrativas à construção de edifícios religiosos[76].

Outros municípios impõem obstáculos à construção de edifícios de culto. Essas restrições são relativas sobretudo à contaminação acústica emitida pelos templos e edifícios de culto religioso[77].

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70. Artigo 2º, III, Estatuto da Frente Parlamentar Evangélica, setembro de 2003.

71. Como afirmado na Carta sobre as Missões Indigenas que a Frente Parlamentar Evangélica dirigiu à Ministra dilma Rousseff, Ministra da Casa Civil em 16 de dezembro de 2008.

72. TRT-12ª Região - RO-V 457/2003 – Acórdão COAD 109946 – 1ª Turma – Rel. Juiz Gerson Conrado – Publ. em 22-3-2004). *Tribunal Regional do Trabalho*-3ª Região; RO 870-2006-038-03-00-9 – Acórdão COAD 121121 - 2ª Turma – Rel. Juiz Marcio Flávio Salem Vidigal – Publ. em 23-2-2007). TST - *Acórdão n° 4842*, 29 de Setembro de 1994, Proc: RR n° 104323/1994, 3ª Região, 1ª Turma – DJ, 25/11/1994, p. 32430.

73. Alice MONTEIRO DE BARROS, *Revista Decisório Trabalhista*, n° 75, pág. 09 - 2. Délio MARANHÃO, *Instituições de Direito do Trabalho*, Freitas Bastos, 14ª Edição, , 1994, p. 303.

74. Ver. *Agravo de Instrumento em Recurso de Revista*, TST-AIRR-357/2005-202-01-40.9, *Agravante*: Igreja Internacional da Graça de Deus – *Agravado*: Carlos Eduardo Ramos dos Santos. Acórdão, 2ª Turma, JSF/MGC/saf; TRT da 9ª Região, Rel.ª Juíza Sueli Gil El-Rafihi, publ. em 14-5-2004 / *Recurso Ordinario* - 27789/2002-002-11-00; TRT - 11ª Região Rel. Juiz Eduardo Barbosa Penna Ribeiro, publ. em 10-12-2003.

75. Por disposição do art. 182 da Constituição Federal de 1988, a execução de políticas urbanas é competência do "Poder Público Municipal", ou seja, de cada município. Existe, contudo uma lei federal, o chamado "Estatuto das Cidades" (Lei Federal nº 10.257, de 10 de Julho de 2001. "Regulamenta os arts. 182 e 183 da Constituição Federal, estabelece diretrizes gerais da política urbana e dá outras providências"), define em âmbito nacional a política urbana.

76. Lei Municipal Nº 5.896, 20 de Novembro de 1990, Ribeirão Preto - *dispõe sobre normas administrativas concernentes a reserva de áreas e construção de templos religiosos nos projetos de loteamento, conjuntos habitacionais e bairros residenciais.*

77. Por exemplo: Lei nº 296, de 18 de Julho de 2005, do Município de Itaperuna, que regula o controle da contaminação acústica emitida por "templo de culto religioso" e permite os "ruídos e sons" dos sinos das igrejas em determinados horários. E também outros municípios como a cidade de São Paulo (Lei nº 13190, de 18 de Outubro de 2001, São Paulo / Lei nº 13.287, 09 de Janeiro de 2002, município de São Paulo - *dispõe sobre a*

Em alguns municípios brasileiros se faz referencias aos edifícios de culto nos Planos Urbanísticos.[78] Outros tratam da questão por meio de legislação específica, regulando questões como a dispensa da exigência de autorização prévia para o funcionamento de edifícios de culto;[79] a concessão de isenção tributaria municipal a templos o instituições religiosas;[80] a autorização para a construção de edifícios religiosos em zonas específicas;[81] privilégios especiais em relação à área construída[82] e outras questões.[83]

VIII. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

O ordenamento jurídico brasileiro reconhece os efeitos civis do matrimónio religioso. No período republicano o reconhecimento civil dos efeitos do matrimónio religioso aparece pela primeira vez no artigo 146 da Constituição Federal de 1934.[84] Foi reconhecido também posteriormente pelo artigo 163 da Constituição Federal de 1946 e em todos os textos constitucionais seguintes[85]. A Constituição Federal de 1988, atualmente em vigor, garante o reconhecimento dos efeitos civis do matrimónio religioso em seu artigo 226, §2º.[86]

O matrimónio religioso com efeitos civis é disciplinado no direito interno pelo Código Civil Brasileiro.[87] A disciplina do "*casamento*" se insere no livro IV "*Do Direito de Família*," título I "Do *Direito Pessoal,*" subtítulo I "*Do Casamento.*" No seu art. 1511, o matrimónio é definido como "a comunhão plena de vida, com fundamento na igualdade de direitos e deveres dos cônjuges."[88] Segundo parte respeitável da doutrina o matrimónio é definido, como: "*a união de duas pessoas de sexo diferente, realizando uma integração fisiopsiquica permanente*";[89] "*a sociedade solenemente contratada por um homem e uma mulher para colocar sob a sanção da lei a sua união sexual e a prole dela resultante*";[90] "*a união permanente do homem e da mulher, de acordo com a lei, a fim de se*

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inclusão na lei nº 13.190 de 18 de Outubro de 2001 das multas a serem aplicadas aos templos de culto religioso no município de São Paulo, concernente ao controle da poluição sonora emitida.).

78. É o caso por exemplo do Plano diretor do Município de Belo Horizonte, que determina vagamente que a ocupação e o uso do solo urbano deve assegurar o direito à livre expressão religiosa. (Art. 4º, IX. Lei nº 7165, de 27 de Agosto de 1996, de Belo Horizonte).

79. E.g.: Lei nº 9054, de 26 de Dezembro de 2002, de Porto Alegre; Lei nº 1022, de 1996, do Distrito Federal; Lei nº 3590, de 25 de Setembro de 2000, de São José dos Campos; Lei nº 3077, de 19 de Agosto de 2002, de Viamão.

80. Lei nº 956, de 23 de Março de 2006, de Manaus; Lei nº 4861, de 23 de Dezembro de 2003, de Canoas; Lei nº 4014, de 13 de Novembro de 1995, de Pelotas.

81. Como ocorre por exemplo no município do Rio de Janeiro, que por meio da Lei nº 521, de 6 de Janeiro de 1982, autoriza a construção de "templos de instituições religiosas" em áreas residenciais.

82. O município de Osasco no Estado de São Paulo, por meio da Lei nº 1704, de 10 de Setembro de 1982, permite que os "Templos Religiosos" ocupem até 80% de todo o terreno, dispensando-os também de outras exigências como o "recuo frontal e de fundos" e da obrigação de haver um determinado número de vagas de garagem.

83. O município de Diadema, no Estado de São Paulo, determinou por meio de lei municipal, que os "motéis e drive-ins", estruturas destinadas a encontros de carácter sexual, deve estar a uma distância mínima de "500 (quinhentos) metros lineares" de escolas, hospitais e templos religiosos (Lei nº 625 de 19 de Junho de 1979, município de Diadema). Outro exemplo de restrição urbanística em função do respeito aos credos religiosos é a Lei nº 10.684, do município de Ribeirão Preto, que proíbe o funcionamento de casas de jogos de azar, conhecidas como bingos, a uma distância inferior a 300 metros de um edifício de culto religioso. *(*Lei nº 10.684, 9 de Março de 2006, município de Ribeirão Preto - *dispõe sobre a concessão de alvará de funcionamento para casas de bingo próximas a escolas de ensino básico e médio, igrejas e congregações religiosas).*

84. Ver: FERREIRA, Waldemar Martins, *O Casamento Religioso de Efeitos Civis*, Siqueira, 1935.

85. Constituições Federais de: 1967 (art. 167, § 2 e 3), 1969 (art. 175, § 2 e 3) e 1988 (art. 266, §2).

86. Segundo o Prof. Dilvanir da Costa, da Universidade Federal de Minas Gerais, a Constituição Federal de 1988 reconhece três tipos de matrimónio "formal e de forma plena": o matrimónio civil, o matrimónio religioso e a "união estável". DA COSTA, Dilvanir José, "A Família nas Constituições", *Revista do Instituto dos Advogados de Minas Gerais*, n. 12 (2006), p. 21.

87. Lei nº 10.406, de 10 Janeiro de 2002.

88. A expressão "*comunhão plena de vida*" empregada pelo artigo 1511 do Código Civil, remete à expressão utilizada pela Constituição Pastoral *Gaudium et Spes*, nº48, do Concílio Vaticano II, que define a família fundada no matrimónio como "intima comunhão de vida e de amor conjugal".

89. Cfr. DA SILVA PEREIRA, Caio Mário. *Instituições de Direito Civil*, n.373, p.33.

90. Cfr. GOMES, Orlando. *Direito Civil*, n.25, p. 46.

produzirem, de se ajudarem mutuamente e de criarem os filhos."[91] Ainda segundo a normativa do Código Civil o matrimónio religioso produz efeitos desde o momento de sua celebração, com a condição de que sejam observados os seguintes requisitos básicos previstos. Não existe no Código Civil Brasileiro um elenco das religiões e cultos hábeis a celebrar o matrimónio religioso com efeitos civis[92]. Isso não impede, entretanto, que parte da doutrina distinga entre cultos e religiões idóneos e não idóneos para a celebração de matrimónio hábil para a atribuição de efeitos civis[93]. Ainda que se tratem de cultos amplamente difusos entre a população brasileira, alguns juristas não reconhecem a idoneidade dos matrimónios celebrados em um centro espírita[94], na "macumba" ou no "candomblé."[95]

IX. RELIGIOUS EDUCATION OF THE YOUTH

Segundo a organização politico administrativa tanto a União, ou seja o governo federal, quantos os estados e também os municípios, todos igualmente, nas suas diversas áreas têm competência para legislar em matéria de ensino nas escolas publicas.[96] Assim sendo, corresponde a cada "sistema de ensino," ou seja federal, estaduais ou municipais, definir os conteúdos dos cursos de religião[97] e as normas para admissão dos professores.[98] Diversos estados[99] e municípios[100] brasileiros possuem legislação própria disciplinando o

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91. cf. DE BARROS MONTEIRO, Washington. *Direito de Família*, São Paulo, Saraiva, n.95, p.11.

92. A legislação anterior de 1937 estabelecia um elenco de cultos idóneos para o reconhecimento dos efeitos civis do matrimónio religioso. "Art. 1º Aos nubentes é facultado requerer, ao juiz competente para a habilitação conforme a lei civil, que seu casamento seja celebrado por ministro da Igreja Católica, ao culto protestante, grego, ortodoxo, ou israelita, ou de outro cujo rito não contrarie a ordem publica ou os bons costumes." Lei nº 379, 16 de Janeiro de 1937.

93. A ausência de norma jurídica que defina ou confira elementos de definição sobre quais são os cultos considerados idóneos para o reconhecimento dos efeitos civis do matrimónio, é causa de incertezas, como demonstra o duvida gerada nesse sentido pelo matrimónio religioso celebrado no Centro Espírita Cavaleiros da Luz, na Bahia (Processo N° 34739-8/2005 – Mandado de Segurança, Tribunal de Justiça do Estado da Bahia).

94. A dúvida sobre a idoneidade dos matrimónios celebrados em centro espírita, é atual como demonstra o artigo do Juiz Antônio Cardoso, segundo o qual: "Os estatutos e os ensinamentos mostram que a seita espírita não possui o requisito de organização religiosa no relacionamento com o Estado…". CARDOSO , Antônio Pessoa, "Casamento religioso com efeitos civis", *Artigos de Associados*, Associação dos Magistrados Brasileiros, Abril/2006. In: http://www.amb.com.br/?secao=artigo_detalhe&art_id=311& (en 09/10/2008).

95. Nesse sentido é o entendimento de juristas brasileiros de escol, como, Caio Mario da Silva Pereira, segundo o qual é "…válido o matrimónio oficiado por ministro de confissão religiosa reconhecida (católico, protestante, muçulmano, israelita). Não se admite, todavia, o que se realiza em terreiro de macumba, centros de baixo espiritismo, seitas umbandistas, ou outras formas de crendices populares, que não tragam a configuração de seita religiosa reconhecida como tal." In Da Silva Pereira, Caio Mario, *Instituições de Direito Civil*, 16ªed, vol.5, Forense, Rio de Janeiro, 2006, p.43.

96. Um exemplo do exercício da competência normativa dos municípios em sede de educação religiosa é a Lei Municipal nº 3479/2006 do município de Patos, no Estado da Paraíba, segundo a qual a educação religiosa é facultativa para os estudantes, mas é obrigatória para as escolas.

97. Ainda que não existam impedimentos legais, não se constata intervenção direta do Estado na definição do conteúdo das aulas de religião. O Conselho Nacional da Educação no Parecer 097/99, afirmava a "… necessidade, por parte do Estado, de não interferir e portanto não se manifestar sobre qual o conteúdo ou a validade desta ou daquela posição religiosa e, muito menos, de decidir sobre o caráter mais ou menos ecumênico de conteúdos propostos. Menos ainda deve ser colocado na posição de arbitrar quando, optando-se por uma posição ecuménica, diferentes seitas ou igrejas contestem os referidos conteúdos da perspectiva de sua posição religiosa, ou argumentem que elas não estão contempladas na programação. (*Parecer n.º 097/99 - Formação de professores para o Ensino Religioso nas escolas públicas de ensino fundamental*, Conselho Nacional de Educação, 6 de Abril de 1999).

98. Não existe na legislação brasileira nenhuma norma que estabeleça critérios específicos para a habilitação e admissão de professores de religião nas escolas da rede pública. A Lei nº 9.475, de 22 de Setembro de 1997 (que modificou a Lei de Directrizes e Bases da Educação) não menciona a criação de cursos que habilitem para a docência de religião, limitando-se a conferir aos sistemas de ensino a atribuição dessa competência. Deste modo a formação dos professores de religião poderia ser realizada exclusivamente por entidades religiosas ou por organizações similares.

99. Como é o caso por exemplo do Estado do Rio de Janeiro: Lei nº 3459, 14 de Setembro de 2000 – "dispõe sobre ensino religioso confessional nas escolas da rede pública de ensino do Estado do Rio de Janeiro".

100. À semelhança do governo estadual, também o município do Rio de Janeiro aprovou sua legislação própria sobre a educação religiosa nas escolas da rede municipal (Lei Municipal nº 3228, de 26 de Abril de 2001, de Rio de Janeiro – "dispõe sobre ensino religioso confessional nas escolas da rede pública de ensino do município do Rio de Janeiro").

ensino religioso. Não existe na legislação brasileira uma definição jurídica de educação religiosa. Encontram-se nos textos legais menções que indicam algumas de suas características, competência e descrições, mas, nunca uma precisa definição propriamente dita. A única tentativa de dar um conceito jurídico de ensino religioso segundo o direito brasileiro foi dada em 1997 em um parecer do Conselho Nacional da Educação segundo o qual:

> Por ensino religioso se entende o espaço que a escola pública abre para que estudantes, facultativamente, se iniciem ou se aperfeiçoem numa determinada religião. Desse ponto de vista, somente as igrejas, individualmente ou associadas, poderão credenciar seus representantes para ocupar o espaço como resposta à demanda dos alunos de uma determinada escola.[101]

Existe uma escassa jurisprudência em matéria de educação religiosa nas escolas públicas. Uma decisão jurisprudencial de grande repercussão foi preferida pelo Tribunal de Justiça do Estado do Rio de Janeiro,[102] que julgando um recurso direto de inconstitucionalidade considerou em harmonia com a norma constitucional a disposição da lei estadual n.º 3459/2000, que incluía o ensino do ecumenismo como parte do conteúdo do ensino religioso e estabelecia os requisitos para a admissão dos professores de religião. Decidindo sobre a constitucionalidade de uma norma (Lei nº 11.830, do Estado do Rio Grande do Sul) que visava a adequação do calendário das escolas publicas aos dias de guarda das diversas religiões professadas, o Tribunal de Justiça considerou-a inconstitucional.[103]

X. RELIGIOUS SYMBOLS IN PUBLIC PLACES

Recentemente houve um intenso debate nos meios jurídicos brasileiros com relação à exibição de símbolos religiosos em edifícios públicos. A questão tem origem em uma Ação Civil Publica[104] que tinha por objeto a condenação da União Federal de retirar todos os símbolos religiosos (crucifixos, imagens, etc.) ostentados nos locais proeminentes, de ampla visibilidade e de atendimento ao público nos prédios públicos da União no Estado de São Paulo. O cidadão Daniel Sottomaior Pereira, Presidente de uma Associação Brasileira de Ateus e Agnósticos, protocolizou uma representação junto à Procuradoria Regional dos Direitos do Cidadão solicitando a retirada de um "crucifixo" da sede do Tribunal Regional Federal (fls. 7 a 62). Anteriormente o mesmo cidadão tinha oferecido representação junto ao Ministério Público Estadual solicitando a que fosse determinada a retirada de um crucifixo existente no plenário da Câmara Municipal de São Paulo, mas representação foi arquivada pelo ministério público estadual. Decidindo sobre o caso a justiça federal rejeitou o pedido, entendendo que a presença de símbolos religiosos em prédios públicos não ofende os princípios constitucionais da laicidade do estado, nem de liberdade religiosa e que o Estado laico não deve ser entendido como uma instituição anti-religiosa ou anti-clerical. Segundo a decisão a laicidade prevista na Constituição Brasileira de 1988, "veda à União, Estados, Distrito Federal e Municípios estabelecerem cultos ou igrejas, subvencioná-las, embaraçar-lhes o funcionamento ou manter com elas ou seus representantes relação de dependência ou aliança, previsões que não implicam em vedação à presença de símbolos religiosos em órgão público."

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101. *Parecer n.º 05/97*, "Interpretação do artigo 33 da Lei 9394/96". Conselho Nacional de Educação. 11 de Março de 1997.

102. ADI 2000.007.00141 – Ação Direta de Inconstitucionalidade - 1ª Ementa - Julgamento: 02/04/2001 - Representação por Inconstitucionalidade / Lei Estadual N. 3459, de 2000 Ensino Religioso. Ementário: 36/2001 - N. 32 - 22/11/2001 Rev. Direito do T.J.E.R.J., vol 51, pag 178.

103. ADI 2806 / Rio Grande Do Sul, Ação Direta de Inconstitucionalidade, 23/04/2003, DJ 27-06-2003 PP-00029. Ementário: vol. - 02116-02, PP-00359, RTJ, vol.-00191-02, PP-00479.

104. Ação Civil Pública nº 2009.61.00.017604-0, 3ª Vara Cível Federal de São Paulo.

PETER PETKOFF

Religion and the Secular State in Bulgaria

The present report explores the current legal framework which has an impact on the relationship between law and religion with reference to constitutional provisions, secondary legislation, and case law. Where relevant I also refer to earlier legislation which defined the current legal framework and landmark jurisprudence.

Because the focus is on laws relating to religion and relevant adjudication my, report has explored to a limited extent the question of hate speech and religious defamation because, while there are reported incidents, there do not appear to be pending or decided cases in this area.

The overall analysis suggests that the 2002 legislation affecting religion made drastic changes and yet did not change the way journalists, judges and magistrates think about religion. The cases emerging in the light of DA2002 suggest that more is needed to educate and change the culture in the way religion is viewed.

Bulgaria is predominantly an Eastern Orthodox country with a significant Roman Catholic minority and a significant Muslim population consisting of Ethnic Turks, Pomaks, and Muslim Roma[1] In addition, there are a number of fluctuating Protestant communities and new religious movements, some of which were founded in the nineteenth century by missionaries in the Ottoman Empire while others were founded after the fall of the Berlin Wall.

The predominant Orthodox population is measured by the reference to the respondents' statement about their religious background and is not linked to adherence to religious practices. The Bulgarian Orthodox Church is an autocephalous Patriarchate in communion with the family of the Eastern Orthodox Churches.

I. THEORETICAL AND SCHOLARLY CONTEXT

Law, Society and Religion in Bulgaria have been studied through the lens of several disciplines. Their premises have an impact on the formative framing of law and religion within the intellectual discourse of legislature, executive and judiciary. A detailed account of these intellectual trends can be found in several recent publications of law and religion in Bulgaria.[2] Due to the limited space here I have only outlined those trends.

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1. According to the census of 1992 and 2001 Christians are 86 percent (over 100,000 belong to Protestant churches, 80,000 are Roman Catholics, 20,000 belong to the Armenian Apostolic Church, the rest are counted as Orthodox. 13 percent of the population have identified themselves as Muslim in the above mentioned surveys. The ethnic makeup of the Muslim community is Turks, Pomaks, Muslim Roma, Tatars and Circassians and 4500 Jews. These figures only represent the Abrahamic religions and do not take into account the presence of the new religious movements which are below the numbers of the above mentioned religious groups.

2. Petkoff, P. (2005). "Church-State Relations under the Bulgarian Denominations Act 2002: Religious Pluralism and Established Church" *Religion, State and Society Vol. 33, No. 4, December 2005*, Petkoff, P. (2007). "Legal Perspectives and Religious Perspectives of Religious Rights under International Law in the Vatican Concordats (1963-2004) - " *Law and Justice Journal* 158: 30. *Freedom of Religion or Belief in the Jurisprudence of the Bulgarian Constitutional Court* (Religion, State and Society, Volume 36, Issue 3 September 2008, pages 205-223) See also forthcoming volume on Law and Religion in Bulgaria which is due to be published in the IIL Series of Kluwer Law International (2011); *Neutrality in the Jurisprudence of the European Court of Human Rights* – co-authored with Malcolm Evans (Religion, State and Society, Volume 36, Issue 3, September 2008, 225-250).

A. Historical Approach

There is a strong sense of associating Church and state relations as a symbol of the struggle for political, cultural, and national emancipation.[3] This is the predominant focus of Bulgarian historiography and theology since the first issue of the Slav-Bulgarian History of Paisii of Hilendar in the 18th century.[4]

Julia Kristeva, the famous French-Bulgarian literary critic, developed this theme, drawing great conclusions as to the nature of "Orthodox theology" and the roots of the conflict in Yugoslavia. Julia Kristeva bewails the mishaps of post-Communist Bulgarian history as an effect of an implicit nihilism of the Orthodox character.[5] Kristeva's view is representative of a whole school of thought which is prepared to explain the different dynamics of Church and state in the East, and even its very civilization foundations, through an old fashioned and exaggerated contrast between the intensive West and static East.

A school of Christian philosophers from Sofia University (G. Kapriev[6], T. Bojadjiev[7], K. Yanakiev[8]) have offered a more concrete approach towards the relationship between Orthodox Christianity, freedom and Bulgarian culture. Kapriev has noted some culturally important features of this form of Christianity. One of them is the greater autonomy and responsibility of individuals.[9] S. Ramet[10] has also written, edited, or contributed to

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3. Below is a non-exhaustive bibliography illustrating the areas of theological research of the period in question. Снегаров, И. (1924) *История на Охридската Архиепископия*. София; Снегаров, И. (1927) *Св. Климент Охридски*. София; Снегаров, И. (1937) *Солун и българската духовна култура - исторически очерк и документи.* София: Придворна печатница; Снегаров, И. (1944) *Кратка история на съвременните православни църкви.* София; Снегаров, И. (1950) *Духовно-културни връзки между България и Русия.* София; Снегаров, И. (1958) *Документи за историята на Българското книжовно дружество в Браила.* София; Снегаров, И. (1958) *Турското владичество-пречка за културното развитие на българския народ.* София; Снегаров, И. (1995) *История на Охридската Архиепископия.* София; Снегаров, И. (1997) *Българските земи през погледа на чужди пътешественици 1828-1853.* София; Събев, Т. (1968) *Църковно-календарният въпрос*. София: Синодално Издателство; Събев, Т. (1973) У*чредяване и диоцез на Българската екзархия до 1878.* София: Синодално Издателство; Събев, Т. (1977) *Априлското въстание и Българската православна църква*. София: Синодално Издателство; Събев, Т. (1981). *Църквата и съпротивата на българския народ срещу османското иго.* София: Синодално Издателство; Събев, Т. (1987*) Самостойна Народностна Църква в Средновековна България.* София: Синодално Издателство; Кирил Патриарх Български (1956) *Екзарх Антим, 1816-1888.* София; Кирил Патриарх Български (1958) *Граф Игнатиев и Българският църковен въпрос.* София: Синодално Издателство; Кирил Патриарх Български (1960) *Българо-мохамедански селища в южните Родопи.* София: Синодално Издателство; Кирил Патриарх Български (1961) *Принос към Българския църковен въпрос - документи от австрийското консулство в Солун*. София: Синодално Издателство; Кирил Патриарх Български (1962) *Католическата пропаганда сред българите*. София: Синодално Издателство; Кирил Патриарх Български (1968) *Принос към униятството в Македония*. София: Синодално Издателство; Кирил Патриарх Български (1969) *Българската Екзархия а Македония и Одринско.* София: Синодално Издателство.

4. Хилендарски, П. (1981) *Славянобългарска История*. София.

5. Kristeva, J. (2000) "Bulgaria My Suffering" in *Crisis of the European Subject*. New York: Other Press 163 -183.

6. Каприев, Г. (1991) *История и метафизика: очерци по историческото мислене на Западно-европейското средновековие*. София; Каприев, Г. (1993) *Механика срещу символика*. София; Каприев, Г. (1995) "Православие и празноглавие." *Литературен Вестник*, бр. 8-14/03/1995: 5-6; Kapriev, G. (1998) *Ipsa Vita Et Veritas: Der "Ontologische Gottesbeweis" Und Die* Id*eenwelt Anselms Von Canterbury*. Leiden: Brill.

7. Бояджиев, Ц. and Г. Каприев et al. (2000) *Die Dionysius-Rezeption Im Mittelalter*: Internationales Kolloquium In Sofia Vom 8. Bis 11. April 1999 Under Der Schirmherrschaft Der Société Internationale Pour L'étude De La Philosophie Médiévale. Turnhout: Brepols.

8. Янакиев, К. (2002) "Глобализация на света. Глобализация на душата. Глобализация на делниците." *Хростиянство и Култура* януари-март: 6-21; Янакиев, К. (2002) "Каноничност, неканоничност; достойнство и недостойнство (две проясняващи метафори)." *Хростиянство и Култура* брой 3: 68-82; Янакиев, К. (2002) "Православната Църква и нейните базисни изкушения." *Хростиянство и Култура* брой 2: 66-76.

9. Kapriev, G. (1999) "Christian Values and Modern Bulgarian Culture" in Makariev, P., A.M. Blasko, *et al.* (eds) *Creating Democratic Societies: Values and Norms. The Cultural Heritage and Contemporary Change. Series Iva, Eastern and Central Europe: V. 12*. Washington, DC: Council for Research in Values and Philosophy: 229 -239.

10. Ramet, S.P. (1984) *Religion and Nationalism in Soviet and East European Politics*. Durham, N.C.: Duke

numerous volumes which give a broad picture of the complicated relations between Church and state during Communism.

In the field of modern history, the most significant work on Church-state relations in Bulgaria during the Communist period is Daniela Kalkandjieva's book *The Bulgarian Orthodox Church and the State: 1949-58.*[11] This book uses extensive primary sources and provides the most detailed research in the field of Church-state relations which has been produced since the end of Communism.[12] Janice Broun's work on the schism in the Bulgarian Orthodox Church[13] also gives some helpful insight into the problems Bulgarian Church-state relations have faced following the collapse of Communism, though she relied on Bulgarian sources which were not always accurately translated. In the area of intellectual history the book of Maria Todorova *Imagining the Balkans*[14] is the most up-to-date attempt to produce an intellectual history of the region and to map the directions of the exchange of ideas and cultural influences.

For an understanding of religion and politics in Bulgaria, Sugar's studies on the interaction between religion and nationalism in Eastern Europe are a valuable resource.[15]

Again in the area of sociology of religion, Ina Merdjanova discusses religion in Post-communist society, nationalism in Eastern Europe and civil society and Post-Communism.[16] John Anderson's book[17] on the law on religion in Poland, Spain, Greece, and Bulgaria[18] deals specifically with minority religions' legislation in both these countries. A recent volume edited by J. T. S. Madeley and Z. Enyedi presents a general study of Church and state in contemporary Europe and provides significant new data analysis and methodology.[19] *Politics and religion in Central and Eastern Europe: Traditions And Transitions* is a collection of essays which use both quantitative and qualitative research methodology in examining the continuing changes in fundamental values in countries of Central and Eastern Europe and addresses a variety of aspects of

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University Press; Ramet, S.P. (1987) *Cross and Commissar: The Politics of Religion in Eastern Europe and the USSR*. Bloomington: Indiana University Press; Ramet, S.P. (ed) (1988) *Eastern Christianity and Politics in the Twentieth Century*. Durham, N.C.: Duke University Press; Ramet, S.P. (ed) (1989) *Religion and Nationalism in Soviet and East European Politics.* Durham: Duke University Press; Ramet, S.P. (ed) (1990) *Catholicism and Politics in Communist Societies.* Durham, N.C.: Duke University Press; Ramet, S.P. (ed) (1992) *Protestantism and Politics in Eastern Europe and Russia: The Communist and Post-communist Eras.* Durham, N.C.: Duke University Press; Ramet, S.P. (1993) *Religious Policy in the Soviet Union*. Cambridge: Cambridge University Press; Ramet, S.P. (1997) *Whose Democracy?: Nationalism, Religion, and the Doctrine of Collective Rights in Post-1989 Eastern Europe*. Lanham, M.D.: Rowman & Littlefield Publishers; Ramet, S.P. (1998) *Nihil Obstat: Religion, Politics, and Social Change in East-Central Europe and Russia*. Durham: Duke University Press;

11. Daniela Kalkandjieva, *The Bulgarian Orthodox Church and the State:* 1949-58 (1997). Калканджиева, Д. (1997) *Българската Православна Църква и Държавата 1944 -1953*. София: Албатрос.

12. For helpful information in this area, see Marie Todorova, *The Effect of Communism on the Pastoral Work of the Protestant Churches in Bulgaria* (Cambridge: Anglia Polytechnic University 1997).

13. J. Broun, "T*he Schism in the Bulgarian Orthodox Church, Part 2: Under the Socialist Government: 1993-97*," *R.S.S.* September, vol. 28, iss. 3: 263-289 (2000); J. Broun, "*The Schism in the Bulgarian Orthodox Church, Part 3: Under the Second Union of Democratic Forces Government; 1997-2001*," *R.S.S.* vol. 30 no. 4: 365-394 (2002); J. Broun & G. Sikorska, *Conscience and Captivity: Religion in Eastern Europe* (Washington, D.C.: University Press of America, 1988).

14. Maria Todorova, *Imagining the Balkans* (New York: Oxford University Press, 1997).

15. P.F. Sugar, *Southeastern Europe under Ottoman Rule, 1354-1804*, (Seattle: University of Washington Press 1977); P.F. Sugar, *Nationality and Society in Habsburg and Ottoman Europe*, (Brookfield, V.T.: Variorum 1997); P.F. Sugar, *East European Nationalism, Politics and Religion*, (Brookfield, V.T.: Ashgate 1999); Sugar, P.F., and I.J. Lederer (eds) (1969) *Nationalism in Eastern Europe.* Seattle: University of Washington Press; Sugar, P.F., S.P. Ramet, *et al.* (eds) (2002) *Nations and Nationalisms in East-Central Europe, 1806-1948: A Festschrift for Peter F. Sugar.* Bloomington, Ind.: Slavica.

16. Merdjanova, I. (2002) *Religion, Nationalism, and Civil Society in Eastern Europe-the Post-communist Palimpsest*. Lewiston, N.Y.: Edwin Mellen Press.

17. Anderson, J. (1994) *Religion, State, and Politics in the Soviet Union and Successor States*. Cambridge ; New York: Cambridge University Press; Anderson, J. (2002) "The Treatment of Religious Minorities in South-Eastern Europe: Greece and Bulgaria Compared" *R.S.S.* 30:1: 9-31.

18. Anderson, J. (2003) *Religious Liberty in Transitional Societies: The Politics of Religion*. Cambridge: Cambridge University Press. Unfortunately the book came out only just before the submission of the present thesis and it has not been possible to take its findings fully into account.

19. Madeley, J.T.S. and Z. Enyedi (eds) (2003) *Church and State in Contemporary Europe: The Chimera of Neutrality.* London: Frank Cass.

political/religious interaction in the former Eastern Bloc as well as the question of different approaches to the topic.[20]

B. Law and Religion

A very significant contribution in the field of law on religion in Eastern Europe is the study edited by Silvio Ferrari, Cole Durham, and Elizabeth Sewell, *Law and Religion in Post-Communist Europe.*[21] The stated aim of this publication is to be the first comprehensive comparative analysis of the legal framework of Church-state relations in Central and Eastern Europe. Along similar lines, although now slightly out of date, is the study edited by Kevin Boyle and Juliet Sheen *Freedom of Religion and Belief: A World Report.*[22] Malcolm Evans provides a general overview of the international legal instruments relating to freedom of religion or belief and their impact on the OSCE and CE member states.[23]

My study of the legal framework of law and religion identifies key aspects of the provisions of the *Denominations Act, 1949* and in those of the recent *Denominations Act, 2002*, which has now replaced the Communist statute of 1949; it follows the development of the jurisprudence on religious freedom and takes into account historical influences, specifically the impact of concepts from Orthodox theology and canon law, as well as Ottoman jurisprudence and the influence of particular civil law families before and after World War II. Further, it shows to what extent and in what way the legal framework of Church-state relations and laws on religion have been influenced by the jurisprudence of the European Court of Human Rights.

II. GENERAL BACKGROUND

Until 2002, the *Denominations Act 1949* was the main legal framework protecting, or rather regulating, religious freedom in Bulgaria.[24] In the 1990s, the continued use of the statute resulted in tension between the two rival Synods of the Bulgarian Orthodox Church, between two rival Supreme Muslim Councils, and between the executive and various minority religions.

Church-state relations in Bulgaria illustrate this dramatic transformation, starting from the separation of powers evident in the early nineties.

> For societies undergoing transition from an authoritarian to a more liberal political order, the consequences of pluralism are often hard to cope with. Under the old system political repression may have been the norm, but at least the previous regime offered some form of protection against the waves of pornography, violence and social collapse which often appear to accompany liberalization. Such problems are even more acute for religious organizations, any of whose leaders may have played a role in bringing down the old authoritarian regime but now find themselves wondering about the democratic beast they have unleashed. In the changing political system they have to compete with new ideologies and faiths, but also with the more colorful pleasures of the flesh now available to the average citizen.[25]

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20. Swatos, W.H. (ed) (1994) *Politics and Religion in Central and Eastern Europe: Traditions and Transitions.* Westport, Conn.: Praeger.

21. Ferrari, S., Durham, W.C., Jr. and Sewell, E. (eds) (2003) *Law and Religion in Post-Communist Europe.* Leuven: Peeters.

22. Boyle, K. and J. Sheen (1997) *Freedom of Religion and Belief: A World Report*. London: Routledge.

23. Evans, M. D. (1997). *Religious Liberty and International Law In Europe*. Cambridge, Cambridge University Press. *Freedom of Religion or Belief in the Jurisprudence of the Bulgarian Constitutional Court* (Religion, State and Society 36, 3 September 2008, 205-223).

24. *Закон за вероизповеданията 1949.* http://www.daxy.com/cgibin/norm/search.exe?m=0&n=2573&tmpl=daxystandard (09/09/03).

25. Anderson, J. (2002) "The Treatment of Religious Minorities in South-Eastern Europe: Greece and

In such context it is quite difficult to imagine the existence of religion without it being administered by the state. With a complex framework, largely dependent on the concepts of civil law, the law on religion serves the purpose of creating religious entities within the terms of an existing statute, rather than allowing a completely unregulated scheme. There is also a tendency to use civil law models to make clear guidelines and definitions at a statutory level,[26] which theoretically will allow the judiciary to intervene more actively in situations when the executive takes over the legislator's functions. A civil servant is needed to administer the *dispositive* of the legal norm of the civil law.

Freedom of religion is defined in Article 13 (1) of the Constitution of the Republic of Bulgaria.[27] Article 13 (2) states that religious institutions are separated from the state. Article 37 (1) proclaims freedom of conscience, thought, and religion; as well as freedom of religious and atheistic convictions. It also stipulates the state's duty to maintain tolerance and respect among all religious communities, as well as among all believers and atheists. Under Article 5 (3) this freedom is non-derogable during war or states of emergency. The Constitution also introduces certain controversial ideas in connection with freedom of religious belief, some of which were the topic of public discussion at the time of their adoption. Thus, Article 1 (3) defines Eastern Orthodox Christianity as "the traditional religion of the Republic of Bulgaria." This status differed from the legal and constitutional "recognition" that the Bulgarian Orthodox Church had under the *Turnovo Constitution*, which recognized Orthodoxy as the "prevailing religion."[28] "When the ruling Bulgarian Socialist Party set about adopting a Post-communist constitution in early 1991, the Church was struggling to heal its own divisions and made little contribution to the brief debate."[29]

Initially, this provision, describing Eastern Orthodox Christianity as the traditional religion of the Republic of Bulgaria, was interpreted not to provide any legal preference for the Orthodox Church over other religious denominations, although there were several draft laws in the 36th Parliament that attempted to provide such privileged status for the Orthodox Church. The Constitution also prohibits use of religious communities, institutions and beliefs for political purposes,[30] as well as the formation of political parties along religious lines.[31] Article 37 (2) of the Constitution introduces special restrictions on freedom of conscience on five grounds: national security, public order, public health, good morals, and the rights and freedoms of others.

The provision for the Orthodox Church in the Constitution might suggest that the Orthodox Church had been given something of the status of an established Church, in the sense that it was the only religion which had its existence recognized and therefore guaranteed by the Constitution. However, if this was intended, it has been presented in very obscure legal terms: Article 13 (3) says "The traditional religion of Bulgaria is

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Bulgaria Compared" *R.S.S.* (2002) 30:1: 9.

26. In contrast to the judge in the Anglo-American legal system, the judge in France, for example, can hardly ever make a name for himself during his professional career …. Judges in France do not like to put themselves forward as creating rules of law. In practice, of course, they have to do so; it is not, and could not be, the function of a judge mechanically to apply well known and predetermined rules. But judges in France make every effort to give the impression that this is how it is: in their decisions they keep claiming to be applying a statute; only rarely, if ever, do they put forward unwritten general principles or maxims of equity which might suggest to observers that judges were creative or subjective." David, R. and P. Ardant (1960) *Le Droit Français*. Paris: Librairie generale de droit et de jurisprudence: 119

27. *Конституция на Република България 1991* http://www.daxy.com/cgi-bin/dv/search.exe?m=0&n=5810&tmpl=daxystandard (09/09/03)

28. *Търновска Конституция на Българското Княжество 1879.*

29. Anderson, J. (2002) "The Treatment of Religious Minorities in South-Eastern Europe: Greece and Bulgaria Compared" *R.S.S.* (2002) 30:1: 16.

30. *Конституция на Република България 1991* http //www.daxy.com/cgi-bin/dv/search.exe?m=0&n=5810&tmpl=daxystandard (09/09/03)13(4).

31. Id. at 11(4).

Eastern Orthodox Christianity." This formula throws up the question of what is meant by traditional and what is meant by religion. Does it mean majority religion, a term used by the Turnovo Constitution (prevailing religion)? Does it mean established religion in a broad sense or established religion in a narrow sense (as an alternative to separation between religion and the state)?

The constitutional debates in the early 1990s in relation to law on religion lacked specific purpose and were reduced to such issues as how far religious freedom could and should go as well as merging together ideas such as national culture, national religion and national identity into a new ideological device.[32] The discussions surrounding the constitutional text regarding the status of the majority religion took place within the context of a very dramatic work of the House of the Parliament. It was "a compromise between the country's former Communist rulers, who had won the first free elections in 1990, and the democratic forces, which were then poorly organized."[33] This situation of compromise led to some of the texts being badly drafted. Professor Todor Tchipev, a Constitutional Judge, describes the Bulgarian law-making technique as "poor."

Some important laws are passed very quickly. Inconsistencies between laws are found in every country, but they are a serious problem in Bulgaria. One of the reasons for this is probably the small number of legal specialists in parliament - less than twenty of its 240 members. The number of legal experts in the civil service is also insufficient. The non-specialists learn, and are more or less familiar with, the laws that govern their own sectors.[34]

Legislative intervention relating to law on religion was not a priority in the nineties. A central statute regulating religious communities, therefore, was not adopted. There were, however, a number of provisions in other statutes that enable us to identify the general approach of the legislator as far as law on religion is concerned. Article 73 of the new Law on Radio and Television,[35] for example, prohibits the spreading of information about religious beliefs and their being promoted in radio and TV broadcasts and forbids religious organizations to spread their beliefs through or to fund radio and TV broadcasting. The Bulgarian Constitutional Court, by Decision No. 21 of 14 November 1996 on Constitutional Case No. 19,[36] abolished this article of the Radio and Television Act. However, other provisions of the statute have remained that restrict the freedom of religious communities to spread their messages through electronic media. Article 29 prohibits a number of religious groups from having any access to radio and TV broadcasting for the purpose of disseminating their beliefs and ideas. On the other hand, Article 67 (6) of the statute establishes a privileged position for the Bulgarian Orthodox Church; besides the right to statements on great religious feasts, a right given by the Council of Ministers to several other religious communities as well (in accordance with Article 173 (3) of the *Employment Code 1986*), the Bulgarian Orthodox Church also has the right to demand direct media broadcasting of its religious services.

Another significant exception was the special clause in the new Community Clubs Act,[37] which forbids gatherings of religious communities in their premises. The statute gave far too much discretion to local authorities, enabling them effectively to ban a

32. A very interesting account of the impact of the media in interpreting religious freedom and of the political debate about the limits of religious freedom is the report by Bulgarian Helsinki Committee "Changing the Symbols: Media and Religions in Bulgaria" (1996) http://www.bghelsinki.org/special/en/mr.pdf (09/09/03).

33. Tchipev, T. (2000) "Bulgarian Democracy in Transition" *R.C.E.E.L. No. 3 (2000)*. 343; See also Tanchev, E. (1998) "The Constitution and the Rule of Law" in J.D. Bell (ed) *Bulgaria in Transition. Politics, Economy, Society and Ctdture after Communism*. Oxford: Westview Press: 65-93.

34. Tchipev, T. (2000) "Bulgarian Democracy in Transition" *R.C.E.E.L. No. 3 (2000)*:345.

35. *Закон за радиото и телевизията 1996*
http://www.bild.net/temida/index.html(03/09/03)

36. *Решение N: 21 по конституционно дело N: 19 от 1996 г* (Обн., ДВ, бр. 102 от 29.11.1996 г.) http://www.constcourt.bg/(12/09/03).

37. *Закон за народните читалища 1996* http://www.daxy.com/cgi-bin/dv/search.exe?m=0&n=49026 &tmpl=daxystandard (08/09/03).

religious assembly. According to Article 3 (2/6), community clubs perform basic activities, including additional activities assisting the performance of their main functions, with the exception of the use of the community club buildings for clubs with political purposes, for their becoming possessed by religious sects, as well as other activities contradicting good morals, the national security, and national traditions.

There are three articles in the Criminal Code[38] which deal with "crimes against religious denominations." Article 164 forbids "instigation" of "religious hatred through speech, press, action or in some other way." Article 165 criminalizes individuals for disturbing religious rituals and masses, while Article 166 prohibits the establishing of religion-based political parties and the use of religion as propaganda against the state.

III. Legal Context

The new Bulgarian law on religion, the Denominations Act promulgated on 29 December 2002 represents a particular school of jurisprudence and political philosophy which advocates that liberal values in a society can be introduced and achieved through a program which has as its logical aim a particular communitarian model of society as the initial stage of a community and character-building process. The preeminent status of the majority religion, for example, has been reaffirmed together with a non-discrimination clause attached.

The registration of religious faiths has been simplified, and refusal of registration is allowed only in very specific circumstances, and the state is viewed as an observer rather than an administrator implementing a particular religious policy. The first steps are being made towards resolving the difficulties of restitution of property previously belonging to religious communities. A procedure is being introduced for establishing succession of legal personality for the minority faiths which were banned after 1945. One of the best features of the present legislation is that all religious communities (save the Bulgarian Orthodox Church (BOC)) follow the same procedure to become legal persons and that this procedure is administered without prejudice by the independent judiciary rather than by the executive. At the same time, this religious pluralism is outlined alongside the concept of a quasi-established church,[39] the restriction of separatist movements within religious organizations, and the right of the government to give expert opinions in connection with individual religious organizations in court proceedings.

A. The Bulgarian Orthodox Church: an "Established Church"?

Religious pluralism in Bulgaria is defined alongside the concept of a "quasi-established church" in the case of the majority religion represented by the BOC (BOC). On the one hand, religion and state are separated and the general terminology establishing religious freedom is essentially liberal.[40] On the other hand, both the Constitution and the relevant legislation suggest a special role and often a special place for the BOC within what is effectively a social and political context.[41] This eclectic scheme does not seem to be a result of ill-defined lawmaking. It seems that the legal framework of law on religion aims at cultivating religious pluralism and mutual tolerance and yet to center this pluralism and tolerance on a particular ethical paradigm, which in this case is represented by the BOC. The BOC is therefore seen as a factor in the polity (and community) building of the country without forming a theocratic institution. Orthodoxy seems to offer minimum standards for community-building based on ethical and historical roots.

38. *Наказателен кодекс 1968* http://www.daxy.com/cgibin/norm/search.exe?m=0&n=5849&tmpl=daxy standard (08/09/03).

39. I.e., via the establishment clause defining the BOC as a traditional religion with a political significance alongside the constitutional principle of separation of religion from the state.

40. Чл. 13 и 37, ал.1, *Конституция 1991*, Преамбюл, *Закон за вероизповеданията 2002* (Обн., ДВ, бр. 120 от 29.12.2002 г.), *Становище от Министерския съвет на Република България по конституционно дело No 3 за 2003*, *Решение на конституционния съд No 12/5 юли 2003 по конституционно дело 3/2003*.

41. Id.

Opposed to communism, it was its antithesis (although it was often found collaborating with it), and the escape to freedom became inevitably and commonly an escape from a communist paradigm by seeking refuge in a religious paradigm.

In its preamble, the present act acknowledges the special and traditional role of the BOC in Bulgarian history and the formation and development of its spiritual and intellectual history (*dukhovna kul'tura*). Then it declares its respect for the three Abrahamic monotheistic religions in particular and also for any other form of religion.[42] It also reaffirms a commitment to individual freedom of religious and secular convictions, as well as a commitment to promoting mutual tolerance and understanding on matters of religious and nonreligious conviction.[43] In the light of the turbulent post-communist years of church-state relations, it seems that the legislators felt the new law should reaffirm the general constitutional principles of freedom and equality before the law of different denominations by zero tolerance of any form of discrimination or privilege on religious grounds, including the refusal to hold religious beliefs,[44]except under specific circumstances provided by the law and the Constitution.[45] From the background of the painful clash of religion and state in the schism of the BOC, the in-fighting within the Supreme Muslim Council during the 1990s, and in recent European Court of Human Rights cases,[46] Article 4 establishes the central principle that state institutions must not interfere in the internal affairs of religious communities and their institutional structure. This principle emerged from the concept of separation between religion and the state affirmed by the Constitutional Court[47] and the subsequent cases at the European Court of Human Rights.

After it has set the general framework for defining religion, the statute provides a whole article (Article 10) on the status of the BOC. The BOC is defined as a traditional denomination. An attempt has been made to resolve the obscurity of the term "traditional" by adding to it that the majority church has a historical role for the Bulgarian state and has relevance to its political life.[48] I do not think that the legislators could have got any closer to a clear concept of established church in a parliamentary democracy. Although explicit establishment on a constitutional level or a statutory level is lacking, the above text suggests several important things. First, that there is some kind of a relationship between the BOC and the state on the level of polity. Although the law does not suggest what kind of relationship this is, one could imagine that the law will have an Eastern Orthodox framework and will be performed by clergy from the BOC.[49] At the same time, the legislators felt that they should go a step further by legislating on the legitimacy of the BOC, which is to perform functions such as state ceremonies. In the light of the troublesome decade of schism within the BOC, the legislators made a desperate attempt to define what "BOC" means by a combination of theological and jurisdictional criteria, perhaps hoping that such definitions would assist the judiciary to resolve disputes between rival factions by giving more transparent criteria.

In defining the identity of the BOC, the legislators use theological terms as well as terms taken from canon law and administrative law. It is described as "One, Holy,

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42.Преамбюл. *Закон за вероизповеданията*, (Обн., ДВ, бр. 120 от 29.12.2002 г.).

43. Id.

44. Чл. 3 (1).

45. Чл. 3 (2).

46. *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, European Court of Human Rights 2000 and *Metropolitan Church Of Bessarabia And Others v. Moldova*, (Application no. 45701/99) European Court of Human Rights 2001.

47. See *Решение на конституционния съд No 12/5 юли 2003 по конституционно дело 3/2003*. *Решение N: 5от 11 юни 1992 г. по конституционно дело N: 11 от 1992 г.*, докладчици съдиите Цанко Хаджистойчев и Пенчо Пенев (Обн., ДВ, бр. 49 от 16.06.1992 г.); *Решение N: 21от 14 ноември 1996 г. по конституционно дело N: 19 от 1996 г.*, докладчик съдията Тодор Тодоров (Обн., ДВ, бр. 102 от 29.11.1996 г.).

48. Art. 10 (1).

49. In fact this kind of clarification was included in the second Denominations Bill by Kiril Milchev MP and Rupen Krikorian MP. See *Законопроект за вероизповеданията,* No. 248, 26/04/02/254-01-32., http://www.parliament.bg/appropriations.php?id=6 (03/09/03).

Catholic and Apostolic," thus adopting Article 9 of the Creed.[50] Second, the BOC is described in canon law terms: it is autocephalous,[51] having the status of a Patriarchate; it is the legal successor of the Bulgarian Exarchate;[52] and, its governing body is described as a Holy Synod, chaired by the patriarch, who is also metropolitan of Sofia. The texts which deal with the organization of the BOC employ and repeat the texts from the church's ecclesiastical Constitution.[53] The above arrangement clearly follows the example of the Hellenic Constitution.[54]

Such wording generates a number of problems. First, in effect it promotes interference by the state legislature in the internal affairs of the BOC. Should the BOC decide to change the way its church government operates, it has to do so by an act of Parliament. One might consider it preferable for an organization such as the BOC to be able to do this according to the procedure prescribed by its own by-laws. With the present wording of the statute, it seems that the BOC would not be able to do so without parliamentary support. It seems that this text was a way of making a point that the BOC is in some sense an established religion, but it also creates a danger of further tension should a political grouping decide to use the lacunae within a badly written statute in order to manipulate the governing body of the BOC.

Another specific characteristic of the BOC is that it is a legal person *ex lege.*[55] This is the only religion of the land which has its legal status *ex lege*. The above text is immediately linked with a kind of a disclaimer clause providing that the texts relating to the status of the BOC should not be interpreted in such a way as to result in discrimination in relation to other religions.[56] Such a disclaimer is very important in the assistance it gives to the courts in interpreting Article 10, with its theological and canonical allusions. Another text which adds to the impression that a primary purpose of the present legislation was to end the organizational crisis within the ranks of the BOC is Paragraph 3 of the concluding chapters, which provides that persons who have split from a registered religious institution in violation of its Constitution may not use its name or its property.[57]

In view of the mainly descriptive nature of Article 10, one might wonder what the point is of having it in the statute at all. My personal opinion is that Article 10 is a result of the inability of civil law courts to establish the above descriptions as a point of fact, the corollary of which is that the civil law legislator tends to feel obliged to draft such descriptions for the interpretation of the law, and this transforms a mere principle into a point of law. Second, Bulgarian judges demonstrated a concerning inadequacy to deal with law on religion in the 1990s, which seems to have prompted the legislators to make the status of the BOC, as the majority religion in the country, a point of law.[58]

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50. Вярвам в Една Свята, Съборна и Апостолска Църква (I believe in One, Holy, Catholic and Apostolic Church). *Служебник (*1959). София: Синодално издателство стр. 88, corresponding to the English version of the *Divine Liturgy of St John Chrysostom* (1995). Oxford: Oxford University Press.

51. From Greek αὐτοκέφαλος, literally "himself the head." According to the *Oxford Dictionary of the Christian Church* this is a term used in the early Church to describe bishops who were under no superior authority and thus independent both of Patriarch and Metropolitan. In principle later and current use, however, is for the modern national Churches that make up the Eastern Orthodox Church which though normally in communion with Constantinople, are governed by their own national synods.

52. The Bulgarian Exarchate was created as a result of Sultan Ferman granting in 1870 permission for the foundation of an autonomous Bulgarian Church. Text of the Ferman is to be found in G. Noradoungihian, G. (1902) *Recueil d'actes internationaux de l' Empire Ottoman*. Paris, III: 293-95. In Bulgarian historiography this act is treated as an effective recognition of the existence of a Bulgarian nation on the territory of the Bulgarian Empire.

53. *Устав на Българската Православна Църква*, http://www.pravoslavieto.com/ (06/09/03).

54. See *infra*, n. 73.

55.Art. 10 (2).

56. Art. 10 (3).

57. § 3. Преходни и заключителни разпоредби, *Законопроект за вероизповеданията 2002.*

58. See, for example, a Decision of the Supreme Administrative court which concludes that the fairness and the fundamental principles of religious freedom could lead to the conclusion that there could be two religious institutions under the name BOC, with two separate governing bodies, under essentially the same constitution. See Върховният административен съд на Република България – Трето отделение,Определение по адм. дело № 5748 / 2000. See also the earlier case of a Jehovah's witness being refused parental rights on account of her "membership of a dangerous sect" quoted in an earlier chapter.

The above considerations might generate several problems. First, the statute purports to endorse the principle of separation between religion and the state and yet sets up a relationship between the majority religion and the state. Second, by defining what the BOC is, by using theological, canon law and administrative law terminology, the statute essentially declares what the elements are that make the BOC "legal." However, this has further consequences inasmuch as it makes the BOC Church, as well as its internal affairs and its governing structure, dependent on a statute which essentially overwrites its existing ecclesiastical Constitution and the canon law taken into account by the BOC in its internal affairs. If, therefore, the BOC wished to amend its Constitution and to change the structure of its church government for reasons of theology or canon law, it would not be able to do so without a change in the Denominations Act of 2002.

This notion of a religious community whose existence and foundations are based on Episcopal succession rather than coming to existence by law is problematic because becoming a legal person is not the same as becoming a religious institution in a temporal sense (the actual *terminus a quo* being the foundation of a particular church by an apostolic successor, while its Constitution as a legal person is in a way secondary and does not substantially affect the fact that a church has come into life before the law which has legitimized it as a legal person). The text of the Act is somewhat ambiguous on this point. In an interview, Professor Ivan Zhelev, the head of the Denominations Directorate, implied that the BOC is an entity which existed before the state, and therefore should not be subject to the state's administrative law.[59]

A similar view was expressed by the prime minister, Simeon Sakskoburggotsky, in connection with Constitutional Case No 3/2003.[60] The ambiguity is further illustrated by the stand taken by the minority religions which opposed the Denominations Act, partly because it does not sufficiently emphasize the nonconformist character of the religious communities which their denominations represent. The idea of a free church as opposed to an established church was argued to be central to the concept of religious freedom.[61]

Anderson rightly acknowledges that the traditionally dominant religious institutions will generally argue that what they seek is not privilege but "recognition" of a historical, cultural, and religious reality; and that a formal acceptance of their status does not amount to their being given any inappropriate advantages in relation to other religious communities. Equally, in most of the countries within the European and Slavic context such arguments will be buttressed by a more nationalistic approach that would question the appropriateness of the U.S. model of church-state separation, for example, with its liberal, if not secularist, intellectual underpinnings.

BOC was never established as a state religion, but as a religious entity which has had the most significant historical influence on the formation of the Bulgarian identity. This was a concept very similar to the concept adopted in the Hellenic Constitution,[62] but

59. Димитров, И. Ж. (2003) "Законът за вероизповеданията - признание за историческата и настояща роля на БПЦ" *Църковен Вестник*, Година 103, брой 3 София, 1-15 февруари. http://cv.dir.bg/03-2003.htm (06/09/03)

60. *Становище от Министерския съвет на Република България по конституционно дело № 3 за 2003г,* http://www.constcourt.bg (02/09/03).

61. See reports by the Bulgarian Helsinki Committee, Tolerance Foundation, http://www.hrwf.net/html/bulgaria_2003.html#Religiousfreedompractice, The Rule of Law Institute, http://www.hrwf.net/html/bulgaria2002.HTM#OpinionbytheRuleofLawInstitut, and the assessment of the Council of Europe, New Bulgarian law on religion known as the Confessions Act 2002 , Motion for an order presented by M. Atkinson and others Parliamentary Assembly, Assemblée parlementaire Doc. 970313 February 2003.

62. According to the *Hellenic Constitution* Greece is the only Orthodox state in the world. Art. 3.1 of the constitution states that the Eastern Orthodox Church is the "prevailing" religion: The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions, It is autocephalous and is administered by the Holy Synod. The constitution sets up a regime where there is neither an established Church nor complete Church-state separation. However, the European Court of Human Rights noted in 1993 that "according to Greek conceptions, it [the Church] represents *de jure* and *de facto* the religion of the state itself, a good number of whose administrative functions it carries out". The involvement of the Greek Orthodox Church in areas of public life,

without the specific doctrinal and anthropological statements that the Hellenic Constitution makes. Many political events are also religious feasts and the rituals performed during these events are exclusively Orthodox in Bulgaria. All the state holidays are Orthodox Christian feasts. What does that tell us? Is a *de jure* non-established religion *de facto* established? Could we think of St George's Day, which is also the day of the armed forces, without a political presence and without the Great Blessing of the Waters being performed by Orthodox clergy?[63] And what about the feasts of St Cyril and Methodius[64] and Epiphany?

The designation of religious feasts to replace secular communist cults has its reverse precedent in the communist period. In 1970 the Central Committee of the Communist Party appointed a civil servant to design a strategy for replacement of traditional religious feasts with communist ones.[65] The restitution of religious feasts in the post-communist period was no doubt treated by some Orthodox triumphalists as the instating of established religion. In other words, although relations between religion and the state were, in theory, shaped by a disestablishment clause in the 1991 Constitution, the symbolic place of the majority religion in the public celebrations following the end of communism, and its historical significance, made it possible for it often to influence modern Bulgarian politics as some kind of a quasi-established religion.

These debates about the balance between a disestablishment clause and *de facto* established religion took place during the late 1990s, and in 1999 four draft laws were circulating, of which three proposed the granting of special status to the Orthodox Church and one obliged "state institutions to support and pay special attention to Eastern Orthodoxy as the traditional religious denomination of the Bulgarian nation."[66]

Here the wording did not of itself do more than recognize the traditional place of these Churches in the culture and history of the country, but in each draft there were clauses that suggested that something more was on offer, whilst other aspects of the laws appeared likely to have detrimental consequences for minority religious communities.[67]

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which come under state regulation, has been institutionalised by means of the provision of art. 2 of the Charter of the Church of Greece, which constitutes a law of the state. Its integrative function has been constitutionalised through the Ministry of Education and Religion, by which it exercises administrative control over all religious affairs in Greece. The state also pays the salaries of Orthodox clergy and for the functions which other ministers of religion perform as public officials in civil matters, such as marriages (for which there also exist civil ceremonies). However, the prerogatives of the "prevailing religion" with respect to other "known" religions have been tempered by other provisions of the Constitution. Thus everyone can enjoy their individual and political rights, irrespective of their religious convictions.

63. Four main holidays of the BOC are also official holidays in Bulgaria. They are non-working days and workers have the right, in addition to them, to have several weeks of paid holidays.

64. During the Communist period this Church feast remained a national day of celebration of the Slavic Script and Culture and a corporate feast of the cultural and educational sector.

65. Decision of the Politburo of The Central Committee of the Bulgarian Communist Party of 26.5.1970 and a report concerning an additional paid officer in the Propaganda Department of the Central Committee who should be responsible for the development and introduction of the new civil and socialist rituals and traditions. A86 Ф1 ОП36 АЕ975. Information concerning the increased number of people wearing crosses, 12.10.1967. A95 Ф1 ОП40 АЕ122. Information from the First Secretary of the Bulgarian Embassy in the USSR concerning the development and introduction of new rituals and holidays in the USSR and the participation of the Soviet Trade Unions in all this. 25.2.1969-3.3.1969. А101 Ф1 ОП40 АЕ206. Information concerning the Easter festivities. 29.4.1970. А108 Ф.1 ОП40 АЕ284; Minutes of the managers' meeting of the Propaganda Department, 8.2.1971. Reports concerning the introduction of civil rituals, the improving of lecture propaganda; basic trends in Party education etc. А108 Ф1 ОП40 АЕ339; information from workers in the Propaganda Department, the Regional Committees, the Central Committee of the Komsomol, the Trade Unions and the State Council of the People's Republic of Bulgaria, concerning the implementation of the decision of the Secretariate of The Bulgarian Constitutional Court of BCP from 11 March 1971 for the introduction of the new civil rituals in the life of the working people.13 June 1972-28 July 1972. Some of the above sources have already been discussed in Todorova, M. (1997) *The Effect of Communism on the Pastoral Work of the Protestant Churches in Bulgaria*. Cambridge: Anglia Polytechnic University.

66. *Паметна бележка от традиционния консултативен съвет на политически съюз "Гергьовден – ВМРО"*.София, 11 юли 2001 г. *Законопроект за изменение и допълнение на Закона за вероизповеданията*, внесен на 31.07.1997 г. от Б. Великов, В. Вълканов, П. Славов и А. Данаилов; *Законопроект за вероизповеданията*, внесен на 10.12.1998 г. от Пл. Славов.

http://www.bsp.bg/polit/zakon.html (07/09/03).

67. Anderson, J. (2000) "Justifying Religious *Privilege*" (Transitional Societies, Paper delivered at ECPR

B. Registration, Property Issues and Restriction of Religious Activities and the Role of the Executive

The dynamics of Church-state relations under the Denominations Act 2002 involved a substantial transformation of the administration of religious affairs in two directions. On the one hand, it promoted greater independence of religious communities, administration of their affairs being moved from the executive to the judiciary and the judiciary being given more transparent guidelines in the application of substantive law. On the other hand, the administration of religious communities remained centralized, this time partly in the hands of the judiciary, partly in the hands of the executive. The concept of the majority religion as a quasi-established religion was also reinforced, and it was reaffirmed that on a legislative level the country was undergoing a process of redefining cultural legitimacy and community-building along the boundaries of established religion. The above tendencies, however, should not be overemphasized as extreme polarities of the current statute. The overall balance in the new Denominations Act 2002 works towards a greater transparency in the administration of religious communities, prevents arbitrary involvement of the executive and, most of all, provides a very broad framework for the judiciary in interpreting the law. In the overall picture, the potentially problematic texts suggesting religious establishment could be considered more as a curiosity rather than a worry. The new Denominations Act 2002 was passed by the Parliament in desperation because of the escalation of the conflict between the two rival synods of the Bulgarian Orthodox Church.

C. General Framework Freedom of Religion in DA002

In Denominations Act 2002 the right of belief is considered to be formed in the following ways:

- formation and expression of religious belief
- formation and participation in a religious community
- organizing religious institutions
- providing religious training and education through disseminating of the religious beliefs in question verbally, through publications, through electronic media in the form of courses, seminars, programs.

The present law has made a step forward in defining in legal terms in what a religious community consists. Article 9 specifically recognizes as relevant distinctive elements such as its name as well as its doctrinal statement.

For the purposes of the Denominations Act 2002 the term "religious denomination" designates the sum of religious beliefs and principles, the religious community itself and its religious institutions. This has not been distinguished clearly from the term "person's rights" included in the Denominations Act 2002, or at least a clear balance between the two rights, has not been drawn. Although according to Article 1, the aims of the statute are to protect the personal right of freedom of religion, one of its main faults according to Evans, is amalgamating different emanations of religious freedom, which does not allow us to reach a definite conclusion about the presence or lack of an appropriate protection, even on the level of personal freedom of religion.[68] Special attention has been focused on the area of personal rights, proclaimed in the preamble of the law, on the detailed regulation of religious life and on the balance between personal and religious rights. And while the introduction creates the impression that the defects of the earlier drafts have been overcome, it still remains unclear whether, after the overall reading of the statute and its application, the individual rights and, respectively, their corporate rights have been fully and truly protected.[69]

Workshops: 6.

68. Id.

69. Id.

1. Registration of Religion of Religious Denominations

Bulgarian political and legal theory presents two distinctive views on the question of registration of religious communities. The first view represented in the bill of the Movement of Rights and Freedoms advocates a complete deregulation of religious establishments as an extension of the principle of separation of religion from the state.[70] The second approach, adopted by the present the Denominations Act 2002, presents the view that in order for a religious community to have the status of a legal person, it has to be registered accordingly. This is an approach that somewhat resembles the provisions of the Denominations Act 1949 with its agenda to exercise control over the activities of religious communities.

On the other hand, this seems to be in accord with the general approach taken by Bulgarian law - a civil law system which administers legal persons, companies and property issues via a very complex system of registration. From this point of view the registration regime could also be viewed as a way of introducing a similar regime to the one adopted for other corporations and yet tailored for the specific activities and needs of religious communities. I am even prepared to speculate that the regime has been developed *per analogiam* and many elements of it have found their place in the statute incidentally rather than because of a particular teleology behind the Denominations Act 2002.

As far as specific Church-state relations are concerned, the state is seen as primarily having a duty of care in relation to the religions of the land, which involves maintaining tolerance and respect between the members of different denominations.[71] Denominations are declared to be free and equal.[72] Religion is considered incompatible with political activities, with endangering the national security, and with health and rights and freedoms of other citizens.[73] The statute also states that religious convictions do not constitute a defence for not performing duties imposed by the Constitution or other statutes.[74] The Denominations Act 2002 then makes a distinction between a religious community and a religious institution (a religious community with a status of a legal person).

The novel approach of the Denominations Act 2002 is that registration of a religious institution is transferred from the Denominations Directorate to the judiciary (Sofia City Court). The judiciary could decline registration of a religious community if its doctrinal statement, liturgical practices and services are considered to be a danger to national security; public order; health, ;rights and freedoms of other citizens; used for achieving political aims; and for promoting racial, ethnic, or religious hostility.[75] The decision of the court could be appealed before the Supreme Administrative Court. On a regional level the religious institution can be registered by the County Courts, and the denomination then has only a declarative duty to inform the mayor of the district about its activities.[76] According to the current legislation, a religious community could come into existence in two ways: *ex lege*, and by virtue of registration before the Sofia City Court. While the *ex lege* regime is provided for the Bulgarian Orthodox Church only,[77] all other religious communities have to register in order to be able to function as religious bodies.[78] The subject of the present section is the application of the statutory recommendations in connection with activities for which the registration requirement is in principle justified. The report about the previous draft highlights the excessive burden of information required by the state administration and second the very broad discretionary power of the executive in assessing the applications for registration. Denominations Act 2002 resolves

70. Preamble. *Законопроект за религиозните права и религиозното сдружаване*, 1/05/07/01/154-01-1 No 247.26/04/02/254-01-31. http://www.parliament.bg/appropriations.php?id=4 (09/09/03).
71. § 4(3).
72. § 4(1).
73. § 3(1).
74. § 2(4).
75. Art. 7.
76. Art. 19 (2).
77. Art. 10.
78. Art. 14.

a number of issues in connection with the first problem, but not with the latter.[79]

First, it is unclear whether an expert opinion by the Denominations Directorate would be required in all cases and, if not, what criteria exist for assessing whether one is needed. Second, it is not clear what the legal consequences are. Must the courts take these criteria into account or could they be ignored? Third, it is not clear what criteria, guidelines or code of conduct the Directorate uses, and this makes their discretionary power quite broad. It is also very important that the expert opinions provided by the courts should be made available for inspection by the applicant and that they should have their motives outlined.

The question of registration of religious communities was a major issue in the nineties. The regime of registration operated by a civil servant at the Council of Ministers proved to be biased both in relation to the majority religion and the minority religions. The subsequent legislative amendments deepened the problem rather than resolving it. The present statute is a radical change of this regime by setting up a registration procedure before the Sofia City Court following standard civil litigation proceedings and avoiding political interference in the registration of the individual communities. Second, the law establishes that each religious community will obtain the status of a legal person by virtue of registration. This is a shift from the previous approach which had established an arbitrary procedure for granting the status of a legal person to minority Churches in order to prevent their activities.[80] Article 15 (2) then introduces the approach of company law and trade mark law that there cannot be more than one denomination with the same name and business address. Evans and Lawson are rather skeptical about the practical application of such a text.[81] Indeed, the reason for this section can only be seen in the light of a series of disputes between the rival Muslim Supreme Councils and rival Synods of the Bulgarian Orthodox Church. These disputes, subsequent jurisprudence of the European Court of Human Rights,[82] and a highly controversial decision of the Supreme Administrative Court,[83] had all contemplated the possibility of the existence of two organizations with the same name.

The statute also introduces minimum standards for what should be included in the statutes of a denomination[84]. This text was very much determined by the vagueness of statutes of religious communities in the 1990s, which made it very difficult for the courts to litigate in specific circumstances. The minimum information in a statute regulating a religious community should include name and business address, doctrinal statement, and description of the rituals, structure and governing body, the procedure for appointing governing bodies, their jurisdiction and the duration of their appointment, representatives and the procedure for their appointment, decision-making procedure as well as procedure for calling meetings of the governing bodies, financing routes and property and liquidation procedures.[85] The Central Register of Religious Communities contains the following data:

- Registration court order
- Name and address for business
- Governing body and representatives
- Names of the physical persons representing the religion

A similar procedure applies for the local branches, which have to be registered at the Local Government Authority.[86]

79.Евънс, М. "Доклад относно закона за вероизповеданията, приет през декември 2002." http://bclf.tripod.com/_Toc50626644 (09/09/03).

80. Without the status of a legal person a religious organization cannot operate effectively.

81. See Evans, M., Lawson, R. *Op.cit.*

82. *Hasan and Chaush v. Bulgaria* (2000) Reports of Judgments and Decisions 2000-XI (2002) 34 E.H.R.R. 55 (E.C.H.R. Grand Chamber) http://hudoc.echr.coe.int/hudoc(10/03/03)

83. *Определение, No 6300 по адм. дело No 5748 / 2000., София, 18.10.2000*, Върховният административен съд на Република България - Трето отделение.

84. Art. 17.

85. Id.

86. Art. 18.

Denominations' registration proceedings take effect in accordance with Chapter 46 of the Civil Procedure Code.[87] In this case, the Court shall pronounce its judgment at a closed session, save when the court itself shall rule otherwise.[88] L. Popov of the Rule of Law Institute[89] suggested that "In view of the fact that a wide range of people are interested in the registration of a denomination, it is advisable that a possibility for greater transparency of proceedings be envisaged, as provided by Article 7 (3) of the *Political Parties Act*, i.e. the application should be considered at an open session. This would provide publicity of the registration process."[90]

It is worth mentioning that, according to Article 8 (3), appeal is allowed via the standard route of civil litigation. This, however, seems to be a remedy against cancellation of registration and does not seem to be available for the initial refusal of registration.

The overall format of the statute creates the impression that registration is a precondition for the exercising of the rights protected by the Convention. Moreover, registration is a condition for obtaining the status of a legal person. Even the term "exercising" of religions relates to the condition that the faithful should have access to such status in order to exercise the right of religious belief.[91] Moreover, it is not entirely clear whether the profession of any form of different religious beliefs ought to be exercised according to Article 5 (1) within the framework of "religious community" or "institution of religious community."[92] This is because a major part of the personal and collective rights of believers necessary for the effective exercise of the right to express religious belief is exercised in accordance with the statute via religious institutions, namely religious communities with the status of a legal person.

According to Article 21 (1) only registered communities have the right to own property and probably even to sign binding contracts to rent property. This could possibly suggest that in practice, only a registered religious community could organize public worship in designated ritual places. According to Article 27 only registered religious communities are entitled to set up separate non-profit legal persons to assist their activities. The statute remains vague in many of its provisions regarding whether religious communities or believers have the right to manifest their belief if they are not registered. The transitional provisions (Section 5) repeal a provision under the Denominations Act 1949 which prevented religious groups from registering as non-profit organizations. Article 29 (2) provides that non-profit organizations do not have "the right to accomplish activities which represent the practice of religion in public." The precise interaction of these provisions is unclear, but the intent appears to be to say that only registered religious organizations have the right to engage in the public manifestation of religion. The criticisms connected with the present statute on religion appear to be based on the assumption that there is an international standard that the new law has failed to meet.[93]

Article 7 contains restrictions which could be considered incompatible with Article 9 (2) of the Convention, which stipulates that only the grounds provided in § 2 could justify state interference in the internal affairs of religious communities and could also justify the state taking a view on matters relating to freedom of religion and religious beliefs.[94] Article 7 of the Denominations Act 2002 has also included "national security" and "use of religion for political ends" which extends the terms of the Convention.

In a democratic society, founded on the principle of the rule of law, political ideas which question the political status quo and whose accomplishment could be achieved by

87. *Граждански процесуален кодекс 1952* .
http://www.daxy.com/cgi-bin/norm/search.exe?m=0&n=29&tmpl=daxystandard(08/09/03).
88. Art. 17.
89. Part of Advocates International and Advocates Europe, a Christian lawyers organization with strong links with the US and European Evangelical Alliance.
90. See L. Popov "Report of the Rule of Law Institute," http://www.hrwf.net/html/bulgaria2002.htm# Newlaw(14/08/03).
91. Evans. Id.
92. Evans, Id.
93. Id.
94. See *Sunday Times v. The United Kingdom* Series A No 30 (1979) (E.C.H.R. Plenary) http://hudoc. echr.coe.int/hudoc (09/09/03), § 45 and § 70.

peaceful means should have the opportunity to be expressed through the exercise of the right of association and other lawful means. There is no reason why those principles should not be applied in relation to religious communities. It is natural that the state should be able to defend itself from campaigns which advocate violence and the overthrowing of democratic principles. At the same time it is doubtful that the exclusion *per se* of the religious communities from the political debate could really be a policy justification.[95]

The above concern is particularly reinforced by the fact that the breaches of Article 7 are to be determined by the executive (Denominations Directorate). It is very interesting that the above texts taken in isolation were considered to be a violation of the principles of the Convention. Principles of national security and religion for political aims were understood in the 1990s as an extension of the principle of separation of religion from the state on the one hand and as a means of preventing regional tensions on the other. The collapse of the former Yugoslavia, the tensions between ethnic Turks and the enforcement agencies during Zhivkov's "revival process in the 1980s, and the link between religion and nationalism on the Balkans all made the very idea of the active participation of religion in the political life of the country a very sensitive issue. This was apparent in the development of the image of the Movement of Rights and Freedoms as representative of the ethnic Turks, but not as a Muslim party.[96] The restriction found its place in the Constitution[97] and is very much seen as a means of preventing regional conflicts based on religious affiliation. The overcoming of such texts will therefore involve both a new approach to Balkan history and also address the issue of balance in the separation of religion from the state. Lawson's comments are therefore a good starting point.

It is not very clear what the shortcomings are if a registration has been refused. On the one hand, Article 6 contains a number of rights originating from the right of conscience which could be exercised without the context of a registered religious community. On the other hand, *per argumentum a contrario*, unregistered religious communities would not be able to have all the rights which registered communities would have,[98] including right to own property,[99] to receive state subsidies,[100] and to open religious schools.[101] At the same time, one wonders whether in practice there is always a policy restriction and whether registration in the Denominations Act 2002 is seen as such a floodgate.

Article 15 does not specify the criteria on which registration is based. Since Article 17 specifies a number of elements which have to be included in the statute of a denomination, this implies that Sofia City Court would take these into account in issuing a court order for registration. At the same time it is clear that such assessment, going beyond consideration of completed formalities, would probably be treated as an unjustified encroachment into the affairs of religious communities. *Hassan and Chauch v Bulgaria* highlights the point that the executive and judiciary have to remain neutral in making decisions involving interference in the internal affairs of religious communities, although the very procedure of registration has not been specifically considered as creating such a possibility.[102] If all the other conditions of Article 9 (2) are satisfied, the Sofia City Court would have to assess for each case whether the refusal is "necessary for

95. See an account of a similar debate about the extending of anti-terrorist legislation in the UK to religious activities: Edge, P.W. (1996) "The Holy War on the Doorstep" *N.L.J. 146 (6730)*: 190; Edge, P.W. (1999) "Religious Organizations and the Prevention of Terrorism Legislation: A Comment in Response to the Consultation Paper" *J. Civ. Lib., 4 (2)*: 194-205; Idriss, M.M. (2002) "Religion and the Anti-Terrorism, Crime and Security Act 2001" *Crim. L.R.* Nov: 890-911; Towler, A. (2001) "Emergency Powers Bill Receives Mixed Response: Anti-Terrorism: Measures under 2000 Act Extended" *L.S.G. , 98 (44)*: 5.

96. *Устав на Движение за права и свободи*, http://www.dps.bg/ustav.html. (09/09/03).

97. Art. 11 (4) and art. 13 (4).

98. Ch. 4.

99. Art. 21.

100. Art. 22 and 25.

101. Art. 33.

102. *Hasan and Chaush v. Bulgaria* (2000) Reports of Judgments and Decisions 2000-XI (2002) 34 E.H.R.R. 55 (E.C.H.R. Grand Chamber) http://hudoc.echr.coe.int/hudoc (09/09/03) § 77.

democratic society" within the terms of Article 9 of the Convention. Each refusal would therefore have to be justified on the basis of "pressing social need" and to be "proportionate with the aims of the law."

2. The Role of the Executive

The role of the executive in the new legislation is reduced to being a consultative organ which provides expert information about religious communities and also acts as some kind of a religious ombudsman in observing activities of religious communities empowered to initiate proceedings for breach of the Denominations Act 2002 by religious organizations.

The new Denominations Act 2002 retained the role of the executive in the relations between religion and the state. In the new statute, the Denominations Directorate coordinates the relationship between the executive and the religions, assists the government in implementing its policy to maintain religious tolerance and mutual respect, coordinates and chairs an expert commission dealing with religious communities, provides expert advice and opinions according to the provisions of the Denominations Act 2002, gives expert opinions on proposed visits of foreign religious figures, reviews petitions and signals violations of religious freedom, observes respect for religious freedom, makes proposals before the government for state subsidies, and provides accountability for the way that subsidy is spent. One could even see an attempt of reconstruction of the Denominations Directorate from the pre-communist period. Compared to the Denominations Act 1949 the new act reduces the functions of the Head of the Directorate to those of a religious ombudsman, who coordinates the relationship between the executive and the religious institutions, assists the Council of Ministers in the implementation of the state's policy for maintaining tolerance and respect among religions, organizes and chairs a commission of experts dealing with problems relating to religious communities, provides expert opinions when this is provided by a statute, makes proposals before the Council of Ministers about the distribution of state subsidies to religious institutions.[103]

Another concern is the way the new statute incorporates from the old statute the obligation of the religious communities to declare their local branches before the mayors of the municipalities (Article 19 (2). It should be noted that any of the non-religious organizations are obliged to do the same. By its very nature the law creates a dual regime for sanctioning statutory violations: on the one hand, the Sofia City Court can restrict an organization's activities (e.g. banning publications, restricting public appearances, revoking the registration of educational, health, or social institutions, revoking legal entity status for up to 6 months, permanently revoking the status of a legal religious entity). On the other hand, prosecuting believers on account of statutory violations may be pursued by the Denominations Directorate via the route of administrative sanctions.[104] Consequently, denominations and religious leaders are subject to double jeopardy: they may be prosecuted twice for one and the same violation.

The Directorate is also the organ that can persuade the courts to initiate cases to enforce the sanctions stipulated in Article 8. Moreover, this organ oversees the registration of religious groups by providing expert opinions to the Sofia City Court[105]. Another even more problematic function of the Directorate is its task of "investigating citizens" signals and complaints alleging that their rights and freedoms or the rights and freedoms of their friends or relatives have been violated as a result of a third persons "abuse of the right to religious freedom."[106] According to the new law, parents have a right to provide religious education for their children in accordance with their own convictions. Surprisingly, this paragraph faced the most detailed criticism.[107]

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103. § 30
104. Arts 36-40.
105. Art. 35 (4).
106. Art. 35 (6).
107.See the comments of the Rule of Law Institute, http://www.hrwf.net/html/bulgaria2002.htm (30/08/09).

3. Restriction of Religious Activities

Religious communities, institutions, and beliefs cannot be used for political goals.[108] This is an interesting passage which replicates a similar passage in the Constitution. The activities of a religious organization could be restricted only in the cases specifically provided by law. These conditions are listed in Article 7 and include activities directed against the national security, *bona fides*, civil order, violation of rights and freedoms, using religion as a political agenda.[109]

The forms which restrictions of rights and freedoms could take are also specified in the law: they are publication ban, public activities" ban, closure of educational, health or social institutions, suspending the legal person's status for up to six months, or withdrawal of registration. The proceedings could be initiated by the plaintiff or the prosecutor and the competent court is the Sofia City Court. The decision of the Sofia City Court could be appealed against through the general route provided by the Civil Procedure Code.

A very interesting text is aimed at resolving the schism in the Bulgarian Orthodox Church and to prevent such a crisis in the future: "Persons who have split from the Bulgarian Orthodox Church in breach of its Regulations, cannot use the name Bulgarian Orthodox Church and use or manage its property."[110]

The most detailed criticism of the Denominations Act 2002 by the Rule of Law Institute is directed towards Article 7 (4), which states the parents' right to choose their children's religion and religious education.[111]

An important way of assessing legislation is by determining whether it will be discriminative and also whether it is likely to resolve problems earlier legislation has created. The present law, by its very nature, is an attempt to resolve a whole set of real problems resulting from the Denominations Act 1949, instead of addressing hypothetical issues. It should therefore be seen as a desperate–and perhaps a bit rough–way of moving in the right direction, rather than coming up with a fine theoretical view on the pressing issues. It is far too descriptive; maybe it is far too specific in many ways. By all means, this is a very eclectic law, taking into account very complex issues, which will inevitably be controversial and can be addressed and amended only at a level where legal theory meets practical application.

4. Property Rights

Finally, the present statute addresses the issue of restitution of property of religious institutions on the right footing. The question of the restitution of Church property has also been raised.[112] The regime of hiring and building properties for the needs of religious communities is substantially relaxed. At the same time the statute does not set transparent criteria for state subsidies. "It is arguable whether the states party to the *Convention* are obliged, or not, to subsidize religious organizations. Once a decision for support has been made, this must be done in a non-discriminative way.[113]

The European Court of Human Rights has recently pointed out that "there is a lack of common European standard about the financing of religious communities because these issues are closely linked with the history of individual countries."[114] However, if the state decides to provide subsidies for religious communities, this should not be done in a discriminative manner.[115]

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108. Art. 7 (2).

109. Art. 8.

110. § 5 Преходни и заключителни разпоредби, *Законопроект за вероизповеданията 2002.*

111. http://www.hrwf.net/html/bulgaria2002.HTM (03/05/03)

112. "Religious Freedom and Church-State Relations" (1999) *B.H.C.R* http://www.bghelsinki.org/frames-stan-bg.html (10/05/03).

113.§ 82 and § 37.

114. Id.

115. Id. In *Fernandez and Caballero* the plea was challenging tax privileges provided for the Catholic Church as a part of the concordat between Spain and the Vatican. The court has decided that treaties between the state and a religious institution which provide a special regime for tax collection in favor of that particular religion are not in principle a violation of arts. 9 and 14 of the Convention if there is an objective and reasoned

Although a religious denomination is not a company, having obtained a legal person's status, it could join partnerships and it could also create non-profit legal persons to facilitate its activities. Production and sale of religious items is not treated as a commercial transaction and therefore is tax exempt.

Another innovation of the law is that it provides a framework for religious communities to create and run health care, social care, and educational establishments. Article 4 (1) introduces criteria for establishing the succession rights for legal persons representing religions which existed before 1949. It also introduces a new limitation period for properties which belonged to religious communities, starting from the implementation of the Denominations Act 2002.[116] These were important devices aimed at resolving numerous disputes claiming titles for property of religious organizations banned after 1949.

Denominations Act 2002, for its part dealing with the registration of religious communities, the role of the executive, and the restriction of religious freedom, is a step away from the executive control of Denominations Act 1949. The new statute entertains the idea of a public register of religious communities administered by the judiciary, a flexible way of obtaining the status of a legal person and a new role for the executive as an observer rather than a "procurator." At the same time, it remains noticeable that the new statute, in its aim to address specific problems within a tight time-scale, has provided a statutory framework with far too specific and detailed regulations relating to very broad and quite general affairs. The sharp contrast between specific means and general aims has made the otherwise modern legislation vague and confusing in parts. The main framework, however, seems to provide enough safeguards for religious freedom and could be considered as a promising beginning rather than as a well achieved end.

The above examples present a scenario where a particular religious community is considered to be instrumental for the achieving of a political community. At the same time, many of these countries embrace the ideals of liberal democracy and their communitarian commitment does not affect the protection of liberal values in society.[117] Going back to the Bulgarian case, one can observe an attempt to make Eastern Orthodoxy an established religion in the sense that it is part of the legal status quo in the land. This is implied by the way it is defined by the Constitution.[118] This is also the way it is described in stronger terms in the Denominations Act of 2002.[119]

So far, restitution of nationalized ecclesiastical property has not always been easy, partly due to the technical nature of the administrative process and partly due to unclear title deeds and lack of clear evidence of the full range of property rights at the time of nationalization and inability to retrace the original plan of the property through several stages of restructuring of the town planning.[120]

IV. FREEDOM OF RELIGION OR BELIEF IN THE JURISPRUDENCE OF THE BULGARIAN CONSTITUTIONAL COURT

Religious freedom concerns in the jurisprudence of the Bulgarian Constitutional Court (BCC) are marked by the contrast between the reluctance of the court to articulate

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justification of such special treatment and if other Churches could join such a treaty should they desire to do so.

116. § 5(4) Преходни и заключителни разпоредби, *Законопроект за вероизповеданията 2002.*

117. Robertson, D. (1998) "The Legal Protection of Religious Values in Europe" in Rodriguez, J. (ed) *Religious Liberty and Secularism.* Vatican City: Libreria Editrice Vaticana: 187-88.

118. Art. 1.

119. Art. 10.

120. Some of the following cases illustrate how difficult it could be to establish succession as a result of a restitution of ecclesiastical property which has been nationalized by the Communist government without a clear sucession path documents prior to the nationalization - Определение № 3570 от 27.03.2008 г. на ВАС по адм. д. № 12239/2007 г., II о., докладчик съдията Захаринка Тодорова Определение № 6114 от 18.11.1999 г. на ВАС по адм. д. № 2646/99 г., III о., докладчик съдията Боян Магдалинчев Решение № 5542 от 16.06.2004 г. на ВАС по адм. д. № 11187/2003 г., III о., докладчик съдията Йовка Дражева Определение № 7707 от 28.09.2004 г. на ВАС по адм. д. № 7460/2004 г., III о., докладчик председателят Пенка Гетова

detailed legal reasoning on questions of freedom of religion and belief in 1992, and its willingness to engage head-on with freedom of religion or belief in its Decision No 12/2003 (BCC, 2003, 6) by taking on board a large volume of ECTHR jurisprudence and complex theoretical constructions relating indirectly to some trends of contemporary Anglo-American analytical legal theory discourses. By connecting the levels of a literal approach in the area of human rights with a more analytical approach about the boundaries of law and religion in this particular case, the BCC emerged able to resolve ambiguities of legal discourse where they could be resolved and to leave the vagueness of law where this might be prudent. It suggested that freedom of religion or belief is something courts should take on even when such engagement is not necessarily able to deliver clear-cut decisions.

With this most recent decision on the constitutionality of the existence of religion *ex lege* established by the Denominations Act 2002, the court was split 6:5, which resulted in a non-decision. At the same time the divided court showed maturity in being able to deal creatively with difficult questions, in not being embarrassed to be divided on complex issues, and in being prepared to admit that there are difficult issues on which it is perhaps better to remain unresolved.

The fact that the BCC remained divided highlighted an important point, that competing debates in relation to freedom of religion and belief cannot be resolved by simple elimination of one of these claims, but by a dynamic approach which views such competing claims through the lens of human rights as legal tools and resolves them through such a lens in each particular case. In this respect the BCC decision was a "successful failure." As we shall see in this article, the divided court was divided along fundamental questions about the relationship between law and religion which dominate such discourse in almost every modern jurisdiction. By remaining divided the court also highlighted the division within constitutional debates about law and religion and effectively proposed solutions in this area flagged by the perspectives of each group of constitutional judges. This decision marked a departure from "even- handed," politically correct and often politically biased BCC approaches in relation to religious freedom and the emergence of a critical and creative jurisprudence prepared to tackle difficult questions through the lens of human rights. On this occasion the judges showed reluctance to go in one radical direction or the other (with an over-simplified or over-complicated substantive law).

The Bulgarian Denominations Act 1949 (DA, 1949) was not replaced until 2002. Despite its reputation as a piece of communist legislation *par excellence* designed and used for decades to make religion subordinate and dependent on the state the 1949 law was not abolished or declared unconstitutional (an initiative pioneered by President Zhelyu Zhelev (1990-97)[121], and ironically was used by the Denominations Directorate under the Filip Dimitrov government (1991-92) to suspend Patriarch Maksim of the Bulgarian Orthodox Church, to appoint an alternative synod and to commence the ongoing saga of the so-called schism of the Bulgarian Orthodox Church.

Leaders of the Bulgarian Orthodox Church and the Supreme Muslim Council challenged some of the acts of the administration before the Supreme Court. Muslim leaders filed a case against the dismissal of the chief mufti. The Supreme Court disallowed the claim, stating that the director of religious affairs had acted "according to his competence under the law," that is, under Article 12 of the Denominations Act 1949. In the case of the Bulgarian Orthodox Church the Supreme Court disallowed the claim of Patriarch Maksim by a decision of 2 July 1992, declaring him "illegitimate" and acknowledging the right of free discretion of the executive branch in legitimizing church leaderships.

Decision No.5/1992 of the BCC blocked to a certain extent the efforts of the government to interfere in the internal affairs of the churches in that it explicitly declared such interference unwarranted and in pointing out the unconstitutionality of Article 12 of

121. In 1992 the Constitutional Court had to address for the first time the question of the legality of the Denominations Act 1949 (BCC, 1992).

the Denominations Act 1949[122] which has not been applied subsequently. At the same time, the cautious approach of the BCC prevented it from declaring the entire Denominations Act 1949 unconstitutional, as had been proposed by President Zhelev. By declaring the act unconstitutional the BCC could have solved the problem of a decade of unsettled church-state relations and, at the same time, would have initiated the drafting of a new denominations bill as a matter of urgency. For some time, the lack of legislative input in this sphere was caused both by the triumphalist nature of some of the drafts as well as by other legislative initiatives which took priority. By declaring the entire Denominations Act 1949 unconstitutional (and it had a number of possible grounds to do so) the BCC would have been able to put a hermeneutic tool in the hands of the judiciary, establishing clear criteria of how to deal with cases relating to religious freedom, religious discrimination and church-state relations. Such clarity would then have helped the work of the prosecution service as well as the work of the executive.

The Denominations Act 2002 (DA, 2002) could be seen as a frustrated attempt to abolish its communist predecessor. There is plenty in it that can be understood only in the light of the schism and as an attempt to provide substantive legal guarantees against the judicial inadequacy and state interference of the 1990s by providing a very detailed, sometimes perhaps too detailed, substantive framework.

One of the most controversial issues in the law appears to be a provision to "establish"[123] *ex lege* the Bulgarian Orthodox Church (the majority religion in the country),[124] while all other religions were to acquire legal personality status through a complex and potentially arbitrary process of registration.

The court could not reach the necessary decisive majority of seven votes on the question of the constitutionality of the above texts or on whether they violated the international treaties Bulgaria had signed, and the application was therefore denied. Because of the lack of a collegial decision the elaborations of the two groups of judges were outlined and presented some unusual trends in relation to the ways courts should tackle freedom of religion or belief.

The way the constitutional judges addressed the "religion *ex lege*" clause, while showing how far the debate still has to go, also showed a balanced and sufficiently flexible approach to accommodate the seriousness and complexity of both points of view, which, though different, are not irreconcilable. What the decision shows is that no matter what model is adopted, the dissenting voices will continue to express valid viewpoints and will have to be taken very seriously.

It is interesting to note that in connection with the Bulgarian Orthodox Church the judges in favor of establishment *ex lege* adopted a "sequential" approach, similar to the rule of recognition adopted by H. L. A. Hart, as a relevant criterion for establishing the moment at which it became a legal entity. This approach involves evoking rules which pre-date or pre-exist the state. On the face of it, rule of recognition in Hart's sense is a meta-principle or criterion (secondary rule) for assessing what is law and what is not in society as a whole. In practice recognition of churches is something that is done by laws

122. This was also the view taken by the European Court of Human Rights in both *Hasan & Chaush v Bulgaria* and *Metropolitan Church of Bessarabia v Moldova*.

123. In this article "establishment" does not refer to a constitutional provision for non-separation between church and state. I have previously argued (Petkoff, 2005) that the status of the Bulgarian Orthodox Church could be described as a quasi-establishment or hidden establishment which does not have the effect of abolishing the constitutional separation between religion and the state. The Bulgarian Orthodox Church nevertheless has as a consequence an implied establishment through the notion of the pre-existence of a particular religion in relation to a particular political community and the relevance of such pre-existence for this political community articulated in positive legal norms. In the present context establishment and establishment *ex lege* refer to the direct creation of legal entities by virtue of primary legislation.

124. Art. 13 of the 1991 Constitution of Bulgaria provides that:

(1) The practicing of any religion shall be unrestricted.

(2) Religious institutions shall be separate from the State.

(3) Eastern Orthodox Christianity shall be considered the traditional religion in the Republic of Bulgaria.

(4) Religious institutions and communities, and religious beliefs shall not be used to political ends. (Constitution, 1991).

(primary rules). In the present case, however, the "establishment *ex lege*" judges invoked legal sequences or secondary rules of recognition (Ottoman law, recognition by other churches, canon law predating the state, none of which are directly transportable into Bulgarian law) as legally relevant for the subsequent construction of what is effectively a statutory justification of establishment *ex lege* in Article 10. The foundation of the Bulgarian Orthodox Church as a legal person with international recognition in 1870125 was considered to precede the formation of the modern independent Bulgarian state. The doctrinal content of the dogmas of the church and its "societal connecting factor" were well known in Bulgarian society and the international community (BCC, 2003, 6).[126]

The dissenting judges – those in favor of establishment *ex lege* – pointed out that the *status quo* inherited by the Bulgarian Orthodox Church from earlier denominations laws, and its historical significance, was effectively based on something similar but not necessarily identical to the Hartian "rule of recognition" which preceded the existence of the Bulgarian state, and that such a rule of recognition was affirmed by the Denominations Act 2002 by establishing the church *ex lege*, only to declare this earlier rule of recognition. In other words the establishment *ex lege* judges may be seen to conclude that the (primary) rule enacted by the Denominations Act 2002, under which the Bulgarian Church is recognized as a legal entity *ex lege*, was a legislative step taken to clarify that according to the post-transition (secondary, Hartian) rule of recognition, primary rules recognizing the Bulgarian Orthodox Church under prior regimes are recognized under the (secondary, Hartian) rule of recognition that is now in place. Stated more straightforwardly, the current (Hartian) rule of recognition acknowledges the validity of (primary) recognition under the rules of former regimes that conferred legal entity.

In other words the dissenting judges in favor of *ex lege* status have proposed what might be considered an extended understanding of the Hartian rule of recognition: that it be extended to considerations of canon law (intercommunion) which are presented here as analogical to recognition in international law. The church(es) preexist the state because their normative existence is based as much on revelation, on interchurch relations, and on mutual recognition as it is on successive legal norms.

It seems that the dissenting judges in favor of establishment *ex lege* have developed a twofold interpretation of the "rule of recognition." First, interpreting its impact on the *ex lege* status, they have invoked the Hartian rule of recognition in arguing that this status is based on secondary rules of recognition through constitutive norms preceding the existence of the Bulgarian state. Second, the dissenting judges seem to argue that the status *ex lege* is also based on something which could be described as a recognition by a parallel legal order (canon law) through the relationship between the Bulgarian Orthodox Church and other Orthodox and non-Orthodox churches. This seems a rather complicated argument to follow. If international ecclesiastical recognition were relevant for the acquisition of status *ex lege*, an act equivalent to international law recognition of secession or self–determination which is then accounted for in municipal law, it raises the question why the *ex lege* status is not applied via the route of international recognition to other religious organizations.

The Bulgarian Constitutional Court thus emphasized a very important point: as far as religious institutions are concerned, the law has to take into account earlier rules of recognition. When a state recognizes a religious community, it is very likely going to be the case that it will be recognizing a community that has been recognized by someone else. Of course, the fact of that other recognition does not force the state in question to grant the same recognition, except in the sense that religious freedom will be likely to require this. At the same time, the state cannot be bound by religious rules of recognition,

125. In 1870 an independent Bulgarian Exarchate was established by a decree (*firman*) issued by the Ottoman sultan. This act of independence was not recognized by the Ecumenical Patriarchate and the Bulgarian Church remained excommunicate until 1949.

126. The constitutional court judges illustrated this point with the example of the role the Orthodox Church played in rescuing Bulgarian Jews from Nazi concentration camps. See Bar-Zohar, 1998; Crampton, 1997.

because that might force it into contradiction (in a case, for example, of mutual excommunication by two recognized churches). In this particular case, the judges in favor of establishment *ex lege* seem to suggest that the state could choose to accept such forms of recognition. The examples of the recognition of the Bulgarian Orthodox Church which they cite in their elaborations seem to have two distinct aspects. In the first example (from the nineteenth century) the Bulgarian church is recognized by a political community, but not by the Ecumenical Patriarchate (which excommunicates the Bulgarian exarchate in 1870); and the Bulgarian political community chooses to ignore the lack of "international" ecclesiastical recognition.

In the second example the church (under the synod of Patriarch Maksim) is not recognized by the political community (which favors an alternative synod), but is recognized by the "international" ecclesiastical community (including the See of Rome and the See of Constantinople), and the BCC chooses to consider this a relevant factor when the political community effectively triggers ecclesiastical divisions within the same religious community. The "establishment *ex lege*" judges came up with a surprising phrase: "The new statute does not in any way change the existing *status quo* of the Bulgarian Orthodox Church as a matter of fact or of law." The constitutional judges considered that discussing the argument about the proviso in Article 8.1 para. 6 of the Denominations Act 2002–suspending the status of a legal person–could only be qualified as "ridiculous." "Waiving the status of legal person from the Bulgarian Orthodox Church would be an act which, in its cultural and historical significance for Bulgaria, would have the opposite effect to the Sultan's firman 127 of 1870" (BCC, 2003, 6).

As noted above, the majority of the judges (six out of eleven) were against "establishment *ex lege*," but although they were in the majority the balance between their opinion and the opinion of the "establishment *ex lege*," judges could not produce a decisive opinion on behalf of the court as a whole.

The majority of the judges formed an opinion that was articulated by reference to the existing human rights mechanisms (with unusually well articulated familiarity with European Court of Human Rights case law) relevant to the case and, the judges were reluctant to take into consideration issues such as autonomy or group rights.

They formed their opinion in accordance with a basic, more literal understanding of legal principles in the light of the jurisprudence of the European Court of Human Rights. In their opinion the "establishment *ex lege*" clause "contradicts the principles of freedom of religion and its separation of the religious institutions from the state, which are protected by Article 13.1 and 13.2 of the constitution."[128]

The two groups of judges also added an additional interpretation of the debate on whether splinter groups are entitled to property which belonged to their original religious community. In their opinion this text does not necessarily exclude the possibility of the denominations in question making an independent decision to provide property to those who have split from the religious institution, and the text provides a guarantee against malpractices relating to the name and the property of religions.[129]

The Bulgarian Constitutional Court also found that the petition about the illegality of the legal ban on more than one religious organization registering under the same name lacked *locus standi*. In its opinion the name is an individualizing element of every legal person. In the present case the name also serves the purpose of distinguishing a religious institution from other religious institutions.

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127. This refers to the Ottoman statute which established an independent Bulgarian Church. On 28 February 1870 in response to petitions from the Bulgarian lobby in Constantinople the grand visier Ali Pasha granted the Bulgarian Constantinopolitan dignitaries a firman which resolved the longstanding dispute with the Patriarchate of Constantinople over church autonomy. By virtue of this firman the Bulgarian Church (Exarchate) had its independent right of existence restored. In its jurisdiction (15 dioceses) were included all territories inhabited by the Bulgarian population. A referendum was to be held in regions, towns and villages with mixed population in order to determine their choice of jurisdiction.

128. BCC, 2003, 6.

129. *Решение No 12 от 15 юли 2003 г. по конституционно дело No 3 от 2003 г.* (Обн., ДВ, бр. 66 от 25.07.2003 г.) http://www.constcourt.bg/(12/09/03)

As far as the provision regarding the ban on religious groups which have left a particular religious group to use their previous denomination's property, the court has taken a rather conservative stance. According to the dissenting judges, the ban on using a religious institution's property by persons who have split from it in violation of its internal rules is a "specific manifestation of the constitutional protection of the property right according to Article 17 of the Constitution." It is a fundamental civil law principle, no matter whether it has been mentioned in the Constitution or not, that whoever holds a property title can primarily hold and manage that property. There is a lack of legal and moral grounds for a person who has separated from a legal person in violation of this legal person's rules to be allowed to continue to use this legal person's property.

When a property belongs to a particular legal person, no matter whether such a legal person is a religious institution or not, all the matters regarding its property should be decided only by the legal person itself. Persons who have separated from the legal person do not have the right to its property. They could claim such rights only if they have added their own property to the *patrimonium* of the legal person insofar as there are legal grounds to claim such property back.[130] It is an absurd statement to claim that the ban of § 3 of the intermediary and concluding texts of the Denominations Act 2002 violates the autonomy of the religious institutions and prevents the possibility of the legal person on its own accord providing property for the use and/or management by the splinter group. The ban of § 3 reflects only on the hypothesis where the persons who have separated from the religious institution claim rights over property which does not belong to them, but to the institution they have left.

This becomes very clear from the context of the provision - it relates to persons who have split from the institution in violation of its statutes. If a religious institution (legal person) is willing to offer to a person who has split (legally or illegally) from it, to use and to manage its property, this could be done using the general rules of civil law. In this case the relationship between the legal person and the splinter group is one of third party. They are not internal affairs.[131] Property disputes are always between specific persons and for a specific matter. The provision of § 3 is general *erga omnes* and regulates property matters in a general manner in relation to all religions. The principle of a ban on use and management of property belonging to someone else is based on the constitutional right of property and extends to religious institutions as well.[132]The assenting judges found the claim in connection with § 3 of the intermediary and conclusive provisions of the Denominations Act 2002 admissible only in connection with the wording "to use and to hold its property."[133] Apart from the ban on using an identical name, the contested text also introduces another ban in connection with the persons who at the time of implementation of the statute have split from a religious institution in violation of its internal rules. Such ban excludes the use and holding of property belonging to the religious institution by such persons. This ban contradicts Article 13 (1 and 2) and Article 37 (1) of the Constitution. The autonomy of religious communities is affected by such a prohibition. The same prohibition, while excluding the possibility of independently resolving property disputes between religious institutions and persons who have split from them, does not help either party, and it even restricts the creation and maintaining of tolerance among different religious groups. It is another matter that resolving a property issue *ex lege* in fact takes over the function of the courts.[134]

The dissenting judges have decided that on the same grounds that the provision does not accord with Article 9 of the Convention and Article 18 of the Covenant. It only reflects on a property dispute, which has occurred before the new law was implemented, and is a dispute between the religious institution and a group which has split from it in violation of its ecclesiastical constitution. The statutory solution which is to be applied

130.Id. at 10.
131.Id. at 10.
132.Id. at 10.
133.Id. at 11.
134. Id. at 11.

when a split has occurred protects the interests of only one group and does not help in maintaining mutual respect, tolerance between these communities and contradicts the above provisions, which oblige the state to guarantee tolerance between such communities.[135]

V. EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE

A number of Article 9 cases were appealed in Strasbourg. The present section presents a mere summary of all settled, pending, and decided cases.

1. Pantusheva and Others v. Bulgaria (32 Applications) - Facts and Questions to the Parties

All applicants supported the "alternative leadership" of the Orthodox Church, presided over by Patriarch Pimen until his death in 1999, and thereafter by Metropolitan Inokentiy. The applicants did not accept the leadership of Patriarch Maxim.

Following the adoption of the Religious Denominations Act 2002, which entered into force on 1 January 2003, the activities of the "alternative leadership" chaired by Metropolitan Inokentiy were suppressed and the Church was forcibly united under the control of Patriarch Maxim. In a massive police operation ordered by the Chief Public Prosecutor and carried out on 21 July 2004, the representatives and supporters of the alternative leaders were evicted from all churches, monasteries, and administrative premise they controlled. Some of the applicants were present and were physically evicted.

These events are described in detail in the Court's decision on admissibility in the case of *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria* ((dec.)), nos. 412/03 and 35677/04, 22 May 2007). The case is filed in connection with the case of *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria* (cited above). The applicants complain, relying on Articles 9 and 13 of the Convention and Article 1 of Protocol No. 1, that they had been the victims of an unlawful and arbitrary State interference in internal affairs of the Church, that they had been deprived of property, and that they did not have effective remedies. Some of the applicants also complained under Article 6 of the Convention that they had been deprived of access to court in relation to the actions of the prosecuting authorities.

2. Hasan and Chaush Ivanova v. Bulgaria[136]

The applicant alleged that her right to freedom of religion had been violated because her employment had been terminated on account of her religious beliefs (Article 9), which had amounted to discrimination on religious grounds (Article 14, in conjunction with Article 9).

By a decision of 14 February 2006 the Court declared the application partly admissible. Considering the above facts and the sequence of events, the Court finds that the termination of the applicant's employment was not simply the result of a justified amendment of the requirements for her post, but in fact took place on account of her religious beliefs and affiliation with Word of Life, thus constituting an interference with her right to freedom of religion at variance with Article 9 of the Convention. The fact that the applicant's employment was terminated in accordance with the applicable labor legislation – by introducing new requirements for her post which she did not meet – fails to eliminate the substantive motive for her dismissal. Most telling in this respect is the meeting of 2 November 1995 at which the applicant was pressured by two Government officials to renounce her religious beliefs in order to keep her job (see paragraphs 31 and 42-43 above). The Court considered this to be a flagrant violation of her right to freedom of religion guaranteed under Article 9 of the Convention (see the general principles and case-law references in paragraphs 77-80 above).

In view of the above, the Court found that the applicant's right to freedom of religion was violated because her employment had been terminated on as a result of her religious beliefs. There has therefore been a violation of Article 9 of the Convention on that account.

3. Ivanova v. Bulgaria[137]

The applicant alleged that her right to freedom of religion had been violated because her employment had been terminated on account of her religious beliefs (Article 9), which had amounted to discrimination on religious grounds (Article 14, in conjunction with Article 9).

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135. Id. at 11.

136. Hasan v Bulgaria (30985/96). (2002) 34 E.H.R.R. 55. (ECHR) European Court of Human Rights.

137.Ivanova v Bulgaria. (2008) 47 E.H.R.R. 54; 23 B.H.R.C. 208; [2007] E.L.R. 612 (52435/99) European Court of Human Rights, 12 April 2007.

By a decision of 14 February 2006 the Court declared the application partly admissible. Considering the above facts and the sequence of events, the Court finds that the termination of the applicant's employment was not simply the result of a justified amendment of the requirements for her post, but in fact took place on account of her religious beliefs and affiliation with Word of Life, thus constituting an interference with her right to freedom of religion at variance with Article 9 of the Convention. The fact that the applicant's employment was terminated in accordance with the applicable labor legislation – by introducing new requirements for her post which she did not meet – fails to eliminate the substantive motive for her dismissal. Most telling in this respect is the meeting of 2 November 1995 at which the applicant was pressured by two Government officials to renounce her religious beliefs in order to keep her job (see paragraphs 31 and 42-43 above). The Court considered this to be a flagrant violation of her right to freedom of religion guaranteed under Article 9 of the Convention (see the general principles and case-law references in paragraphs 77-80 above).

In view of the above, the Court found that the applicant's right to freedom of religion was violated because her employment had been terminated on as a result of her religious beliefs. There has therefore been a violation of Article 9 of the Convention on that account.

4. Khristiansko Sdruzhenie[138]

Involved registration of Jehovah's Witnesses in Bulgaria, and parties reached a settlement.

5. Lotter and Lotter v. Bulgaria

Bulgarian authorities acted arbitrarily and unlawfully and in ordering applicants to leave Bulgaria for the sole reason that they were Jehovah's Witnesses. Parties reached a friendly settlement.

6. Glas Nadezhda EOOD and Elenkov v. Bulgaria

Applicants complained that refusal of a competent body to grant Glas Nadezhda EOOD a radio broadcasting license and of the Supreme Administrative Court to review the merits of the decision made by this body had breached their rights under Articles 9, 10 and 13 of the Convention. The Court concludes that, as in the cases just cited, the approach taken by the Supreme Administrative Court – refusing to interfere with the exercise of NRTC's discretion on substantive grounds – fell short of the requirements of Article 13 of the Convention. ECtHR held that there has been a violation of Article 10 of the Convention; that there is no need to examine separately the complaint under Article 9 of the Convention; that there has been a violation of Article 13 of the Convention in conjunction with Article 10.

6. Supreme Holy Council of the Muslim Community v. Bulgaria[139]

The applicant organization alleged, in particular, that it had been the victim of arbitrary and discriminatory State interference in the organization of the Muslim community in Bulgaria, that it did not have an effective remedy in this respect and that the requirements of impartiality and fairness had been breached in the ensuing judicial proceedings.

The applicant, the Supreme Holy Council (Висш духовен съвет) of the Muslim Community, headed by Mr Nedim Gendzhev, was the officially recognized leadership of Muslims in Bulgaria, at least between 1995 and 1997. In reality, at the relevant time it was one of the two rival Muslim religious leaderships in Bulgaria. Mr Nedim Gendzhev, a Bulgarian citizen born in 1945 and residing in Sofia, was its leader. He was the Chief Mufti at least between 1988 and 1992 and the President of the Supreme Holy Council at least between 1995 and 1997.

It follows that the applicant organization's complaints fall within the ambit of Article 9 of the Convention, which is applicable.

ECtHR decided that the interference with the applicant organization's rights under Article 9 of the Convention in 1997 was not necessary in a democratic society for the protection of public order or the rights and freedoms of others, and it was therefore contrary to that provision.

7. Holy Synod of the Bulgarian Orthodox Church v. Bulgaria[140]

The court established that there has been a violation of Article 9 of the Convention in respect of all applicants but held that the question of the application of Article 41 is not ready for decision in so far as pecuniary and non-pecuniary damage is concerned.

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138. Christian Association of Jehovah's Witnesses v Bulgaria. (1997) 24 E.H.R.R.

139. Supreme Holy Council of the Muslim Community v Bulgaria

. *(2005) 41 E.H.R.R. 3* (39023/97) European Court of Human Rights, 16 December 2004

140. Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v Bulgaria *(2010) 50 E.H.R.R. 3* (412/03) European Court of Human Rights, 22 January 2009

Accordingly, reserved the said question and invited the Government and the applicants to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach. It also reserved the further procedure and delegates to the President of the Chamber the power to fix the same if need be.

In this way the Court established that there has been an Article9 (state interference) violation and encouraged the parties to reach a settlement for the damages which under the circumstances implied a further state interference by way of "helping" the divided groups within the BOC to reach a settlement.

8. H. M v. Bulgaria[141]

The applicant was denied her parental rights because she is a Jehovah Witness. The parties reached a settlement.

VI. Domestic Jurisprudence Relating to Law and Religion

A. State Interference

The issue of state interference dominated the relationship between law and religion throughout the post-communist period. The democratic changes were marked by divisions within the governing bodies of the Bulgarian Orthodox Church and the Supreme Muslim Council. Those divisions were part of the painful process of purging Communist collaborators from all strata of public life and the reformers perceived a radical makeover of the major religious institutions to be part of this process. In both cases, the divisions were viewed as a Government-backed renewal of the religious institutions in Bulgaria by creating a Government backed parallel structure and by sacking the incumbent religious leadership. DA2002 was aimed at resolving this trend of religious interference and putting an end of the schism within the Bulgarian Orthodox. Subsequent jurisprudence suggests that DA2002 did not change the way executive and judiciary in Bulgaria dealt with questions relating to freedom of religion or belief.

The most peculiar example was the question which the status *ex lege* designed to protect the Bulgarian Orthodox Church from state interference raised subsequent to the passing of DA2002. The existence of a registration procedure for all other religions and the maintaining of a register of all religions in the land prompted a query – should the Bulgarian Orthodox Church be entered in this register or not? From the point of view of the constituting of the Bulgarian Orthodox Church the answer to this question would have probably been negative. From the point of view of administrative law however there appeared to be a loophole in DA2002 which stipulates that on the one hand all registered religious denominations could register local branches on the basis of their prior registration in the SCC register. The statute was tacit whether or not and on what basis should BOC register its local branches.

How do the BOC branches come into being if BOC does not have to be constituted like all other religious organizations? The Supreme Court of cassation had to look into the issue and came up with the view that BOC would have to request a declarative, rather than a constitutive recordal in the Register which will create a record of the consequences of the statutory *establishment ex lege.*[142] The Holy Synod of BOC did not accept this interpretation and declined to register a recordal of its hierarchy and branches.

This case flagged an interesting question of religious autonomy but the discourse was not pushed further the implications of the interpretation of both sides – an argument for legal certainty v an argument for religious autonomy from possible state interference. In 2003 two Muslim conferences split in two fractions and by the end of 2003 two separate Muslim forums elected two Supreme Muslim Spiritual Councils and two Chief Muftis – Fikri Hasan and Ali Hadjisaduk. Both leadership structures applied for registration with

141. M v. Bulgaria *(1996) 22 E.H.R.R.*

142. Решение № 120 от 11.03.2005 г. на ВКС по гр. д. № 496/2004 г., ТК, I о., докладчик съдията Караколева.

the Sofia City Court. Meanwhile, Nedim Gendzhev, elected as the leader of the Muslim faith at the 1996 conference, challenged the legality of the conferences of 1997 and 2000 before the Bulgarian courts, and subsequently - before the European Court in Strasbourg. In 2004, the Supreme Appellate Court ruled on Nedim Gendzhev's complaints that those forums had been illegitimate and their decisions invalid.[143] This interrupted the registration procedures regarding the decisions that resulted from the two conferences held at the end of 2003.

In July 2004, the Chairman of the Sofia City Court "referred the matter to himself" and appointed a temporary official leadership of the Muslim religion, headed by Fikri Hasan, who had been chosen at one of the two conferences and whose choice had the approval of the MRF.[144] Later both the Appellate Court and the Supreme Court of Cassation (on January 20, 2005) ruled that the decision by the Chairman of the Sofia City Court had been *ultra vires*.[145] Thus, only Nedim Gendzhev, as the chairman of the Supreme Muslim Council elected in 1996, and the Chief Mufti, Ali Uzunov, were ruled legitimate. The Sofia City Court despite the above judgment issued in January 2005 a certificate of Current Legal Status to Fikri Hasan. According to that document, he and his council constitute the leadership of the Muslim faith. The prosecution required and held the original incorporation documents thus preventing further the registration of Gendzhev and Uzunov. On 16 December 2004, the European Court of Human Rights delivered its judgment establishing a state interference in the internal affairs of a religious community in the case of the *Supreme Holy Council of the Muslim Community v. Bulgaria.*[146] On 20-21 July, 2004 in an attempt to resolve the internal dispute within the Bulgarian Orthodox Church, the police ceased 94 churches and other buildings all over the country, evicted the priests serving in them, sealed the churches restituted all the property to the Synod of Patriarch Maxim. The ECtHR considered this to be another case of state interference in the internal affairs of a religious community.[147]

B. Registration

Under the new Denominations Act 2002, the other recognized religious denominations had their registration renewed by the Sofia City Court without major obstacles by early 2003. Despite the establishment *ex lege* of the BOC, the courts were rather confused over the question whether BOC should record its governing structures like the other religions but as an overseeing procedure rather than as a constitutive procedure.[148] Registration of local branches remained a problem. Local ordinances

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143. Определение № 1237 от 8.02.2005 г. на ВАС по адм. д. № 9756/2004 г., III о., докладчик съдията Галина Христова; Определение № 5068 от 26.05.2003 г. на ВАС по адм. д. № 577/2003 г., III о., докладчик председателят Бисерка Коцева; Определение № 811 от 31.01.2003 г. на ВАС по адм. д. № 11053/2002 г., 5-членен с-в, докладчик съдията Ангел Калинов.

144. On 28.May 2004 CCC with Decision №3/08.03.2004 of company case № 1659/2003, removed from the company register of religious denominations Selim MEhmed and Mustapha Hadji who in the view of the court were elected in a Muslim conference which was summoned in 2000 not in violation of the existing statute of the Muslim community in Bulgaria. Having declared the Muslim conferences of 1997 and 2000 as void in Decision № 3/28.05.2004 CCC with Ruling of 19.07.2004 to company case №1659/2003 appointed an interim governing council (Firi Sali, Ridvan Mustapha and Oslam Ismailov) who are to represent and govern the Muslim community until a judgment establishing the legitimate representative of the Muslim faith. This is an unprecedented development – DA2002 introduces only declaratory and not constitutive powers of the court which registers a religious organization, the court could enter facts into the register but has no authority to appoint governing bodies.

145. On 29 October 2004. SApC with Ruling № 648 on priv.civ.case.№1816/2004. */Appendix №7/* of the Supreme Muslim Council annulled as inadmissible the Ruling of 19 July 2004 regarding comp.case. №1659/2003 of CCC which appointed a governing body to the Muslim council, On 20 January 2005 SCasC issued Ruling № 46 */Appendix №8/*confirmed Ruling №648/29.10.2004. на SApC, which abolishes the appointed interim body.Together with Ruling № 46/20.01.2005 BCasC with Ruling №45/20.01.2005*/Appendix №9/and returnedthe case to* CCC with instructions to record N Gendzev's governing body § 2 in accordance with the Transitional and concluding rules of DA2002.

146. See id.

147. See id.

148. Решение от 20.10.2003 г. на ВтАС по в.ф.д. № 258/2003 г., ГК, докладчик съдията Минов

adopted prior to DA2002 were and are still in force. Article 19(2) of DA2002 calls for a "notice requirement" for the purposes of local branch registration. Yet, the Act itself provides a number of formal requirements, which, if not met, may result in a registration refusal. At present, almost none of the major denominations have completed the process, which severely hinders their local activities.

The above-discussed issue of state interference within the internal affairs of the Bulgarian Orthodox Church and of the Supreme Muslim Council emerges initially as a registration matter.[149] In April 2008, an NGO was closed based on accusations that it was involved in activities that are only allowed to communities registered under the DA2002. This was the case with the so-called Ahmadii in Blagoevgrad. The group had obtained registration as an NGO because in 2005 it was denied registration as a religion. In April 2008, the Blagoevgrad County Court revoked its NGO status following two registration refusals in 2005 and 2007 under the name of Religious Community of the Ahmadis.[150] The Sofia Court of Appeal (SApC) upheld the above judgments and while the concerns that the Ahmadis as a heretical Muslim sect may "cause dissent in the Muslim religious circles" and that their interpretation of the Islam is "not traditional" for our country maintained that the religious community cannot exist as a religious organization by bypassing the legal framework of the DA2002.[151]

On 28 December 2009, the Smolyan County court decided to terminate the activities of the Union for Islamic Religion and Culture, an NGO. The organization became known by helping high school students from Devin file a failed complaint with the Commission for Protection against Discrimination because the Smolyan school authorities had banned them from wearing Muslim headgear in school.[152]

The Bulgarian Helsinki Committee reported that in 2007, the Sofia City Court (SCC) reined the registration of the Eastern Orthodox Apostolic Church.[153] The Plovdiv-based organization filed for registration on the 22 December 2006. Among its founders was Hristofor Sabev, well-known political dissident, who was in the centre of the initial schism of the Bulgarian Orthodox Church and was subsequently excommunicated by the Bulgarian Orthodox Church. The new denomination is Orthodox; two new characteristics have been added to its name, in order to avoid duplication of names, which the law prohibits. It is not just "Orthodox," but also "Eastern" and "Apostolic." The court denied registration and found that the by-laws of the new church make it evident "that this is a group of Christians who have left the Bulgarian Orthodox Church (a legal entity under Article 10, para 2 of the Denominations Act)." The court went on to conclude: "It is evident that this group of Christians does not recognize the governing powers of the supreme bodies of the Bulgarian Orthodox Church, which is why it does not seek registration as a local division at the respective district court (Article 20 of the Denominations Act), but is trying to obtain registration at the SCC."

In the court's opinion, a group that identifies itself as Orthodox may only exist as a local division of the Bulgarian Orthodox Church. Therefore, the court stated: "This group is trying to use the registration procedure to solve an internal organizational issue that the

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Решение № 120 от 11.03.2005 г. на ВКС по гр. д. № 496/2004 г., ТК, I о., докладчик съдията Караколева

149. The Bulgarian Denominations Act 1949 (DA, 1949) was used by the Denominations Directorate under the Filip Dimitrov government (1991–92) to suspend Patriarch Maksim of the Bulgarian Orthodox Church, to appoint an alternative synod and to commence the ongoing saga of the so-called schism of the Bulgarian Orthodox Church. Leaders of the Bulgarian Orthodox Church and the Supreme Muslim Council challenged some of the acts of the administration before the Supreme Court. Muslim leaders filed a case against the dismissal of the chief mufti. The Supreme Court disallowed the claim, stating that the director of religious affairs had acted "according to his competence under the law," that is, under Article 12 of the Denominations Act 1949. In the case of the Bulgarian Orthodox Church the Supreme Court disallowed the claim of Patriarch Maksim by a decision of 2 July 1992, declaring him "illegitimate" and acknowledging the right of free discretion of the executive branch in legitimizing church leaderships.

150. Decision № 51 of 13.03.2008 civ.case 171/2006 Blagoevgrad County Court.

151. Решение № Т-106 гр.София, 19.02.2010 год Софийски Апелативен Съд, търговско отделение,6с-в

152. Решение 37 постановено от Трети специализиран постоянен състав на Комисиятя за защита от дискриминацията, http://kzd-nondiscrimination.com (11/07/10)

153. BHC Report http://www.bghelsinki.org/index.php?module=pages&lg=bg&page=reports (11/07/10)

court is really able to solve, but following another procedure." For the SCC, however, "not only its name, but the description of its religious beliefs defines it as Orthodox, and Article 10, para. 1 of the Denominations Act explicitly stipulates that the self-governing Bulgarian Orthodox Church – a legal entity by law (Article 10, para. 2) and thus excluded from the scope of Article 15 of the Denominations Act – is the expression and the representative of the Eastern Orthodox Christianity."

There cannot be an alternative Orthodox canonical order of presbyters and bishops, given the fact that this religious community does not recognize the canonical leadership of the Bulgarian Orthodox Church, which is recognized by the local churches."[154] The Eastern Orthodox Apostolic Church eliminated the word "Orthodox" in its name and submitted another registration application in August 2007. Registration was again denied, on the grounds that, according to the Religions Directorate, the principles of the faith were described "too generally". The organization was thus forced to submit a third registration application in January of 2008 and was finally registered in February of 2008. In March 2007, the SCC denied registration to the International Community for Krishna Conscience – Sofia, Nadezhda. In 2008, the Supreme Court of Cassation, ruled in favor of denial of registration because there is no difference between the organization applying for registration and the registered International Community for Krishna Conscience in Bulgaria and is therefore subject to the limitations under Article 15, para. 2 DA2002, which stipulates that "the existence of more than one legal entity as a religion with the same name and headquarters shall not be allowed."[155]

VII. SECURITY AND COUNTER-TERRORISM

In March 2003, two members of the Caliphate Muslim Society were arrested in the Roma quarter of Pazardzhik on allegations of Islamic fundamentalism. No formal criminal charges were pressed. In May 2003, press reports and police sources claimed that the authorities prevented an "unauthorized gathering of Muslims who had come under the influence of a Lebanese Islamic movement" in South Bulgaria. At the beginning of November 2004, the Pazardzhik County Court sentenced Muslim cleric Ahmed Musa Ahmed to three years imprisonment and a 1,000-lev (500 Euro) fine, for his preaching of "radical Islam."[156]

On 20 February 2007 the National Security Service (NSS) announced the discovery of a criminal group of four "Islamists" under the leadership of the former mufti of Sofia, Ali Hayredin. The group was preaching "radical Islam, the ideology of Jihad and Wahhabism" and maintained "relations with banned Islamic organizations and mostly with Ahmad Musa, a Jordanian expelled from the country six years ago." According to the security services, these people "have conducted their intelligence activities" via the Internet by maintaining websites containing information on Islamic teachings. Four people were arrested and released on bail.[157]

VIII. TAX

Representatives of several Protestant bodies complained about discrimination in local tax assessments. Their properties were treated for tax purposes as industrial estates, while Christian Orthodox churches paid token amounts or were exempt altogether. Non-Orthodox denominations are required to pay taxes on foreign donations, even when these are in the form of humanitarian aid or literature. [158]

154. BHC Report 2006 http://www.bghelsinki.org/index.php?module=pages&lg=bg&page=reports (11/07/10).
155. Id.
156. В Пазарджик гледат дело за проповядване на ислямски фундаментализъм 01.11.2004, news.bg http://news.ibox.bg/news/id_1593234747(11/07/10); supra n. 154.
157. Supra n. 154.
158. Id.

IX. CONSCIENTIOUS OBJECTION

In May 2003, Parliament adopted amendments to the Alternative National Service Act[159] whereby the term of peacetime alternative service was reduced from double to one and a half times the duration of conscription military service; and the provision was repealed under which alternative service could be extended by way of a disciplinary sanction. However, certain additional restrictions were introduced by the same amending legislation. Decisions to grant exemption from military service or impose disciplinary sanctions were excluded from judicial review. Moreover, the amendments did not go as far as to repeal altogether the unreasonable and discriminatory restrictions imposed on alternative servicemen, such as the inadmissibility of civil work in non-profit organizations; the ban on religious or atheistic propaganda; the ban on alternative servicemen's membership in trades unions or participation in trades union activities; the ban on alternative servicemen's running for elected office.

In 2010 Bulgarian Army became professional and the issue of conscientious objection in the context of military service became redundant.[160]

X. FAMILY LAW

Veliko Tarnovo Appellate Court found admissible a case filed by the relatives of a female member of the Jehovah's Witnesses.[161] She was to be stripped of legal powers and placed under guardianship on the grounds of having a "mental disorder" because she was a member of the Jehovah's Witnesses.

According to the Bulgarian Helsinki Committee in December 2003, the Turgovishte County Court upheld the District Court decision in the divorce case of Violeta Tacheva Tsvetkova, who was deprived of custody over her children, aged 9 and 12, and her former husband given full custody.[162] The grounds for this were that the mother, due to her membership in the Jehovah's Witnesses, could not raise her children properly, because "she, as a parent, has to a large extent violated the rights of her children, as well as other constitutional principles." In addition, the court considered that "with regard to this indicator [ability to raise one's own children], the father has an exceptionally large advantage, because he is capable of giving the children the opportunity both to be informed, and to develop their own abilities in a different direction," while the mother had "restricted [their] rights." That restriction consisted of her strong desire for the children to receive a religious upbringing, in the spirit of the teachings of the religion to which she belongs. In December 2004, the Supreme Administrative Court upheld the ruling of the Turgovishte County Court.[163]

XI. RELIGIOUS DISCRIMINATION IN THE WORKPLACE

In October 2005, a company in Veliko Turnovo refused to accept German intern Kristina Engel, because she had stated that she was a Jehovah's Witness. The victim filed a complaint with the Anti-Discrimination Commission.[164]

In 2007, the ECtHR ruled in favor of Ivanova who was dismissed from her teaching position for belonging to "a dangerous cult" (see the case comment above).

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159. Id.

160. ЗАКОН за отбраната и въоръжените сили на Република България Обн., ДВ, бр. 35 от 12.05.2009 г, в сила от 12.05.2009 г.

161. Пращат свидетелка на Йехова на психиатър Монитор, Четвъртък 15 Октомври, 2009 http://www.monitor.bg/ (10/07/10); supra n. 154.

162. Supra n. 154.

163. At the time of completion of this report the author has been unable to gain access to the judgments of this case and relies entirely on the accuracy of the BHC Report, supra n. 154.

164. For further details see: Rositsa Stoykova, "Jehovah's Witnesses File Complaint with Anti-Discrimination Commission," *Obektiv* magazine, issue 126, November 2005. See also Определение № 8308 от 25.07.2006 г. на ВАС по адм. д. № 6444/2006 г., V о., докладчик съдията Захаринка Тодорова. Определение № 11479 от 21.11.2006 г. на ВАС по адм. д. № 10270/2006 г., 5-членен с-в, докладчик съдията Джузепе Роджери.

XII. MEDIA ACCESS RESTRICTIONS

Major nationwide TV networks only broadcast programs geared towards Orthodox Christians (the exception is one Sunday-morning program on the Bulgarian National Radio station Hristo Botev, which discusses other religions in addition to Orthodox Christianity, but in a purely informational tone).

The United Church of God's application to receive a radio-station license was been denied in five consecutive years by the Council on Electronic Media (CEM), due to a "lack of technical feasibility.[165] Similarly, while Voice of Peace, an evangelical radio station in Sliven, does have a programming license issued by the CEM, but it does not have a technical license and cannot operate.[166] There are other radio stations operating in the same city without a technical license.

XIII. LEAVE TO ENTER

The practice of preventing foreign missionaries attempting to work in Bulgaria by delaying or denying the granting of leave to enter continues. In December 2004 two German missionaries were denied entry into Bulgaria, with no explanation given.[167]

On 26 October, 2005, the Interior Ministry did not grant leave to enter to famous Korean preacher, Dr. Sun Myung Moon who was due to open the Bulgarian branch of his new organization, The Federation of Universal Peace. The reason given for the ban on his entry was the "complex situation in the country" following the unconnected recent murder of the financier Emil Kyulev. Prior to Moon's arrival, extreme nationalist groups lobbied against granting him a leave to enter.

XIV. PLACES OF WORSHIP AND RELIGIOUS SYMBOLS

On 13 June, 2008 the Ruse Municipal Council passed a decision which required mayor Bozhidar Yotov "to initiate the necessary measures to terminate the sound aggression emanating from the sound system of the Sais Pasha mosque.[168] According to the majority in the local council, the sound system on top of the minaret is a "public nuisance" and it is the mayor's duty was measures to eliminate nuisance as required by the legislation on the environmental protection from noise.[169] Decision was adopted on initiative by the councilors of the Ataka Party upon collection of signatures initiated by the same party and after the visit to Ruse of the leader of Ataka, Volen Siderov. Similar attempts were made by the initiative of GERB and Ataka politicians and the them Mayor and now Prime-Minister Brissov met with the Chief Mufti and to discuss allegations of public nuisance in connection with the speakers used to amplify the prayer call from the mosque in the centre of Sofia.[170]

XV. ADMINISTRATIVE LAW AND PROSELYTISM

A common way of preventing of proselytizing at a municipal level in Bulgaria involves different forms of administrative action imposed by way of fines, policing, and restrictions on the basis of legal technicalities. Below is a summary of such instances reported by the Bulgarian Helsinki Committee.

On July 12, 2005, the Plovdiv Municipality fined Hans Amon, a Jehovah's Witness, 200 levs (100 Euro), because on March 28, 2005, he had been "distributing brochures

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165. Решение № 10683 от 27.11.2002 г. на ВАС по адм. д. № 4247/2002 г., 5-членен с-в, докладчик съдията Ваня АнчеваРешение № 4064 от 23.04.2003 г. на ВАС по адм. д. № 4302/2001 г., V о., докладчик съдията Таня Радкова.

166. Определение № 7283 от 17.06.2008 г. на ВАС по адм. д. № 4073/2008 г., VII о., докладчик съдията Юлия Ковачева.

167. Supra n. 154.

168. Id.

169. Id.

170. Кмет, мюфтия и ходжа се събират заради шума от джамията Dnevnik.bg 16 юли 2006.

with religious content in a public place."[171] In December, a Plovdiv court upheld the fine and Regional Court and the SAC upheld the decision.[172]

In April 2005, a group of Mormons from Pleven was forbidden to distribute brochures with religious content on the streets of the city. The case is pending at present.[173]

A number of municipal ordinances restrict the right to public expression of religious beliefs of groups which are not officially recognized under DA2002 or are officially recognized nationally, but have not registered a regional branch in a given city. Under Article 19 of the *DA2002*, they may have local branches if their by-laws provide for this, and the registration of a local branch is left at the discretion of the religion itself.

In Burgas, the respective municipal ordinance prohibits in Article 1, para. 1 "the public expression of religious beliefs by representatives of religions that have not been registered under the DA2002."[174]

In Plovdiv, the local *Ordinance on the Protection of Public Order* in its Article 7, para. 1 prohibits "demonstrations, religious and other mass and public events without prior notification of the Municipality". Religions may "organize public activities outside their prayer homes under the terms of this ordinance," i.e. after they notify the municipality.[175]

In 2008, the Varna municipal government continued to do everything to hinder the construction of a Jehovah's Witnesses prayer home. On July 16 the Supreme Administrative Court confirmed the decision of the Varna Administrative Court rejecting the Jehovah's Witnesses complaint against the municipal order for the suspension of the construction of their prayer home.[176]

On 9 April 2008 the municipality of Burgas sent a circular letter to all schools in the city warning of the danger of religious movements such as Jehovah's Witnesses, the Church of Jesus Christ of Latter-day Saints, and the Evangelical Pentecostal Churches of Bulgaria.

In a judgment of 3 November 2008, the Burgas Administrative Court denied a motion for defamation filed by the Jehovah's Witnesses against the above letter, on the grounds of technicality that the evidence submitted does not allow the Court to draw a conclusion regarding the connection between the identity of the Jehovah's Witnesses described in the information and identity of the plaintiff – the Jehovah's Witnesses in Bulgaria.[177]

XVI. RELIGIOUS HATRED/RELIGIOUS HATE CRIMES

A. Christianophobia

The following cases are reported by the Bulgarian Helsinki committee and while there is no ongoing litigation in connection with these cases it is important for those to be mentioned in passim because they highlight an ongoing problem of lack of adequate due process in these categories of cases.

In October 2005, two protestant preachers were attacked by Muslims in the town of Gotse Delchev as they were distributing invitations to an evangelical film.[178] Similar

171. Plovdiv District Court Decision No. 360, on Case No. 1442, 20 December 2005.

172. Решение от 12.11.1999 г. по ах. д. № 1876/99 г. по описа на Пловдивски окръжен съд, трети състав. Решение № 11299 от 5.12.2003 г. на ВАС по адм. д. № 5116/2003 г., III о., докладчик съдията Йорданка Костова

173. Supra n. 154.

174. Supra n. 154.

175. Id.

176. № 1941 от 7.08.2007 г. по частно адм. дело № 1469/2007 г. на Административен съд, Варна, XXXI-състав ; Определение № 8988 от 1.10.2007 г. на ВАС по адм. д. № 8588/2007 г., II о., докладчик председателят Веселина Тенева; Решение № 8791 от 16.07.2008 г. на ВАС по адм. д. № 2518/2008 г., II о., докладчик съдията Захаринка Тодорова

177. Supra n. 154.

178. Reported by Pastor Nikolai Nedelchev, president of the *European Evangelical Alliance*, quoted in *Religious Freedom in Bulgaria, Romania and Turkey: In Depth*, a report published in November 2005 by the Dutch organization *Jubilee Campaign NL*, 13.

incident took place on 4 August, 2005, in the village of Grohotno, near the town of Devin, when some evangelical students distributing biblical-themed films were greeted with a protest demonstration led by the local imam and the mayor withdrew the permission for distribute of the above mentioned films.[179]

On 24 May 2003, the Evangelical Pentecostal Church in the town of Shoumen was vandalised: unknown perpetrators threw stones and broke 17 windows.

In June 2003, residents of the *Slaveikov* housing estate in Bourgas announced their intention of staging a riot to prevent the construction of a house of prayer by the Jehovah's Witnesses. The protest lasted several days and provoked discriminatory comments against the Jehovah's Witnesses by local politicians and city officials. In the end, Jehovah's Witnesses suspended the project.

In November 2003, an American pastor was assaulted in Varna by young nationalists and suffered grievous bodily injury. The offenders were identified but never prosecuted.

In December 2003, the Mayor of Stamboliiski refused to allow Seventh-day Adventists to hold a religious teaching event in the village of Yoakim Gruevo, and initiated a petition against the "sect" signed by 41 local residents. Local police and city officials in several in several areas continued to issue fines against the Jehovah's Witnesses proselytizing.

As the result of instigation by Skat TV residents of the Burgas neighborhood Meden Rudnik protested the inauguration of a building belonging to the Jehovah's Witnesses on 2 October 2003, on the pretext that it was "a danger" to their children and that the religious organization had lied to them, by failing to inform the population what purpose the building would be used for.

There were also other cases of the flames of religious hatred being fanned by the media: articles in *24 Chassa*, shows on Nova Television, etc.[180]

In the spring of 2007, IMRO (Internal Macedonian Revolutionary Organisaiton) activists tried to disrupt the organization's regional congresses in Varna, Dobrich and Pernik. In November, the bTV and Nova national television stations launched a campaign against the organization. The occasion was the refusal of blood transfusion by Hristo Hristov, a member of the organization from Dimitrovgrad who was being treated from internal hemorrhage at the Military Medical Academy in Sofia.

In late June 2007, the municipality of Varna initiated a series of inspections of the recently started construction works of the Kingdom Hall. On 4 July 2007, a group of citizens from the Mladost residential area held an IMRO-instigated protest rally against the construction. During the rally, which was covered widely by local and national television stations, they claimed that the "prayer house" will "be a threat to [their] children" and that it constitutes "an attack against Orthodox Christianity". The same day the mayor of Varna fined the technical site manager at the site with BGN 3,000 (1,500 Euro) for alleged failure to comply with some technical requirements at the site. As a result the building works have been suspended for the last nine months and there are pending court cases appealing the administrative act.

B. Islamophobia

The Bulgarian Helsinki Committee registered a series of incidents involving buildings of the Muslim religion in Bulgaria in 2007: insulting graffiti, attempted attacks, broken windows.

According to the Chief Mufti's Office, the mosque in Pleven was desecrated ten times with swastika drawings on its walls.

The mosque in Kyustendil and Silistra, which suffered many attacks in past years, had its windows broken in December 2007.

On 11 September, 2008 against 53-year-old Hasan Salih Tahir, a Bulgarian Muslim

179. Id. at 12.

180. For example, "Dangerous Cult Sows Miracles," *24 Chassa* newspaper, July 16, 2005, as well as the Nova Television morning show on December 5, 2005, on the topic of "Dangerous Cult Discovered in Sofia,"et al.

from the village of Bogdanitsa near Plovdiv was attacked and left unconscious on the street close to the mosque where he was later found by other Muslims attending a morning prayer. The night before the incident, a group of half-naked young people gathered in front of the mosque, shouted and cursed the people coming out of the house of prayer, and threw stones at the congregation. Police was present but did not intervene.[181]

According to Chief Mufti's Office, Husein Hafazov, there were more than 50 cases of desecration of Muslim prayer and administrative buildings in the past 10 years, i.e., between 1997 and 2007[182]. There have been only two successful arrests. The press reported the desecration but did not denounce it.[183]

There is no evidence that defamation of religion is at all prominent in the religious freedom discourse in Bulgaria.

Defamation of religion as a specific discourse originating from within the Muslim community and aimed at protecting Islam has not become prominent in Bulgaria. This is partly due to the fact that Bulgarian Muslims have been represented by the MRF a secular political party which is the Kingmaker in the Bulgarian Parliament and relies on the votes of the Bulgarian Ethnic Turks.

On the one hand MRF consider themselves as kingmakers and while they rely on the stable electorate of the Bulgarian ethnic Turks, they cannot and do not wish to present themselves as a religious party. Their Denominations Bill 2002 was the most liberal and they tend to stay out of the debate about religious symbols in the public sphere. On the other Ataka, the far right nationalist party which found its way into the Parliament sides with the populist government in the maintenance of traditional Bulgarian Orthodox culture and is also reported to be involved in most of the acts of religious hatred in relation to alien, non-Bulgarian religions in Bulgaria.

Another reason for the absence of a defamation of religion discourse is the memory of the 500 years of Ottoman rule in the Bulgarian psyche which makes defamatory or hateful views about Islam an integral part of the colloquial political rhetoric in Bulgaria and is very far from not being politically correct. Recently he far right party Ataka praised the stunt organized by SKAT TV backed by them and involving a cameraman and a reported entering the private lodgings of the Plovdiv Metropolitan Nikolai a presenting him with a fez hat which in the eyes of the Nationalists is a symbol of Muslim Turkish allegiances.[184] Metropolitan Nokolai prohibited his priest Boyan Saraev to accept the nomination to become a mayor of Kardzhali, the regional stronghold of the Bulgarian ethnic Turks. He was backed by a group of nationalist-populist parties hoping to reverse the electoral success of RFM in Kutdzhali. Father Boyan Saraev a former police officer and a Pomak convert to Christianity has acquired notoriety by pursuing a mission among the Pomaks who he viewed as Slavs forcefully converted to Islam during the early days of the Ottoman conquest. This returning home narrative has won admiration amongst the nationalists and has made Father Boyan an iconic figure amongst them. Metropolitan Nikolai banned Father Boyan from accepting the nomination by pointing out that Orthodox clerics are not supposed to take up civic duties and infuriated the nationalists.[185] Metropolitan Nikolai himself was not a stranger to controversies. He himself had a reputation for pronouncing very controversial anti-Catholic and homophobic statements and event to try to ban a concert of Madonna.[186]

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181. Supra n. 154.

182. For more details, see "On People and Violence", an interview with Hasan Salih, *The Obektiv*, N0. 159 of October, 2008.

183. For more information, see "The institutions remained silent on yet another desecration of a Muslim building," interview with Husein Hafazov, *Obektiv*, no. 152, March 2008. 17 *Sega*, 13 June 2008.

184. Телевизия СКАТ нахлу при митрополит и му връчи фес, Novinite.bg 07.08.2007.

185. Боян Саръев вече не иска да е кмет на Кърджали, Dnevnik.bg, 5 August 2007 http://www.dnevnik.bg/bulgaria/2007/08/05/365550_boian_saruev_veche_ne_iska_da_e_kmet_na_kurdjali/ (12/07/10).

186. Митрополит Николай: Мадона е скандална и неморална, Монитор Четвъртък 20 Август, 2009; Митрополит Николай: Бог ни наказа заради концерта на Мадона.

Пловдив, 06.09.2009; НовинитеPRO.bg; Пловдивският митрополит Николай: Стига с тази интеграция, дотука! Vesti.bg.*26.12.2008.*

XVII. BILATERAL AGREEMENTS

At present there are no bilateral agreements between the State and religious communities by analogy with the bilateral agreements between the Holy See and particular states or between the State and religious community(ies) by analogy with Slovakia[187] and Georgia.[188]

XVIII. STATE FINANCIAL SUPPORT FOR RELIGION

There is no "church tax" as a form of subsidizing religious organizations in Bulgaria. Under Article 21.3 DA2002 the State and the municipalities *may* provide free of charge leaseholds on state and municipal properties and may assist them with subsidies factored in the national and municipal budgets.

Article 22 provides that any property transfer rights are stipulated in the Religions' Constitutions. Any production and sale of religion-related merchandise are not transactions within the provice of State regulation.

There cannot be advertising related to places of worship without an express permission (22.3). Under Article 25 the State *may* assist and encourage the registered denominations for the fulfillment of their religious, social, educational, and health activities through tax breaks, credits, customs and other financial and economic breaks. Ant such allowance is audited under the regime of the non-profit organizations.

Article 28 provides that the distribution of the state subsidy for the registered denominations is done with the annual budget. Article 29 stipulates that employment relations of the members of the clergy are to be negotiated in accordance with the Religion's constitution, Employment law and Social Welfare legislation.

An example of this is Rila Monastery which is under the jurisdiction of the Holy Synod of the Bulgarian Orthodox Church but also receives subsidies from the state budget as is audited by the Fiscal Chamber. [189]

This is not unproblematic – the most recent audit of Rila Monastery was very critical about the internal rules of management in connection with the spending of the subsidy from the state budget. It effectively puts an autonomous monastic community with its own internal discipline under pressure to change its internal management principles in order to comply with state practices.

XIX. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

A. Religious Acts

Bulgarian law does not recognize religious acts as legally relevant. Baptismal certificates cannot substitute birth certificates although persons born before the introduction of birth certificates after World War II could exceptionally certify their date of birth with a baptismal certificate. Religious/customary marriage ceremony must be preceded by a legally binding ceremony at the registry office which is the point at which the couple acquires marital legal status. Since this is not a socio-legal paper I will not discuss the proportion of recognized and not recognized marriages by law. I could only say that since civil marriage is the only way to claim social benefits originating from marital status religious/customary marriage or secular cohabitation tends to drift towards a civil marriage when these benefits are to be received.

The only occasion where religious acts are considered legally relevant in the public

187. Martín de Agar y Valverde, J. T. & Pontificia Universitas Sanctae Crucis. 2010. *I concordati dal 2000 al 2009*, Città del Vaticano, Libreria Editrice Vaticana.

188. State of freedom of religion in Georgia since the adoption of Constitutional Agreement between Government and the Orthodox Church of Georgia, HRC 2008, http://www.humanrights.ge/admin/editor/uploads/pdf/ReligionReport.pdf (10/07/10).

189. Република България Сметна Палата Одитен доклад № 0100000606, приет с решение на Сметната палата № 251 от 12.10.2006 г. за резултатите от извършен одит на предоставената субсидия по чл. 8, ал. 1 от Закона за държавния бюджет на Република България за 2006 г. на Рилската света обител - Рилски манастир.

sphere is the entry requirement to submit an Eastern Orthodox baptismal certificate when applying to study at the theology faculty of the Sofia University.[190]

B. Private education

Secular or religious education is permitted but not necessarily properly integrated within the state system of education. A private prestigious French school which might be recognized in France is not properly integrated within the Bulgarian educational system. If a pupil decides to move to another school he or she will have to sit additional exams in order to be incorporated within the state system.

Religious education in Bulgaria moved through several stages since the early nineties and gravitated between World Religions, Ethics, Orthodox Faith.

Denominations Act 2002 created a legal framework for the creation of religious schools. *National Education Regulations 2009* stipulates the only form in which religion could be taught in state schools. At present this is done as a free or as a compulsory elective from class 1 until 12 (first year in primary school until the last year of high school).[191]

In some specialized schools as the National College of Classics and Culture religion is also taught as part of the broader *litterae humaniores* syllabus which enables the teachers to do it at a more advanced level as part of the Latin, Classical Greek, History, Literature, Philosophy and Intellectual History syllabi.

C. State Interference and Religious Education

The only case law which refers to state interference in the area of religious education is the dispute between one of the two splinter groups within the Muslim community in connection with the Islamic Institute by the recommendation of the Chief Mufti. [192] Nedim Gendgzev, the leader of one of the two groups, contested the closure by the Council of Ministers and considered this to be an interference with the exercise of religious autonomy. The court offered a literary interpretation of DA2002 and considered that the Council of Ministers does have a power to close Theological educational establishments.

XX. RELIGIOUS SYMBOLS IN PUBLIC PLACES

The only occasion where the issue of religious symbols acquired a normative framework was the proposed bill by the Educational Minister Milen Velchev and the above mentioned headscarf case filed before the Discrimination Commission.[193] The bill suggested a next which bans public display of religious symbols in schools and also the personal display of religious symbols worn in an aggressive manner.[194] The bill bears the

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190. In July 1997 the Sofia City Court declared the *Rules for Accepting Students in Sofia University* to be discriminatory and therefore null and void in their part concerning the requirement of a birth certificate from the Orthodox Church.

191. Particularly Art. 2 and 3, Правилник За Прилагане На Закона За Народната Просвета Издаден от министъра на образованието и науката, обн., ДВ, бр. 68 от 30.07.1999 г., изм., бр. 19 от 10.03.2000 г., изм. и доп., бр. 53 от 12.06.2001 г., в сила от 15.09.2001 г., доп., бр. 7 от 18.01.2002 г., изм. и доп., бр. 68 от 16.07.2002 г., в сила от 16.07.2002 г., бр. 19 от 28.02.2003 г., в сила от 28.02.2003 г., бр. 33 от 11.04.2003 г., в сила от 11.04.2003 г., попр., бр. 48 от 23.05.2003 г., изм. и доп., бр. 65 от 22.07.2003 г., в сила от 22.07.2003 г., бр. 99 от 11.11.2003 г., в сила от 11.11.2003 г., изм., бр. 15 от 24.02.2004 г., в сила от 24.02.2004 г., изм. и доп., бр. 7 от 27.01.2009 г., бр. 51 от 7.07.2009 г., бр. 87 от 3.11.2009 г., в сила от 3.11.2009 г., изм., бр. 94 от 27.11.2009 г., в сила от 27.11.2009 г.

192. Id.

193. Законопроект за училищното образование и предучилищното възпитание и подготовка30.03.2009 г. Министерски съвет, обсъждане, 902-01-19, http://www.parliament.bg/ ?page=app&lng=bg&aid=4 &action= execute (10/07/10).

194. According to the bill both students and teachers are required not to wear ‘ religious symbols which demonstrate in an aggressive manner in aggressive manner their religious preferences Art. 168/3/6 and Art. 183/2/13. Законопроект за училищното образование и предучилищното възпитание и подготовка 30.03.2009 г. Министерски съвет, обсъждане, 902-01-19.

footprint of the minister's personal views and was put on hold partly due to the opposition against the bill partly due to the general elections and subsequent change of government with new priorities.

There is no debate of change of policy with respect to religious symbols in public place beyond the schools.

There is no presence of a laïcité discourse which drives the question of religious symbols within a framework compatible to the debate in France, Italy, Turkey, Britain or Spain. We could therefore speak of a sociological data of informal bans particularly of headscarves in school but there has not been jurisprudence to test the case. One of the reasons could be a number of non-discrimination provisions in the Denominations Act 2002 and more importantly – in the radical Anti-Discrimination Act [195]which has provided fairly clear guidelines about the range of the act.

The general overview of cases relating to law and religion in Bulgaria since DA2002 suggests that the new legislation did not make the courts less politicized and less divided on questions relating to religion. The trends of jurisprudence and administrative action range from a very biased and media inspired approach to the questions of fact in such cases to very strict, narrow technical interpretations of the point of law. The new legislation and growing Article 9 ECtHR jurisprudence did not change the way the Bulgarian judiciary and administrative organs thing of religion in a legal context. Religion remains a strong factor for asserting political presence and visibility in Bulgaria and the crude rhetoric as part of this process appears to dominate the schisms within the major religious communities, the attitudes in relation to "the Other," the media narrative as well as the narrative of the legislature, judiciary and the executive. The aftermath of DA2002 demonstrated that there is not much that has changed in terms of attitudes and that a lot more than a legislative intervention needs to happen to change the ways judges, policy makers and journalists think about religion and its place in society.

195. Закон за защита от дискриминация (загл. Изм. - дв, бр. 68 от 2006 г.) Обн. ДВ. бр.86 от 30 Септември 2003г., изм. ДВ. бр.70 от 10 Август 2004г., изм. ДВ. бр.105 от 29 Декември 2005г., изм. ДВ. бр.30 от 11 Април 2006г., изм. ДВ. бр.68 от 22 Август 2006г., изм. ДВ. бр.59 от 20 Юли 2007г., изм. ДВ. бр.100 от 30 Ноември 2007г., изм. ДВ. бр.69 от 5 Август 2008г., изм. ДВ. бр.108 от 19 Декември 2008г.

JOSÉ WOEHRLING
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Religion and the Secular State in Canada

I. THE RELIGIOUS AND SOCIAL COMPOSITION OF CANADA

Canada is a country of 33.8 million people populating a vast geographic area of almost 10 million km^2, stretching 8,000 km from the Atlantic to the Pacific Oceans. Its current demographic composition is both a natural consequence of its founding peoples, the French Roman Catholics who settled New France (or Lower Canada, now the province of Quebec), the English Protestants who settled Upper Canada (now Ontario) and the aboriginal communities that lived here for millennia[1] as well as the product of a robust immigrant population from around the world. These complexities make it difficult to pinpoint the religious and social composition of Canada in just one or two sentences. It would be most accurate to describe Canada as a bilingual, multicultural federation operating within a pluralistic society.[2]

The most recent data pertaining to the religious and social composition of Canada was compiled in the 2001 census, at a time when Canada's population was only 30 million.[3] Its results reveal that seven out of every ten Canadians self-identified as either Roman Catholic or Protestant,[4] with almost 13 million identifying as Roman Catholic (almost half of whom live in Quebec), and another 8.6 million identifying as Protestant.[5] It is worth noting, however, that this represented a decrease from the 80 percent mark of just a decade earlier. This decrease is due both to the significant immigrant populations that increasingly constitute the Canadian mosaic, as well as the fact that in that ten-year period, the percentage of people who claimed no religious affiliation increased from 12 percent to 16 percent (representing 4.9 million people).[6] Further, the analysis of the 2001

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1.The most recent 2006 Canadian Census enumerates 1,172,790 Aboriginal people in Canada, comprising 3.8 percent of the country's total population. See Statistics Canada, *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations* (Aboriginal Peoples, 2006 Census), Statistics Canada Catalogue no. 97-558-XIE2006001 (Ottawa: Minister of Industry, 2008), online: Statistics Canada http://www12.statcan.ca/census-recensement/2006/as-sa/97-558/p2-eng.cfm.

2. Contrary to the "melting pot" notion prevalent in the United States, Canada sees itself as a mosaic celebrating multiple identities. In 1985, Parliament passed the *Canadian Multiculturalism Act*, R.S.C. 1985 (4th Su), c. 24 aimed at promoting the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and is a fundamental characteristic of Canadian heritage and identity, and acknowledging the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage.

3. Although Canada conducts a census every five years, questions pertaining to religious affiliation are only asked every ten years and as such, the data from 2001 is the most recent official data on this subject. See Statistics Canada, *Religions in Canada* (2001 Census: analysis series), Statistics Canada Catalogue no. 96F0030XIE2001015 (Ottawa: Minister of Industry, 2003), online: Statistics Canada http://www12. statcan.ca/english/census01/Products/Analytic/companion/rel/pdf/96F0030XIE2001015.pdf (Statistics Canada, *Religions*).

4. Id. at 5 According to the 2001 census, 72% of the population identified as either Catholic or Protestant.

5. Id. at 16. A further 479,620 identified as Christian Orthodox and 780,450 as Christians not included elsewhere.

6. More recent statistics taken from the General Social Survey (GSS) of 2004 indicate that the percentage of Canadians reporting no religious affiliation jumped to 19%. See Warren Clark and Grant Schellenberg, "Who's Religious?" *81 Canadian Social Trends* (2006): 2. This decline reflects a change not only amongst Canada's existing population but also reflects the religiosity of some of its immigrant populations. According to Statistics

census reported that, "the largest gains in religious affiliations occurred among faiths consistent with changing immigration patterns toward more immigrants from regions outside of Europe, in particular from Asia and the Middle East."[7] Among this group, those who identified as Muslim recorded the biggest increase.[8]

Statistics on the self-identification of Canada's religious groups do not, however, tell the whole story of the religious and social composition of this country. While the census data records the religious identification of Canadians, it does not portray the extent of their religious practice or religiosity. As aptly pointed out in a recent article on secularization and religiosity in Canada, "[b]ecause the notion of religiosity is so complex, several different dimensions of *human* religious participation need to be considered."[9] A report published in 2006[10] seeks to measure this more nuanced aspect to Canada's religious composition by way of an index of religiosity.[11] Its findings reveal that that while religion continues to play a significant role in Canada,[12] "the last several decades have witnessed an increasing share of the population reporting no religion and a decreasing share reporting monthly or weekly attendance at religious services."[13] This move toward secularization has been most acutely felt in Quebec which, over just several decades,[14] moved from being one of the most religious communities in Canada, with a population closely tied to the dictates of the Catholic Church, to one of its most secular.[15]

Notwithstanding, or perhaps because of, what some would surmise is an increasingly secular society, there has been a steady stream of cases coming before Canadian courts asserting religious freedom and religious accommodation in both the public and private legal spheres. This Report will attempt to encapsulate the various dimensions of religion and its interaction with the secular state in Canada.

II. THEORETICAL AND SCHOLARLY CONTEXT

This Report on Religion and the Secular State attempts to analyze the relationship of religion and the state in Canada from a variety of perspectives, touching both the private law and public law dimensions of this complex issue. The national reporters have been asked to discuss "how the secular State deals with religion or belief in a way that preserves the reciprocal autonomy of State and religious structures and guarantees the

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Canada, *Religions*, supra n. 3, one-fifth of the 1.8 million immigrants who arrived in Canada between 1991 and 2001 reported they had no religion, especially those from China (including Hong Kong) and Taiwan.

7. Statistics Canada, *Religions*, supra n. 3 at 8 (noting that the 2001 Census found that 579,640 people identified as Muslim, 329,995 as Jewish, 300,345 as Buddhist, 297,200 as Hindu and 278,410 as Sikh).

8. Id. (showing an increase from 253,300 in 1991 to 579,600 in 2001 representing an increase from 1 percent to 2 percent of the population). In addition, of the 1.8 million new immigrants who came to Canada during the 1990s, Muslims accounted for 15 percent, Hindus almost 7 percent and Buddhists and Sikhs each about 5 percent.

9. Mebs Kanji and Ron Kuipers, "A Complicated Story: Exploring the Contours of Secularization and Persisting Religiosity in Canada," *Faith in Democracy?: Religion and Politics in Canada*, eds. John Young and Boris DeWiel (Newcastle: Cambridge Scholars, 2009), 18.

10. Clark and Schellenberg, supra n. 6. This report used the General Social Survey (GSS) and the 2002 Ethnic Diversity Survey (EDS) to track religious practice as distinct from religious identification. Id.

11. Id.at 2. This index of religiosity is measured by the presence of four dimensions of religiosity: religious affiliation, attendance at religious services, frequency of private religious practice and importance of religion. Id.

12. Id. at 4 The report concluded that overall, 44 percent of Canadians place a high degree of importance on religion in their life and that, judging by the "four dimensions of religiosity," 40 percent of Canadians have a low degree of religiosity, 31 percent are moderately religious and 29 percent are highly religious. Id.

13. Id. at 6. Note, however, that as pointed out by Kanji and Kuipers, supra n. 9 at 24, "subjective assessments of religiosity are not the same as actual involvement in religious institutions."

14. This occurred most notably during the 1960s, a period of intense social change in Quebec that is known as the Quiet Revolution.

15. See "Catholicism in Canada: Quebec Catholics" *CBC News* (2 October 2003), online: CBC News Indepth http://www.cbc.ca/news/background/catholicism/quebeccatholics.html (noting that weekly Church attendance in Quebec dropped dramatically between the 1950s and 2000 from 88% to just 20%). The heightened sensitivity of Quebecers to religion and religious accommodation culminated in the Bouchard-Taylor Commission. The Commission and its final report are discussed in more detail in the Theoretical and Scholarly Context section of the Report (section 2) at 4–6, below.

human right to freedom of religion and belief."[16] The snapshot of the diverse and changing social and religious composition of Canada, provided in the introductory section to this Report, underscores the increasing relevance of this question. However, before devling into a more detailed analysis of this larger question, it is opportune to examine what is meant by the "secular state," or secularism, in Canada.

Understanding the concept of secularism is key because as legal theorists working in this field have pointed out, "the term 'secular' or the declaration that we live in a 'secular state' is proposed as the main conceptual means by which Western Liberal societies deal with the expression of religious conscience."[17] The notion of secularism is "generally understood to mean the ordering of public life exclusively on the basis of non-religious practices and values. It is viewed by many as a neutral ground that stands outside religious controversy."[18]

At the risk of oversimplification, a closer examination reveals two different meanings that may be ascribed to secularism, one which may be termed "rigid secularism", the other "open secularism." These competing visions of secularism were at the forefront of the highly publicized Bouchard-Taylor Commission[19] that was constituted in Quebec in February 2007 to investigate the issue of accommodation practices in Quebec in light of it being a pluralistic, democratic and egalitarian society. The Report produced by this Commission aptly pointed out, "We cannot grasp secularism through simple, unequivocal formulas such as "the separation of Church and State," "State neutrality towards religions" or "the removal of religion from public space," even though all of these formulas contain part of the truth.[20]

According to the Commission, the four key principles constituting any model of secularism are: the moral equality of persons; freedom of conscience and religion; State neutrality towards religion; and the separation of Church and State. Secularism, however, takes on a different meaning depending on the importance given to each of these four principles.

A "strict" or "rigid" conception of secularism would accord more importance to the principle of neutrality than to freedom of conscience and religion, attempting to relegate the practice of religion to the private and communal sphere, leaving the public sphere free of any expression of religion.[21] Also termed "a-religiousness," this concept of secularism is obviously less compatible with religious accommodation, as well as antithetical to the recognition of the place of pluralism in the modern state.[22]

A more "flexible" or "open" secularism, on the other hand, is based on the protection of freedom of religion, even if this requires a relaxation of the principle of neutrality. In this model, state neutrality towards religion and the separation of Church and State are not seen as ends in themselves, but rather as the means to achieving the fundamental objectives of respect for religious and moral equality and freedom of conscience and religion. In open secularism, any tension or contradiction between the various constituent facets of secularism should be resolved in favour of religious freedom and equality. This conception, which sees secularism as directed at state institutions rather than individuals,

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16. In their "questionnaire for the preparation of national reports for the IACL Congress," this was the central question that the general reporters, Professors Javier Martinez-Torron and W. Cole Durham, Jr., asked the national reporters to address.

17. Benjamin L. Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17 C.J.L.S. 39 at 49 [hereinafter Berger, "Limits"].

18. Richard Moon, "Introduction: Law and Religious Pluralism in Canada," *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: UBC Press, 2008): 6 [hereinafter Moon, "Introduction"].

19. Named as such for the Commission's co-chairs, Gérard Bouchard and Charles Taylor. Its formal title is the Consultation Commission on Accommodation Practices Related to Cultural Differences.

20. Gérard Bouchard and Charles Taylor, *Building the Future: A Time for Reconciliation* (Quebec City: Government of Quebec, 2008), 135, online: http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf.

21. As Richard Moon points out, "Introduction", supra n. 18 at 17, it is both difficult to draw the line between private and public and unrealistic to confine religion to private life and wholly insulate it from the impact of state law.

22. Berger, "Limits", supra n. 17 at 49–50.

does not strive to neutralize or erase religion as an identity marker in society.

Open secularism is the model that is advocated by the Bouchard-Taylor Commission. Moreover, it is the model that recognizes that "secularism and pluralism are both realities of Canadian society."[23] According to Chief Justice Dickson's enduring words in the seminal case of *R. v. Big M Drug Mart*, "[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct."[24]

By and large, the model of open secularism is applied by Canadian courts in their interpretation of the *Canadian Charter of Rights and Freedoms*.[25] A more detailed review of the Canadian position, with respect to the variety of contexts in which we have been asked to examine this issue, will provide a more nuanced and complex picture of religion and the secular state, a picture of what is essentially the "coexistence of religious and non-religious individuals and communities in a diverse contemporary society."[26]

III. THE CONSTITUTIONAL AND LEGAL CONTEXT

A. Pre-Confederation Period (1759-1867)[27]

Au Canada, la neutralité étatique en matière de religion et la séparation de l'État et des religions ne se trouvent pas affirmées de manière expresse dans les instruments constitutionnels, mais les tribunaux ont fait progressivement découler de tels principes de la liberté et de l'égalité religieuses. Par contre, les fondements de la liberté religieuse et de l'égalité des cultes remontent au XVIII[e] siècle et découlent des nécessités politiques dont devait tenir compte la Grande-Bretagne après sa conquête de la Nouvelle-France aux dépens du Royaume de France en 1759. Le gouvernement britannique, malgré son projet initial d'établir l'Église anglicane et d'appliquer au Canada les mesures anti-catholiques en vigueur dans la métropole et dans ses autres possessions, dut rapidement reconnaître la liberté de culte à ses nouveaux sujets catholiques afin de s'assurer de leur loyauté et d'éviter qu'ils ne s'associent aux colons américains dans leurs positions anti-britanniques (*Proclamation royale* de 1763).[28] L'*Acte de Québec* de 1774,[29] confirme cette visée conciliatrice et autorise l'Église catholique à prélever la dîme.

En outre, la même loi abolit l'exigence du serment du Test (*Test Oath*) qui imposait aux catholiques voulant accéder à des fonctions publiques l'abjuration de la fidélité au pape, une déclaration contre le dogme de la transsubstantiation et contre le culte de la Vierge. Dans les autres territoires britanniques et même aux États-Unis, les catholiques n'obtiendront des mesures d'assouplissement similaires que plusieurs décennies plus tard. En 1832, le Parlement du Bas Canada (l'actuel Québec) adoptait une loi reconnaissant aux personnes de religion juive "tous les droits et privilèges des autres sujets de Sa Majesté".[30]

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23. Id. at 50. See also Benjamin L. Berger, "Law's Religion: Rendering Culture," *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: UBC Press, 2008): 264.

24. [1985] 1 S.C.R. 295 at para. 94, 18 D.L.R. (4th) 321 [hereinafter *Big M* cited to S.C.R.].

25. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*]. See José Woehrling, "The 'Open Secularism' Model of the Bouchard-Taylor Commission Report and the Decisions of the Supreme Court of Canada on Freedom of Religion and Religious Accommodation," *Religion, Culture and the State – Reflections on the Bouchard-Taylor Commission*, eds. Howard Adelman and Pierre Anctil (Toronto: University of Toronto Press, forthcoming in 2010).

26. Shauna Van Praagh, "View from the *Succah*: Religion and Neighbourly Relations," *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: UBC Press, 2008): 22.

27. Pour l'histoire des relations État-Églises au Canada, voir Douglas A. Schmeiser, *Civil Liberties in Canada*, Aalen Scientia Verlag, 1977 (Reprint of the Edition Oxford 1964), 54 suiv.; Jacques-Yvan Morin and José Woehrling, *Les constitutions du Canada et du Québec – Du régime français à n os jours*, Montréal, Éditions Thémis, 1992, 93 suiv.; Siméon Pagnuelo, *Études historiques et légales sur la liberté religieuse en Canada*, Montréal, Beauchemin et Valois, 1872 ; Micheline Milot, *Laïcité dans le Nouveau Monde. Le cas du Québec*, Turnhout, Brepols Publishers, 2002.

28. A. Short and A.G. Doughty, *Canada, Constitutional Documents*, 1921, 136-141.

29. *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 14 Geo. III, c. 83 (1774).

30. 1 Will. IV, c. 57 (1831).

Il fallut attendre plus d'un quart de siècle pour que le Parlement britannique reconnaisse pleinement à son tour, en 1858, les droits politiques des Juifs. Un autre événement déterminant pour les avancées de l'égalité des cultes a été l'adoption de la *Loi sur la liberté des cultes* (*Freedom of Worship Act*, 1851)[31] qui condamne toute restriction au libre exercice du culte. En 1854, une autre loi abolit les avantages matériels et financiers qui avaient jusqu'alors été accordées à l'Église anglicane.[32] La séparation des Églises et de l'État était dès lors nettement consacrée.

B. Federal Constitution of 1867

Cette tradition politique trouvera sa confirmation dans la constitution créant la fédération canadienne et le Canada moderne en 1867. *L'Acte de l'Amérique du Nord britannique*[33] ne comporte aucune disposition sur les relations qui régissent l'État et les religions et son préambule ne fait aucune référence à Dieu ou à un Être suprême. Cette constitution ne garantit pas davantage la liberté de religion (pas plus que les autres droits ou libertés, l'absence de toute déclaration constitutionnelle des droits étant conforme au principe britannique de la souveraineté du Parlement), mais les mesures antérieures protégeant la liberté et l'égalité religieuse sont maintenues en vigueur. La constitution de 1867 contient toutefois un élément dérogatoire à l'égalité des religions (toujours en vigueur aujourd'hui) en prévoyant une protection spéciale, en matière d'administration scolaire, pour les catholiques et les protestants lorsqu'ils se trouvent en situation minoritaire (protection qui avait été considérée nécessaire en 1867 pour rassurer les minorités religieuses là où elles existaient).[34] Il n'y a pas de religion d'État. Les activités religieuses ne font l'objet d'aucune restriction constitutionnelle. Aucun soutien financier n'est prévu pour les Églises et l'État ne perçoit aucun impôt à des fins de redistribution aux communautés religieuses. Les édifices de culte ne sont pas entretenus aux frais de l'État. Ces principes de neutralité religieuse de l'État et de séparation du pouvoir politique et des autorités religieuses seront par la suite régulièrement rappelés dans la jurisprudence des tribunaux supérieurs.[35]

Ainsi, jusqu'en 1982, le Canada présentait l'exemple d'un pays dans lequel les principes de liberté et d'égalité religieuses et de séparation de l'État et des Églises étaient été mis en œuvre par des lois ordinaires, sans être prévus dans la constitution formelle, et résultaient du pragmatisme et des nécessités politiques plutôt que de l'application de principes généraux. Cette situation a quelque peu changé avec l'inscription formelle de la liberté de conscience et de religion dans la Constitution en 1982.

C. Freedom of Religion and Conscience in the Canadian Charter *(1982) and its Jurisprudential Interpretation*

La *Charte canadienne des droits et libertés*,[36] adoptée en 1982, ajoute à la

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31. 14 & 15 Vict., c. 175.

32. *Clergy Reserves Act*, 18 Vict., c. 2 (1854).

33. Aujourd'hui *Loi constitutionnelle de 1867* (R.-U.), 30 & 31 Vict., c. 3, reproduite dans L.R.C. 1985, a II, n° 5.

34. Id., art. 93. Cette question est traitée plus loin dans le présent rapport, aux 20-23, ci-dessous.

35. Ainsi, en 1955, dans l'arrêt *Chaput* c. *Romain*, le juge Taschereau de la Cour suprême du Canada exposait les principes applicables comme suit : "In our country, there is no state religion. All religions are on an equal footing, and Catholics as well as Protestants, Jews, and other adherents to various religious denominations enjoy the most complete liberty of thought": [1955] S.C.R. 834, à la 840.

36. *Charter*, supra n. 25. Sur l'interprétation par les tribunaux canadiens de la liberté de religion garantie dans la *Charte canadienne*, voir de façon générale : José Woehrling, "Quelle place pour la religion dans les institutions publiques ?" dans *Le droit, la religion et le "raisonnable"* (sous la direction de Jean-François Gaudreault-DesBiens), Montréal, Éditions Thémis, 2009, 115-168; José Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse", (1998) 43 *Revue de droit de McGill* 325-401; Richard Moon, «Liberty, Neutrality, and Inclusion : Religious Freedom Under the Canadian Charter of Rights and Freedoms», (2003) 41 *Brandeis Law Journal* 563; Donald L. Beschle, «Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada», (2002) 4 *U. Pa. J. Const. L.* 451; Bruce RYDER, "State Neutrality and Freedom of Conscience and Religion", (2005) 29 *Supreme Court Law Review* (2d) 169; Paul Horwitz, "The Sources and Limits of Freedom of Religion in a

Constitution un instrument de protection des droits et libertés qui lui faisait auparavant défaut et qui garantit, entre autres, "la liberté de conscience et de religion" (art. 2(a)). Le préambule de la *Charte* contient également une référence à la "suprématie de Dieu", laquelle ne s'est cependant vue reconnaître aucune portée significative dans les décisions des tribunaux. Quant à la liberté de conscience et de religion, les tribunaux, en particulier la Cour suprême du Canada, lui donnent dans leur jurisprudence un double contenu.[37] En premier lieu, une liberté positive et négative d'exercice de la religion : le contenu positif correspond à la liberté d'avoir des croyances religieuses, de les professer ouvertement et de les manifester par leur mise en pratique, par le culte et par leur enseignement et leur propagation; le contenu négatif correspond au droit de ne pas être forcé, directement ou indirectement, d'embrasser une conception religieuse ou d'agir contrairement à ses croyances ou à sa conscience. Dans ce dernier sens, la Cour suprême a souligné que la protection offerte par la liberté de conscience et de religion s'appliquait également "aux expressions et manifestations d'incroyance et au refus d'observer les pratiques religieuses",[38] donc, à l'athéisme, à l'agnosticisme, au scepticisme et à l'indifférence religieuse.

En second lieu, la liberté de conscience et de religion impose une obligation de neutralité à l'État en matière religieuse. La question qui n'est pas encore clairement résolue en droit canadien est celle de savoir si le neutralité religieuse imposée à l'État l'empêche seulement de privilégier ou de défavoriser une religion par rapport aux autres (cette première facette de la neutralité est clairement reconnue) ou s'il est également interdit à l'État de favoriser la religion en général par rapport aux autres convictions profondes entretenues par les individus, et en particulier par rapport aux convictions a-religieuses ou anti-religieuses comme l'athéisme. Si cette deuxième interprétation du concept de neutralité était retenue, il faudrait en conclure que les accommodements ou exemptions en matière religieuse sont constitutionnellement prohibés, puisqu'ils constituent une façon de favoriser la religion (c'est un point de vue qui est présenté par certains auteurs des És-Unis). Or, comme on le verra plus loin dans ce rapport, les tribunaux canadiens admettent l'existence d'une obligation d'accommodement s'imposant constitutionnellement à l'État sur le fondement de la liberté de religion, ce qui est incompatible avec une interprétation de l'obligation de neutralité qui empêcherait l'État d'aider les religions de façon non-discriminatoire.[39] On verra également, dans une section subséquente du présent rapport, qu'à l'heure actuelle, la moitié des provinces canadiennes ont choisi de financer les écoles religieuses privées, sans que cette pratique ait jamais été contestée constitutionnellement comme contraire au principe de neutralité religieuse de l'État.[40]

D. The Individualistic and Subjective Conception of Freedom of Religion Adopted by the Supreme Court of Canada

Traditionnellement en droit canadien, la personne qui invoque un précepte religieux

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Liberal Democracy: Section 2(a) and Beyond", (1996) 54 *University of Toronto Faculty of Law Review* 1.

37. Voir notamment l'arrêt *Big M*, supra n. 24.

38. Id. au para. 123, juge en chef Dickson ("Historiquement, la foi et la pratique religieuses sont, à bien des égards, des archétypes des croyances et manifestations dictées par la conscience et elles sont donc protégées par la *Charte*. *La même protection s'applique, pour les mêmes motifs, aux expressions et manifestations d'incroyance et au refus d'observer les pratiques religieuses*» [nos italiques]).

39. De nombreux auteurs prennent la position selon laquelle le principe de neutralité reconnu au Canada, doit être considéré comme moins rigoureux que le principe de non-établissement aux États-Unis; voir notamment : Peter W. Hogg, *Constitutional Law of Canada*, Scarborough, Thomson-Carswell, 2005, 945; Ryder, supra n. 36 aux 174-179; Howitz, supra n. 36 aux 60-61 (". . . aid to religion should be constrained by only two considerations. It must not create an "element of religious compulsion" on the part of any believers or non-believers in a given faith. Also, while government aid may properly create the impression that the state is supportive of religion as it is of other mediating institutions, it should not create the impression that it has singled out a particular faith, or religiosity over non-religiosity, for endorsement. Endorsement, even if it does not compel behaviour on the part of the minority, defeats the pluralism and multiculturalism that are a central part of religion's value to society" [notes infrapaginales omises]).

40. Voir la partie intitulé "Financial Support for Religious Private Schools" aux 20-23, ci-dessous.

doit d'abord prouver l'existence *objective* de ce précepte; à cette fin, elle doit normalement pouvoir s'appuyer sur les enseignements d'une religion existante. Ensuite, elle doit démontrer la sincérité de sa croyance dans le précepte, ce qui constitue un élément *subjectif*. Cependant, on constate que les tribunaux canadiens sont portés à éviter d'avoir à donner une définition objective de la religion ou de se prononcer sur la nature des croyances ou convictions invoquées; pour cette raison, ils tendent à se fier davantage, voire exclusivement, au critère subjectif de la sincérité de ceux qui invoquent la liberté de conscience et de religion. Ainsi, la Cour suprême a défini la liberté religieuse comme "la liberté de se livrer à des pratiques et d'entretenir des croyances ayant un lien avec une religion, pratiques et croyances que l'intéressé exerce ou manifeste sincèrement, selon le cas, dans le but de communiquer avec une entité divine ou dans le cadre de sa foi spirituelle, indépendamment de la question de savoir si pratique ou la croyance est prescrite par un dogme religieux officiel ou conforme à la position de représentants religieux".[41] Cette approche a l'avantage d'éviter aux tribunaux de devoir examiner le contenu des prescriptions religieuses et prendre position, le cas échéant, par rapport aux conflits de doctrine existant au sein d'une communauté de croyants. Par contre, elle leur rend plus difficile le rejet des demandes opportunistes ou fantaisistes fondées sur de prétendues croyances religieuses.

Enfin, il faut signaler que les provinces canadiennes ont adopté des lois sur les droits de la personne qui protègent également la liberté de conscience et de religion et/ou interdisent la discrimination fondée sur la religion.[42] Bien que contenues dans des lois modifiables selon le processus législatif ordinaire, ces lois sur les droits de la personne se voient reconnaître une autorité "quasi-constitutionnelle" dans la mesure où les lois provinciales ordinaires ne peuvent y déroger que de façon expresse. Elles peuvent donc servir, comme la *Charte canadienne des droits et libertés*, de fondement à l'exercice d'un contrôle judiciaire des lois provinciales ordinaires, lesquelles seront invalidées si elles sont jugées incompatibles avec les droits et libertés que les lois sur les droits de la personne protègent (à moins de contenir une disposition de dérogation expresse). Mais, surtout, les lois provinciales des droits de la personne, contrairement à la *Charte canadienne* qui ne s'applique qu'à l'action étatique, s'appliquent également aux relations privées. Elles peuvent donc être invoquées pour protéger la liberté de religion ou l'égalité religieuse contre les atteintes provenant de simples particuliers, comme les employeurs privés ou les entreprises de transport, de biens et de services relevant du secteur privé. Les lois provinciales sur les droits de la personne sont appliquées en dernière instance par la Cour suprême du Canada et celle-ci utilise pour leur interprétation et leur mise en oeuvre les mêmes concepts que ceux qu'elle a développés pour l'application de la *Charte canadienne*, notamment en matière de liberté de conscience et de religion et d'égalité religieuse. On examinera plus loin dans ce rapport une importante décision de la Cour suprême (l'affaire *Amselem*[43]) dans laquelle celle-ci a appliqué les dispositions en matière de liberté de religion de la loi québécoise sur les droits de la personne.[44]

IV. THE STATE AND RELIGIOUS AUTONOMY

The purpose of this section is to examine whether the state may intervene in the life or organization of religious communities and how far secular law may go in restricting the autonomy of religious communities to govern themselves. The short answer to this question is that in Canada, the state and religious communities operate in separate spheres

41. *Syndicat Northcrest* c. *Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551 au para. 46, 241 D.L.R.(4e) 1 [*Amselem* avec renvois aux R.C.S.].

42. Voir par ex. *Charte des droits et libertés de la personne*, L.R.Q. c. C-12, art. 3, 10 [Quebec *Charter*]; *Code des droits de la personne*, L.R.O. 1990, c. H.19, art. 1-3, 5-6; *Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 7-11, 13-14; Alberta Human Rights Act, R.S.A. 2000, c. A-25.5, ss. 3–5, 7–9; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, ss. 4, 9-19. Voir généralement *Human Rights Legislation : An Office Consolidation*, Toronto, Butterworths, 1991.

43. Supra n. 41.

44. Voir la partie intitulé "Freedom of Religion and Contractual Promises" aux 13–15, ci-dessous.

and, in principle, it is not the role of the state, or secular courts, to intervene in their organization, nor to interfere in their autonomous governance. As Justice Iacobucci of the Supreme Court of Canada stated, "the State is in no position to be, nor should it become, the arbiter of religious dogma."[45]

However, as with most issues canvassed in this Report, the immediate response requires a more nuanced analysis. One way to provide such analysis is to focus on a recent Canadian case where this issue arose and where judges, and the academic community commenting on their judgments, responded with different reactions. The case is *Bruker v. Marcovitz*[46] and its facts turn on a promise made in the context of a corollary relief settlement entered into upon the divorce of a married couple. The settlement contained a so-called "*get* clause" – a commitment on the part of the husband to appear before the *Beit Din,* or rabbinic tribunal, for the purpose of obtaining a *get,* or Jewish divorce, thereby releasing his wife religiously from the marriage.[47] The husband refused to appear before the *Beit Din* for over 15 years and the wife initiated an action in the secular courts for monetary damages to compensate her for this extended non-compliance with the commitment to consent to a *get.*

A unanimous Court of Appeal, as well as two dissenting judges of the Supreme Court, found that as the substance of the obligation to consent to the *get* was exclusively religious in nature, any alleged breach could not be enforced by secular courts. The Court of Appeal held the issue to be non-justiciable before secular courts, since such courts must refrain "from becoming involved in disputes between parties that are internal to their religions."[48] Justice Deschamps, writing for the dissent in the Supreme Court, echoed this view stating "secular law has no effect in matters of religious law . . . . Where religion is concerned, the state leaves it to individuals to make their own choices. It is not up to the state to promote a religious norm. That is left to religious authorities."[49]

The majority of the Supreme Court, however, found the obligation consented to by the husband to be an enforceable contractual obligation, notwithstanding its link to religion.[50] While it is arguable that religious obligations are merely moral obligations and therefore unenforceable, in this instance, the husband was seen as having transformed his moral obligation into a civil or juridical one by voluntarily consenting to perform it in a non-religious contract.[51] Moreover, notwithstanding the husband's argument to the contrary, the enforcement of this contractual obligation was found not to be contrary to his rights based on freedom of religion.[52]

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45. *Amselem,* supra n. 41 at para 50.

46. 2007 SCC 54, [2007] 3 S.C.R. 607, 288 D.L.R. (4th) 257 [*Bruker* cited to S.C.R.]. For some of the academic commentary generated by this judgment see generally Rosalie Jukier and Shauna Van Praagh, "Civil Law and Religion in the Supreme Court of Canada: What Should We *Get* out of *Bruker v. Marcovitz*?" (2008) 43 Su Ct. L. Rev. (2d) 381; M. H. Ogilvie, "*Bruker v. Marcovitz*: Get(ting) Over Freedoms (Like Contract and Religion) in Canada" (2009) 24 N.J.C.L. 173 [hereinafter Ogilvie, "*Bruker*"]; Richard Moon, "*Bruker v. Marcovitz*: Divorce and the Marriage of Law and Religion" (2008) 42 Su Ct. L. Rev. (2d) 37 [hereinafter Moon, "*Bruker*"]; Benoît Moore, "Contrat et religion: À la volonté de Dieu ou des contractants? Commentaire sur l'affaire *Marcovitz* c. *Bruker*" (2009) 43 R.J.T. 219; Louise Langevin *et al*., "L'affaire *Bruker c. Marcovitz* : variations sur un thème" (2008) 49 C. de D. 655.

47. According to Jewish law, a marriage remains in effect until a *get* is given by the husband, supervised by the rabbinic tribunal (*Beit Din).* Without such *get,* a Jewish woman cannot re-marry with religious sanction and any civilly consecrated marriage will not be recognized by Jewish law. Moreover any children issuing from a subsequent union are considered illegitimate according to traditional rules of Orthodox Judaism. Rabbi Jonathan Reiss, "Jewish Divorce and the Role of Beit Din" Jewish Action (Winter 1999), online: Jewish Law http://www.jlaw.com/ Articles/divorcebeit.html.

48. *Marcovitz v. Bruker*, 2005 QCCA 835, 259 D.L.R. (4th) 55 at para. 77, [2005] R.J.Q. 2482 [hereinafter *Bruker* QCCA cited to D.L.R. (4th)].

49. In *Bruker,* supra n. 46 at para 132.

50. As pointed out by John C. Kleefeld and Amanda Kennedy, "'A Delicate Necessity' *Bruker v. Marcovitz* and the Problem of Jewish Divorce" (2008) 24 Can. J. Fam. Law 205 at 275, "the mere existence of a religious element in a dispute should not isolate it from a judicial lens".

51. A contractual analysis by Jukier and Van Praagh, supra n. 46 at 388-398. See also Moore, supra n. 46.

52. The husband's claim was that the judicial enforcement of this obligation would be contrary to his freedom to abstain from participating in a religious obligation or appearing before a religious tribunal, protected by the Quebec *Charter,* supra n. 42, s. 3. This issue is discussed in more detail in Section V of this Report,

The complicating factor in this case is that by virtue of internal Jewish religious law and practice, the power to deliver the *get* is asymmetrical, lying primarily in the hands of the husband, thereby making its effects potentially discriminatory and contrary to the equality rights of women that are protected in Canadian society. Undeniably, Jewish women have sometimes been coerced to consent to unreasonable terms and conditions in order to obtain this religious release from their marriage and to avoid alienation from their community and its religious norms. However, this raises the delicate question of whether the majority's decision stepped over the line of the secular courts' jurisdiction by indirectly furthering gender equality for religious women.[53] Some see the decision as an inappropriate interference in internal religious decisions and autonomy since "it is not the role of secular courts to palliate the discriminatory effect of the absence of a *ghet* on a Jewish woman who wants to obtain one."[54]

On the one hand, viewed from the perspective of the dissent, this case may be seen as a crucial test of the state's secular identity and its commitment to viewing personal faith and law as operating within two parallel universes. On the other hand, viewed from the perspective of the majority, it may be seen, more simply, as a case where religious people happened to have entered into a valid consensual agreement, albeit one with religious overtones, but nonetheless, a case of an ordinary contract to which ordinary contract principles apply.[55]To hold otherwise, "might unfairly deny religious individuals the power to make binding legal arrangements based on their values, practices and interests."[56]

The *Bruker v. Marcovitz* decision provides the ideal factual framework to examine the Canadian position on the state and religious autonomy, but it is by no means the only circumstance in which this issue arises. In *Bruker*, the courts had to grapple with enforcing an ostensibly religious obligation that had been consented to in the context of a civil agreement.

The reverse may also occur. Canadian courts have been called upon to enforce contractual provisions (seemingly non-religious ones such as the payment of money) within the context of a religious contract. This has occurred with respect to the enforcement of the payment of the *mahr* (a lump sum payment claimed by the wife upon divorce) agreed to in the Islamic marriage contract. There is not, as of yet, unanimity on the subject of enforcing such a promise amongst Canadian courts.[57]

The larger question of the effect given by state courts to decisions made by religious bodies or tribunals is also tied to the question of the state and religious autonomy, which is canvassed in more detail in a subsequent section of this Report dealing with the larger issue of the civil legal effects of religious acts.[58]

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below.

53. See e.g., Moon, "*Bruker,"* supra n. 46 at 62. Moon is generally favourable to the decision but states that Madam Justice Abella, writing for the majority, was "acting to mitigate the inequity of the divorce rules of Judaism." Id..

54. *Bruker* QCCA, supra n. 48 at para 76. See also Ogilvie, "*Bruker*," supra n. 46 at 173, who sees this decision as advocating "a more interventionist role for the civil courts in disputes involving religious issues than has previously been the case in Canadian jurisprudence. One of his criticisms of the decision, expressed at 186, is that "the majority privileged its understanding of the dignity of Jewish women and the equality of women and children in law over Marcovitz' religious freedom".

55. This is largely the conclusion adopted by by Jukier and Van Praagh, supra n. 46.

56. Moon, "*Bruker*", supra n. 46 at 47.

57. See *Kaddoura v. Hammoud* (1998), 168 D.L.R. (4th) 503, 44 R.F.L. (4th) 228 (Ont. Ct. J.) (refusing to enforce the payment of the *mahr*). Compare with cases in which the *mahr* was enforced: *M. (N.M.) v. M. (N.S.)*, 2004 BCSC 346, 26 B.C.L.R. (4th) 80, 130 A.C.W.S. (3d) 333; *Amlani v. Hirani*, 2000 BCSC 1653, 194 D.L.R. (4th) 543, 13 R.F.L. (5th) 1; *Nathou v. Nathou* (1996), 68 A.C.W.S. (3d) 487; *Nasin v. Nasin*, 2008 ABQB 219, 443 A.R. 298, 53 R.F.L. (6th) 446. In *Nasin*, the *mahr* was not enforced because it did not meet the requisite statutory formalities for a pre-nuptual contract; however, at para. 24 the court stated that "[a] s to the religious aspects of the Mahr, if parties enter into pre-nuptial agreements in a religious context, they will be enforced if they meet the requirements under the *Matrimonial Property Act* and the courts do not find the contracts invalid for other reasons."Id. See generally Pascale Fournier, "In the (Canadian Shadow) Shadow of Islamic Law: Translating *mahr* as a Bargaining Endowment" (2006) 44 O.H.L.J. 649.

58. See Section VII of this Report, below, entitled "Civil Legal Effects of Religious Acts," in particular, part C: "Civil Effects of Religious Decisions outside the Family Context."

V. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

In Canada, religious affiliation of individuals has no legal consequences under State law. Pursuant to the equality clause of the Canadian *Charter of Rights and Freedoms*,[59] all Canadians benefit from equality before and under the law without discrimination based on a variety of factors including religion.

The question of whether freedom of religion, protected by section 2(a) of the *Charter*, may entitle individuals to be exempt from laws or contractual clauses on the basis of conscientious objection is a broader question that merits a more nuanced answer. This section will examine this question first in the context of private law, namely the extent to which freedom of religion entitles individual parties to claim exemption from contractual clauses of general application. It will then examine the question in the context of public law and the requirement that the State provide individuals reasonable accommodation from laws of general application on the basis of religious objection.

A. Freedom of Religion and Contractual Promises

At the outset, it should be noted that the protective function of the federal *Charter of Rights and Freedoms* is limited to State action, namely laws of general application or governmental action.[60] Private agreements between individuals are thus not subject to the federal *Charter* and any religious protections must be found in equivalent provisions in provincial Human Rights Codes or the Quebec *Charter of Human Rights and Freedoms*.[61]

The precise question of whether freedom of religion entitles a contracting party to be exempt from a provision in a private agreement arose in the Canadian context in the seminal case of *Syndicat Northcrest v. Amselem*.[62] That case concerned a private contract entered into by a co-owner of an apartment unit in a Montreal condominium. Under the terms of the by-laws in the declaration of co-ownership, the owners of the individual units contractually agreed not to erect any constructions of any kind on their balconies. While the purpose of such restriction was to create a clean and uniform outward appearance of the building, it resulted in a legal battle over the right of one of the condominium owners to erect a temporary structure, a Succah (a form of hut), on his balcony in order for him to observe the week-long Jewish High Holiday of Succot.[63]

The unusual aspect of this claim to freedom of religion was that it was not, as is most often the case, being asserted against the State. The assertion of the right to freedom of religion in this case effectively pit one party's contractual rights against the religious freedom of the other contracting party. Notwithstanding the express contractual stipulations of the parties, a narrow majority (5 to 4) of the Supreme Court found in favour of the condominium owner's claim to freedom of religion, thereby entitling him to an exemption from the contractual restriction in question and entitling him to erect his Succah on his balcony. The net result of this decision was, in effect, to extend the reasonable accommodation principle to the private contractual arena.

The very weight one dissenting judge, Justice Binnie, placed on the private contract voluntarily made between the parties caused him to rule in favour of the applicability of the contractual restriction, notwithstanding its potential to violate one of the party's religious freedoms. He concluded that "there is a vast difference . . . between using freedom of religion as a shield against interference with religious freedoms by the State

59. *Charter*, supra n. 25, s. 15.

60. *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

61. See examples given in supra n. 42.

62. *Amselem*, supra n. 41.

63. This seminal case has been discussed at 9–10, above, in section 3 of the Report dealing with the Constitutional and Legal Contexts, as this case provided the factual context in which the Supreme Court articulated the subjective definition of religion. As such, it mattered little for the majority that expert religious testimony did not support the religious obligation of erecting one's own succah. Mr. Amselem's sincere, subjective belief in his religious requirement to erect his own Succah sufficed to ground his claim in freedom of religion.

and as a sword against co-contractants in a private building."[64]

While the circumstances under which a party may waive a fundamental right, such as religion, are not precisely delineated in the *Amselem* decision, Justice Iacobucci, writing for the majority, implies that if done properly, clearly and with full consent, such a waiver is possible.[65] However, he found there to be no valid waiver in this case because it was not "voluntary, freely expressed and with a clear understanding of the true consequences and effects."[66] In fact, it was made in the context of a non-negotiated adhesion contract, to which the co-owner had no choice but to adhere. Further, it was not explicit given that the restriction on erecting *any* structures on the balconies was so general that it would hardly convey to ordinary individuals a waiver of their right to freedom of religion.[67]

On the other hand, the *Bruker v. Marcovitz* case, discussed in a preceding section of this Report,[68] may be seen as an instance where a court enforced a contractual waiver in the context of a religiously-protected right. Although waiver did not form an explicit part of the Supreme Court judgment, the fact that the majority enforced the husband's contractual promise to appear before the religious tribunal, despite his claim that this would interfere with his freedom of (or rather from) religion, is implicit recognition that a contractual waiver is indeed possible. The problem becomes how to distinguish *Amselem*, where the Court did not accept such waiver and freedom of religion trumped private contract law, and *Bruker*, where contract seemed to trump freedom of religion. For one, there is no doubt that the factual bases of the two decisions are different. On the facts of *Bruker*, it would be hard to assert lack of knowledge or consent to the explicit and clear obligation contained in a negotiated agreement, prepared with the assistance of legal advice, to appear before the religious tribunal to obtain a religious divorce.

As does the *Bruker* case, *Amselem* demonstrates that an inquiry into religion and law is not exclusively a public law narrative, nor one that always takes the form of drawing lines around state power. The *Amselem* decision is potentially far-reaching in its holding that contractual obligations may be unenforceable if they infringe individual religious freedom, defined broadly as encompassing not necessarily what religious authorities state is a religious obligation, but anything that a person views as a religious practice, according to his or her conscience.[69] After *Bruker*, however, this holding may be nuanced depending on the circumstances of the contract and its effectiveness in waiving this fundamental right.

B. Freedom of Religion and State Law – Reasonable Accommodation

Sur la base des lois provinciales (et de la loi fédérale) sur les droits de la personne, les tribunaux canadiens ont établi l'existence d'une obligation d'accommodement raisonnable s'imposant aux acteurs privés, notamment en matière religieuse. Ils ont également admis, mais avec davantage de réserves, l'existence d'une obligation semblable s'imposant aux

64. *Amselem*, supra n. 41 at para. 185. Note that there were two dissenting opinions in this case. Bastarache J, with whom 2 other judges concurred, dissented on grounds related to the definition of religion itself. Binnie, J. dissented on his own based on contract waiver.

65. Moon, "*Bruker*", supra n. 46 at 55-57. The waivability of fundamental rights has been examined in other contexts: see e.g., *R. v. Smith* [1991] 1 S.C.R. 714, 104 N.S.R. (2d) 233 (right to counsel); *R. v. Turpin*, [1989] 1 S.C.R. 1296, 96 N.R. 115 (right to a jury trial); *R. v. Richard*, [1996] 3 S.C.R. 525, 182 N.B.R. (2d) 161 (right to be presumed innocent and right to a fair an public hearing by an independent and impartial tribunal); *Mills v. The Queen*, [1986] 1 S.C.R. 863, 67 N.R. 241 (right to be tried within a reasonable time); *R. v. Wills* (1992), 7 O.R. (3d) 337, 12 C.R. (4th) 58 (C.A.) (right to be secure against unreasonable search and seizure); *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647, 89 D.L.R. (4th) 653 (right to privacy); *Dell Computer Cor v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, 284 D.L.R. (4th) 577 (right to refer one's dispute to a court of law is implicitly waived in an arbitration agreement). Only fundamental rights that form part of public order, arguably human dignity, cannot be waived.

66. *Amselem*, supra n. 41 at para. 96.

67. For further comments on the *Amselem* decision see Richard Moon, "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005) 29 Su Ct. L. Rev. (2d) 201; Ryder, supra n. 36; David M. Brown, "Neutrality or Privilege? A Comment on Religious Freedom" (2005) 29 Su Ct. L. Rev. (2d) 221.

68. See the section entitled "The State and Religious Autonomy" at 1 –13.

69. For further discussion on the subjective conception of religion see section 3 of this Report entitled "The Constitutional and Legal Context" at 9-10, above.

autorités étatiques lorsque celles-ci adoptent des normes de portée générale, comme des lois ou des règlements. Dans ce deuxième cas, plutôt que d'accommodement raisonnable, on parle d' "exemption constitutionnelle", laquelle peut alors être réclamée contre une norme étatique soit en vertu d'une loi provinciale ou fédérale sur les droits de la personne (selon qu'il s'agit d'une norme fédérale ou provinciale), soit en vertu de la *Charte canadienne des droits et libertés*[70] (qu'il s'agisse d'une norme fédérale ou provinciale). L'obligation d'accommodement ou d'exemption peut être fondée sur la liberté de religion elle-même (si l'on démontre que la norme incriminée entraine une atteinte à cette liberté) ou sur le droit à l'égalité sans discrimination fondée sur la religion (si l'on démontre que la norme incriminée entraine une discrimination religieuse).

Ainsi, dans l'arrêt *R.* c. *Videoflicks Ltd.*[71], la Cour d'appel de l'Ontario était arrivée à la conclusion que la *Loi sur les jours fériés dans le commerce de détail* de l'Ontario qui prohibait l'ouverture des commerces le dimanche restreignait la liberté de religion des propriétaires de commerce de foi juive qui ne pouvaient se prévaloir des exceptions prévues dans la loi (dont le bénéfice était limité aux petits commerces ne dépassant pas un certain nombre d'employés) et qui, pour se conformer sincèrement aux préceptes de leur religion, n'ouvraient pas leur commerce le samedi. La Cour avait donc jugé que la loi était *inopérante à leur égard*, ce qui revenait à accorder à ces personnes une "exemption constitutionnelle" à l'égard de la loi pour autant que celle-ci violait leur liberté de religion. Cette décision de la Cour d'appel de l'Ontario a été renversée par la Cour suprême dans l'arrêt *Edwards Books*.[72] À la majorité, la Cour a jugé la loi valide sans ajouter d'exemptions à celles prévues par le législateur. La Cour commença par reconnaître que l'objectif séculier de la loi – procurer un jour de repos hebdomadaire commun à tous les travailleurs – était valide.[73] Cependant, par ses effets, la loi restreignait la liberté de religion de ceux qui observaient le sabbat en leur imposant un fardeau financier supplémentaire puisqu'ils devaient fermer leur commerce un jour de plus que ceux qui observaient le dimanche comme jour religieux.

Ensuite, tout en reconnaissant que le législateur ontarien était tenu d'accommoder, dans la mesure du possible, ceux dont la religion les obligeait à fermer un autre jour que le dimanche, les juges majoritaires estimèrent que les exemptions déjà prévues dans la loi constituaient un accommodement suffisant et que l'addition d'exemptions supplémentaires (pour les plus grands commerces) mettrait en péril l'efficacité des mesures législatives en cause. Au contraire, la Cour d'appel avait jugé que le législateur n'était pas allé assez loin dans la voie de l'accommodement et qu'il aurait dû accorder l'exemption à tous les commerçants qui ferment le samedi pour des raisons religieuses, quelle que soit la taille de leur commerce. Notons que, par la suite, le législateur ontarien a, de sa propre initiative, modifié la loi pour étendre l'exemption sabbatique à tous les commerces, quelle que soit leur taille, fermant un jour quelconque autre que le dimanche pour des raisons religieuses.[74]

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70. Supra n. 25

71. *R.* c. *Videofliks Ltd.*, (1985) 14 D.L.R. (4th) 10 (C.A. Ont.).

72. *R.* c. *Edwards Books*, [1986] 2 R.C.S. 713.

73. Dans l'affaire *Big M*, supra n. 24, la Cour suprême a déclaré invalide la Loi sur le dimanche fédérale qui imposait la fermeture des magasins le dimanche pour des raisons d'observance religieuse. La Cour a jugé que l'objet de la loi était d'astreindre l'ensemble de la population à l'observance religieuse chrétienne, ce qui était incompatible avec la liberté de religion garantie par la Charte canadienne. Dans l'arrêt *R. c. Edwards Books,* Id., l'objet de la loi ontarienne, qui prohibait de la même façon l'ouverture dominicale des magasins, était de procurer un jour commun de repos hebdomadaire aux employés du commerce de détail, ce que la Cour a évidemment considéré comme un objet légitime. Elle a validé la loi comme restreignant de façon raisonnable et justifiable la liberté de religion.

74. Le législateur fédéral ou provincial peut de sa propre initiative, sans qu'il y ait obligation constitutionnelle imposée par les tribunaux, prévoir des accommodements, exemptions et autres traitements particuliers justifiés par des raisons religieuses. Ainsi par exemple, en matière d'abattage rituel, la *Loi sur la protection sanitaire des animaux* du Québec (L.R.Q., Chapitre P-42) qui précise que "le propriétaire ou le gardien d'un animal doit s'assurer que la sécurité et le bien-être de l'animal ne soit pas compromis", reconnaît toutefois des exceptions à ce principe (art. 55.9.15) en permettant notamment "les pratiques rituelles prescrites par les lois d'une religion". L'article 14 de la *Loi sur la preuve au Canada* (L.R.C. 1985, c. C-5) prévoit la possibilité d'une affirmation solennelle dans l'hypothèse où le témoin s'opposerait à prêter un serment de nature

Alors que les limites de l'obligation d'accommodement qui s'impose aux acteurs privés s'apprécient à travers le concept de "contrainte excessive",[75] les limites du droit à l'exemption constitutionnelle qui existe à l'égard des normes étatiques de portée générale relèvent, en droit canadien, de l'application des clauses limitatives des instruments en cause (*Charte canadienne* ou lois sur les droits de la personne provinciales ou fédérale). Dans le cas de la *Charte canadienne*, il s'agit de son article 1 qui permet que les droits et libertés garantis, notamment la liberté de religion et le droit à l'égalité religieuse, soient restreints "dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique". Cette disposition est interprétée comme exigeant, pour qu'une restriction à un droit ou à une liberté puisse être considérée comme justifiée, que celle-ci poursuive un objectif social important, que les moyens utilisés par le législateur pour atteindre cet objectif soient les moins restrictifs possibles et, enfin, que les effets bénéfiques de la mesure incriminée soient plus importants que ses effets préjudiciables.[76] Une décision récente de la Cour suprême du Canada permet d'illustrer comment l'article 1 s'applique à l'égard d'une demande d'exemption constitutionnelle pour raisons religieuses. Dans cette affaire,[77] les membres d'une communauté huttérite de l'Alberta réclamaient d'être exemptés de l'obligation de fournir une photographie personnelle d'identité pour obtenir un permis de conduire les véhicules automobiles. La Cour suprême, avoir reconnu le fait que cette exigence portait effectivement atteinte à leur liberté de religion (plus précisément, à leur désir de respecter le 2e commandement), a cependant refusé de leur accorder une exemption constitutionnelle (qui leur avait pourtant été reconnue aux deux premiers degrés de juridiction, par le tribunal de 1ère instance et la Cour d'appel de l'Alberta[78]). Elle a en effet jugé (par une majorité de quatre juges contre trois) que l'objectif législatif d'empêcher les vols d'identité liées à l'utilisation d'un permis de conduire frauduleux ne pourrait pas être atteint avec une efficacité suffisante si l'on dispensait un certain nombre de conducteurs de l'obligation de faire figurer leur photographie sur leur permis. Les juges majoritaires ont également considéré que les effets préjudiciables sur la liberté de religion étaient moins importants que les effets bénéfiques de la norme incriminée sur la prévention des vols d'identité. À cet égard, ils ont souligné que la liberté de religion ne protégeait pas les fidèles contre tous les inconvénients et coûts accessoires associés à leur pratique religieuse et que le refus du permis de conduire ne constituait pas en l'occurrence un coût suffisamment élevé pour priver les plaignants de la liberté de faire un choix véritable relativement à leur pratique religieuse (dans la mesure où ils pourraient se faire conduire par des tiers ou engager quelqu'un à cette fin). Les trois juges dissidents ont au contraire souligné la tradition de vie communautaire retranchée du milieu social ambiant et d'autosuffisance des huttérites, pour considérer que la survie de leur communauté exigeait que certains de leurs membres puissent conduire des automobiles pour assurer les contacts nécessaires avec le monde extérieur. Pour eux, l'obligation de la photo sur le permis constituait une forme de coercition indirecte plaçant les plaignants dans une situation intenable où ils devaient choisir soit de rester fidèles à leurs croyances religieuses, soit de renoncer à l'autosuffisance de leur communauté.

Les motifs profonds du jugement majoritaire semblent résider dans une certaine réticence à transposer l'obligation d'accommodement en matière religieuse du domaine des rapports privés, dans lequel elle est apparue, au domaine des normes étatiques de portée générale. Dans un passage qui n'est pas sans rappeler le jugement majoritaire de la

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religieuse. De la même manière, la *Loi sur la citoyenneté* prévoit un choix entre le serment de nature religieuse et l'affirmation solennelle de citoyenneté, afin d'établir la loyauté envers le chef d'État du Canada et ses institutions. Par conséquent, les juges n'y ont vu aucune forme d'atteinte à la liberté de religion, le libellé du serment ne faisant de surcroît aucune allusion à la Reine en sa qualité de chef de l'Église d'Angleterre : *Roach c. Canada, [1994] 2 C.F. 406* (Cour d'appel fédérale).

75. Voir l'analyse de l'arrêt Amselem dans la sous-section précédente aux 13-15, ci-dessus.

76. *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

77. *Alberta* v. *Hutterian Brethren of Wilson Colony*, 2009 SCC 37, 310 D.L.R. (4th) 193, 390 N.R. 202.

78. *Hutterian Brethren of Wilson Colony v. Alberta*, 2007 ABCA 160, 417 A.R. 68, 283 D.L.R. (4th) 136 confirmant 2006 ABQB 338, 398 A.R. 5, 269 D.L.R. (4th) 757.

Cour suprême des És-Unis dans l'affaire *Employment Division* v. *Smith* (494 U.S. 872 [1990]), la majorité souligne que " . . . la portée étendue de la liberté de religion garantie par la *Charte* représente un véritable défi. La plupart des règlements d'un État moderne pourraient être contestés par différentes personnes selon lesquelles ils auraient un effet plus que négligeable sur une croyance religieuse sincère. Donner suite à chacune de ces revendications religieuses pourrait nuire gravement à l'universalité de nombreux programmes réglementaires [. . .] au détriment de l'ensemble de la population."[79].

VI. State Financial Support for Religion

State financial support for religion is an issue that concerns both direct and indirect forms of support. For the most part, indirect forms of support take the form of tax exemptions and these will be dealt with briefly in the first part of this section. The following part will address the availability of financial support for religious private schools in Canada.

A. Indirect Financial Support for Religion

There are several basic forms of indirect financial support for religious institutions in Canada. One relates to an exemption from the payment of property taxes for land owned or leased by a church or religious organization and used as a "place of worship."[80] Another entitles religious institutions to a partial recovery of the federally-imposed Goods and Services Tax (GST) and the various Provincial Sales Taxes (PST) paid on goods and services acquired by the religious institution.[81]

The other forms of indirect support for religion are related to the special tax treatment Canada's income tax system provides to registered charities, a category into which most religious institutions fall. First, income earned by such charities is exempt under Canada's *Income Tax Act*.[82] As is the case with the exemption from property taxes, this is the functional equivalent of a government subsidy because instead of the government providing religious institutions with direct financial support for their activities, they essentially waive any taxes owing.

Furthermore, if individuals or corporations donate to charities, they will receive a tax credit or tax deduction for their contribution.[83] This provides a strong incentive for people to support religious institutions and enables these institutions to secure funding for their activities, with indirect support from the government. Generally speaking, these subsidies for religious-based institutions are justified on the basis that, like other charities, they provide socially desirable benefits that would otherwise have to be provided by governments directly.[84]

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79. Id. au para. 36, juge en chef McLachlin.

80. See e.g. *Assessment Act*, R.S.O. 1990, c. A.31, ss. 3(1)(3), 4; *An Act respecting Municipal taxation*, R.S.Q. c. F-2.1, ss. 204(8),(12); *Vancouver Charter*, S.B.C. 1953, c. 55 s. 396(1)(c)(iv); *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 326(1)(k). Eligible charities are also entitled to rebatesfor municipal taxes: see e.g: *Municipal Act*, S.O. 2001, c. 25, s. 361(1)–(13).

81. See Canada Revenue Agency, *GST/HST Information for Charities*, Guide no. RC4082 (Ottawa: Canada Revenue Agency, 2008), online: Canada Revenue Agency http://www.cra-arc.gc.ca/E/pub/gp/ rc4082/rc4082-08e.pdf; Revenu Québec, *The QST and the GST/HST: How They Apply to Charities*, Brochure no. IN-228-V (N.p: Revenu Québec, 2004), online: Revenu Québec http://www.revenu.gouv.qc.ca/documents/ en/publications/in/in-228-v(2004-10).pdf

82. *Income Tax Act*, R.S.C. 1985 (5th Su), c. 1, s. 149(1)(f) [hereinafter Canadian *ITA*]. The same exception applies for Provincial Income Taxes: see e.g. *Income Tax Act*, R.S.O. 1990, c. I.2, s. 6 [hereinafter Ont. *ITA*]; *Income Tax Act*, R.S.B.C. 1996, c. 215, s. 27(1)(a) [hereinafter B.C. *ITA*]; *Alberta Income Tax Act*, R.S.A. 2000, c. A-26, s. 7(a); *The Income Tax Act*, R.S.M. 1988, c. I10, C.C.S.M. c. I10, s. 3(3)(a) [hereinafter Man. *ITA*]; *Income Tax Act*, R.S.S. 1978, c. I-2, s. 9(a).

83. Individuals receive a tax credit pursuant to Canadian *ITA*, , s. 118.1(3) and corporations receive a deduction pursuant to Canadian *ITA*, s. 110.1. Similar tax benefits exist under provincial legislation: see e.g. Ont. *ITA*, Id., s. 3.1(18); B.C. *ITA*, Id., s. 4.4; *Alberta Personal Income Tax Act*, R.S.A. 2000, c. A-30, s. 11; *Income Tax Act, 2000*, S.S. 2000, c. I-2.01, s. 21; Man. *ITA*, Id., s. 4.6(18).

84. But see Bruce Chapman *et al*., eds., *Between State and Market: Essay on Charities Law and Policy in Canada* (Montreal: McGill-Queen's University Press, 2001) for a critique of these tax subsidies.

Undoubtedly, religious institutions stand to benefit significantly from these indirect forms of state support, but these forms of taxation relief only apply if the religious institution in question successfully registers as charity.[85] The general legal test for charitable status remains the one laid out in a 19th century English House of Lords decision.[86] According to this case, charitable activities include "the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community."[87] While "churches, synagogues, mosques, and temples, and closely related institutions such as schools, colleges, and eleemosynary organizations normally qualify for registration,"[88] the issue of charitable status for religious institutions has not been free from controversy in Canada. For example, there is ongoing debate over the recognition of charitable status for the Church of Scientology which, as it currently stands, has not been extended charitable status by the Canada Revenue Agency.[89]

B. Financial Support for Religious Private Schools

Comme cela a été vu dans une section précédente,[90] il ne semble pas que le principe de neutralité religieuse de l'État que la Cour suprême considère comme faisant implicitement partie de la liberté de religion doive être interprété comme interdisant à l'État de favoriser l'exercice de religion, à condition que toutes les religions soient traitées sur un pied d'égalité. Selon ce raisonnement, le financement public des écoles religieuses privées serait donc constitutionnellement permis.[91] Il faut cependant souligner que la question n'a pas encore été explicitement tranchée par les tribunaux.[92] Par ailleurs, en pratique, cinq provinces canadiennes sur dix[93] financent actuellement les écoles religieuses privées, à des hauteurs variables selon la province considérée, sans que cette pratique ait pour l'instant fait l'objet d'une contestation constitutionnelle.

Par contre, la politique de l'Ontario consistant à refuser tout financement public aux écoles privées, y compris les écoles religieuses, a fait l'objet d'une attaque fondée, dans un premier temps, sur la *Charte canadienne* et, dans un deuxième temps, sur le *Pacte international relatif aux droits civils et politiques*.[94] Il faut savoir qu'en vertu de l'article 93 de la *Loi constitutionnelle de 1867*, (sur cette disposition, voir l'historique contenu

85. Canadian *ITA*, supra n. 82, ss. 149.1, 248.

86. *Commissioners of Income Tax v. Pemsel* [1891] A.C. 531 (H.L.), 3 TC 53 [hereinafter *Pemsel* cited to A.C.].

87. Id. at 583

88. M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 2d ed. (Toronto: Irwin Law, 2003) at 268 [hereinafter Ogilvie, *Religious Institutions*].

89. As of January, 2010, according to the Canada Revenue Agency's Charities Directorate accessible online at http://www.cra-arc.gc.ca/charities/. With respect to the ongoing debate see e.g. John Saunders and Timothy Appleby, "Scientology seeks tax-receipt status: Fresh from U.S. victory, organization looks to Canada for charity ruling" *The Globe and Mail* (19 January 1998) A1, A6 (QL). It is interesting to note that while the Church of Scientology has not obtained charitable status in Canada for the purpose of issuing tax receipts to donors, the Church itself does not pay income tax given its not-for-profit status and its ministers are authorized to solemnized marriages which will be recognized by the State. Further discussion on the solemnization of civil marriage by religious officials can be found in Section VII of this Report, below, entitled "Civil Legal Effects of Religious Acts," in particular, part A: "Marriage and Divorce."

90. Voir la partie intitulé "Freedom of Religion and State Law – Reasonable Accommodation" aux 16-18, ci-dessus.

91. Dans ce sens, voir notamment Peter W. HOGG, supra n. 39 at 810-811; voir aussi Robert A. Sedler, «The Constitutional Protection of Freedom of Religion, Expression and Association in Canada and the United States : A Comparative Analysis», (1988) 20 *Case Western J. of Int. L*., 577, 584 : «In any event, because of the absence of a non-establishment component in section 2a), the government is not required to be neutral toward religion. Governmental practices that favor religion over non-religion or that favor one religion over another religion, are not as such violative of section 2a). It is only where the governmental action has the action of imposing "coercive burdens on the exercice of religious beliefs" that it may be found violative of section 2a)».

92. Dans *Big M*, supra n. 24 aux para. 107-09, le juge Dickson a laissé expressément ouverte la question de savoir si la Charte canadienne *permet* à l'État de soutenir financièrement les institutions religieuses privées; la question n'a pas davantage été tranchée dans *Adler* c. *Ontario*, [1996] 3 R.C.S. 609 [*Adler*], où la Cour suprême a par contre décidé que la Charte canadienne *n'obligeait pas* l'État à fournir un tel soutien financier.

93. La Colombie-Britannique, l'Alberta, la Saskatchewan, le Manitoba et le Québec.

94. *Adler*, supra n. 92; *Waldman* c. *Canada*, CCPR/C/67/D/694/1996, 4 novembre 1999 [*Waldman*].

dans une section précédente de ce rapport) l'Ontario est constitutionnellement obligée de financer les écoles catholiques séparées, celles-ci étant juridiquement considérées comme des écoles publiques. Par ailleurs, la province finance évidemment les écoles publiques communes qui sont laïques (*secular*). Donc, tout en refusant de financer les écoles religieuses privées, l'Ontario finance les écoles publiques communes laïques et les écoles publiques séparées catholiques.

Dans l'affaire *Adler*,[95] les requérant contestaient le refus de financement public de certaines écoles juives et chrétiennes indépendantes comme contraires à la liberté de religion et à l'interdiction de la discrimination fondée sur la religion. À la Cour suprême, une majorité de juges s'est appuyée sur l'article 93 de 1867 pour rejeter le pourvoi, en considérant qu'on ne pouvait pas invoquer les droits garantis dans la *Charte canadienne* pour contredire ou neutraliser une autre disposition de la Constitution canadienne. Deux juges dissidentes, Mesdames McLachlin et L'Heureux-Dubé, sont arrivées à la conclusion qu'il y avait discrimination indirecte (ou "par suite d'un effet préjudiciable") fondée sur la religion, dans la mesure où la politique ontarienne avait pour effet de refuser un avantage aux personnes dont la religion ne leur permettait pas d'envoyer leurs enfants à l'école publique laïque. Madame la juge McLachlin[96] est cependant arrivée à la conclusion que cette discrimination était raisonnable, et donc justifiée, en application de la disposition limitative contenue dans l'article 1 de la *Charte canadienne*. Elle a en effet considéré qu'encourager l'établissement d'une société multiculturelle harmonieuse plus tolérante constituait un objectif urgent et réel et que le régime des écoles publiques offrait les chances les plus prometteuses d'atteindre un tel objectif. En outre, à son avis, il était impossible de dire si une mesure moins envahissante, comme un financement partiel des écoles confessionnelles privées, permettrait d'atteindre le même objectif avec une atteinte moins grande à la liberté de religion. Par contre, Madame le juge L'Heureux-Dubé a jugé que même si la loi ontarienne avait un objectif légitime, celui de favoriser le plus possible la fréquentation de l'école publique laïque, le refus de tout financement des écoles religieuses allait au delà de ce qui était requis pour atteindre cet objectif et ne constituait donc pas une «atteinte minimale». Pour elle, le fait d'attribuer un financement *partiel* aurait permis d'accorder une certaine reconnaissance aux minorités religieuses et de les aider à survivre, sans compromettre le caractère généralement laïque et universel du système d'écoles publiques.[97]

La position adoptée par la Cour suprême dans l'affaire *Adler* laissait donc subsister la discrimination existant entre le traitement accordé aux écoles catholiques, d'une part, et celui réservé aux autres écoles religieuses, d'autre part. Sans doute cette distinction était-elle autorisée par l'article 93 de la *Loi constitutionnelle de 1867*, mais elle n'en pouvait pas moins être contestée comme incompatible avec l'article 26 du *Pacte international*, ce qui a effectivement été le cas, avec succès, dans l'affaire *Waldman*.[98] Le Comité des droits de l'Homme des Nations Unies n'a guère eu de difficultés à conclure que le financement par l'Ontario des écoles catholiques mais non des écoles d'autres religions (le requérant était de religion juive et devait débourser près de 15,000 dollars par an pour envoyer ses enfants dans une école privée juive non-subventionnée) constituait une discrimination fondée sur la religion, et que les préoccupations qui avaient conduit en 1867 à enchâsser les droits des catholiques à l'article 93 de la *Loi constitutionnelle de 1867* ne pouvaient plus justifier une telle discrimination à l'heure actuelle, si bien qu'elle devait être considérée comme incompatible avec l'article 26 du *Pacte*.[99] Le fait que la

95. *Adler*, Id.
96. Id. au para. 193 et s.
97. Id. au para. 56 et s.
98. *Waldman*, supra n. 94.
99. L'article 2.1 du *Pacte international* énonce : «2.1. Les États parties au présent Pacte s'engagent à respecter et à garantir à tous les individus se trouvant sur leur territoire et relevant de leur compétence les droits reconnus dans le présent Pacte, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation». Étant donné cette conclusion, qui suffisait à donner raison au requérant, le Comité n'a pas jugé nécessaire d'examiner les deux autres arguments de celui-ci, fondés respectivement sur l'article 18

discrimination découlant de la législation ontarienne soit également prévue dans la Constitution canadienne ne la rendait pas davantage compatible avec le *Pacte international*. Le Comité a souligné que le *Pacte international* n'oblige pas les États-parties à financer les écoles religieuses privées. Cependant, s'ils décident de le faire, cela doit être de façon non-discriminatoire.[100]

Le gouvernement de l'Ontario a fait savoir qu'il excluait formellement l'un et l'autre des deux moyens par lesquels il pourrait faire disparaître la discrimination reprochée et rétablir la conformité de sa législation avec le *Pacte* : soit l'extension du financement aux écoles religieuses autres que catholiques ; soit la suppression du financement de celles-ci. Il est vrai que le financement des écoles catholiques est une obligation constitutionnelle lui incombant en vertu de l'article 93 de la *Loi constitutionnelle de 1867*, mais, comme le soulignait le requérant dans l'affaire *Waldman*, Terre-Neuve et le Québec se sont soustraits aux obligations découlant du même article (ou, dans le cas de Terre-Neuve, découlant de dispositions constitutionnelles similaires) par des modifications constitutionnelles adoptées en 1997 et en 1998. Néanmoins, l'Ontario a adopté, peu après l'intervention du Comité des Nations Unies, des modifications fiscales pour faire en sorte que les parents qui doivent débourser des frais de scolarité pour envoyer leurs enfants dans une école privée (alors qu'ils sont également astreints à payer les impôts scolaires destinés à financer les écoles publiques) puissent tenir compte de cette dépense dans leur déclaration fiscale.

VII. Civil Legal Effects of Religious Acts

This section will discuss the extent to which, in Canada, secular law recognizes and enforces acts performed, and decisions made, according to religious law. These issues will be examined in the context of Marriage and Divorce, where they frequently arise, as well as more broadly, within the realm of the internal autonomy of religious communities.

A. Marriage and Divorce

Pursuant to the *Canadian Constitution*, while marriage falls under the competence of the federal government, the solemnization of marriage falls under provincial competence,[101] and it is mainly to provincial legislation to which we must turn to discern the civil legal effects of religious marriages. Today, in every province, there is explicit recognition by secular law of religiously performed marriages by every minister of religion authorized to solemnize marriages.[102] As such, everywhere in Canada, in respect of marriage, "the civil contract and the religious sacrament can be performed simultaneously."[103]

(liberté de religion) et sur l'article 27 (droits des minorités ethniques, religieuses ou linguistiques), combinés avec l'article 2(1) du *Pacte* (non discrimination dans la jouissance des droits garantis par le *Pacte*).

100. «[…] the Committee observes that the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.» (par. 10.6).

101. *Loi constitutionnelle de 1867*, supra n. 33, ss. 91(26), 92(12).

102. Arts. 366, 367 C.C.Q.; *Marriage Act*, R.S.O. 1990, c. M.3, s. 20 [hereinafter Ontario *Marriage Act*]; *Marriage Act* R.S.B.C. 1996, c. 282, ss. 2-3; *Marriage Act*, R.S.A. 2000, c. M-5, ss. 3-4; *Marriage Act*, S.S. 1995, c. M-4.1, as am. by S.S. 2004, c. 66 and S.S. 2009, c.4, ss. 3, 5, 6; *Marriage Act*, R.S.E.I. 1988, c. M-3, ss. 3-8 [hereinafter PEI *Marriage Act*]; *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436, ss. 4-6; *Marriage Act*, R.S.N.B. 1973, c. M-3, s.2 ; *Solemnization of Marriage Act*, R.S.N.L. 1990, c. S-19, ss. 3-5; *Marriage Act*, R.S.M. 1987, c-M50, C.C.S.M. c. M50, ss. 2-3; *Marriage Act*, R.S.Y. 2002, c. 146, ss. 2-3; *Marriage Act*, R.S.N.W.T. 1988, c. M-4, ss. 2-3; *Marriage Act*, R.S.N.W.T. 1988, c. M-4, ss. 2-3, as duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28.

103. Robert Leckey, "Profane Matrimony" (2006) 21:2 C.J.L.S. 1 at 13 (providing an interesting overview of the historical regulation of civil marriages and the evolution of civil marriage in its intersection with religion in Canada).

There are, however, two main issues concerning marriage that involve the delicate intersection between secular law and religion. The first arises in the context of Canada's recognition of same-sex marriages. Following a reference by the federal government to the Supreme Court of Canada,[104] Parliament enacted the *Civil Marriage Act*[105] in 2005 which defines marriage as "the lawful union of two persons to the exclusion of all others." This Act made Canada only the fourth country in the world to legislate same-sex marriage.[106]

Because same-sex marriage may be repugnant to the religious beliefs of certain faith communities, this new legislation had the potential to interfere within the religious domain, and provision needed to be made to protect religious officials from state compulsion to perform same-sex marriages against their religious beliefs.[107] As such, the *Civil Marriage Act*[108] contains, both in its Preamble and in section 3, specific recognition that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs. This is echoed in some provincial legislation.[109]

While Canadians may marry pursuant to a civilly-recognized religious ceremony, they may also choose to marry civilly with no religious sanction. The interesting question that arises in this context is whether a marriage commissioner may conscientiously object to performing a civil same-sex marriage due to his own religiously-held beliefs. As solemnization of marriage is within provincial competence, the answer is not uniform across the country. Prince Edward Island is thus far the only province to have enacted specific protection allowing anyone authorized to solemnize a marriage to refuse to do so if it conflicts with that person's religious beliefs.[110] It has been said that this issue "sets the stage for (yet another) conflict between religious freedom and sexual orientation, between religion-based constitutional claims and (sexual orientation) equality claims."[111]

The one case in Canada where this was recently tested before the courts seems to indicate that barring specific legislative permission to do so, civil officials will not be able to claim conscientious objection, based on religious grounds, to refuse to perform a same-sex marriage. In *Nichols v. Saskatchewan (Human Rights Commission)*,[112] Justice McMurtry upheld a decision of the provincial Human Rights Commission to fine a Saskatchewan civil marriage commissioner $2,500 for refusing to perform his public service for a same-sex couple. The Court held that as a government actor, he was "not entitled to discriminate, regardless of his private beliefs."[113] As Professor MacDougall asserts, to do otherwise would be to allow a "religious 'veto' over the availability of a public service."[114]

The second issue involving the intersection between religion and the secular state in

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104. *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, 246 D.L.R. (4th) 193.

105. S.C. 2005, c. 33 (formerly Bill C-38).

106. The other countries were the Netherlands (2001), Belgium (2003) and Spain (2005). For an overview of this historical evolution and description of this legislation as well as court decisions in the area of same-sex marriage see Mary C. Hurley, "Bill C-38: The Civil Marriage Act" Legislative Summaries, online: Library of Parliament - Parliamentary Information and Research Service http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?Parl=38&Ses=1&ls=c38.

107. In *Reference Re Same-Sex Marriage*, supra n. 104 at para. 58, the Supreme Court held that s. 2(a) of the *Charter*, supra n. 25 was sufficiently broad to offer such protection to religious officials from performing same-sex marriage contrary to their religious beliefs.

108. Supra, n. 105.

109. As the solemnization of marriage falls under provincial jurisdiction, provincial legislation is needed to protect religious officials in a similar way. See Ontario *Marriage Act*, supra n. 102, s. 20(6); Art. 367 C.C.Q.; PEI *Marriage Act*, supra n. 102, s. 11(1).

110. PEI *Marriage Act*, supra n. 102, s. 11(1) as am. by R.S.E.I. 2005, c.12, s. 7. Although there was a Bill proposed in New Brunswick to the same effect, it never came into effect.

111. Bruce MacDougall, "Refusing to Officiate at Same-Sex Civil Marriages" (2006) 69 Sask. L.Rev. 351 at 355.

112. 2009 SKQB 299, [2009] 10 W.W.R. 513, 71 R.F.L. (6th) 114.

113. Id., at para 73.

114. Supra n. 111 at 353. But see Ryder, supra n. 36 at 191. Ryder is less categorical on this issue and points out that "human rights jurisprudence supports the rights of employees, whether in the public or the private sector, whether or not they are religious officials, to object to the performance of job duties on religious grounds and employers have an obligation to accommodate them if they can do so without undue hardshi" Id.

the area of marriage concerns polygamous marriage. While Canada has made polygamy a criminal offence pursuant to s. 293(1) of the *Criminal Code*,[115] at least one Canadian community continues to adhere openly to plural marriage.[116] Although the practice is not widespread in Canada, it has brought to the forefront the potential clash between Canada's criminalization of polygamy and the constitutional protection of religious freedom. Some commentators assert that the paucity of prosecutions for polygamy relates to a concern that "the *Criminal Code* prohibitions on polygamy are vulnerable to constitutional challenge,"[117] although several predict that any such challenge would not be successful.[118]

The legal repercussions of polygamous marriages go beyond their potential criminality and extend to matters of immigration[119] as well as to issues surrounding spousal support and matrimonial property division.[120] And while contrary to the law in Canada, for certain limited purposes, a polygamous marriage entered into validly in a jurisdiction that recognizes such marriages, by persons domiciled in that jurisdiction at the time of the marriage, may be given some effect in Canada.[121]

As is the case with marriage, divorce is also within the federal government's jurisdiction.[122] With respect to the interface between religion and divorce, it is worth noting that the *Canada Divorce Act*[123] contains, in section 21.1, a provision which prevents a spouse from exercising his civil rights in a divorce for so long as he refuses to remove a religious barrier to divorce, such as the granting of a religious divorce. This provision was enacted after consultation with, and through the urging of, the Jewish community since in the Jewish religion, despite a civil divorce, a marriage remains in effect until a *get* (or religious divorce supervised by the rabbinic tribunal called the *Beit Din*) is given by the husband and accepted by the wife.[124] This section of the *Divorce Act* may be seen as palliating a potentially unfair withholding of such a divorce by the husband, without which the wife cannot remarry within her faith.

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115. R.S.C. 1985, c. C-46. Further, the definition of marriage in the *Civil Marriage Act*, supra n. 105, as "the lawful union of two persons to the exclusion of all others" excludes polygamy from the Canadian conception of marriage. Bigamy is also indictable offence pursuant to s. 290(1) of the *Criminal Code.*

116. This community is Bountiful, British Columbia where according to Professor Angela Campbell, who has done empirical research about this community, until two male community leaders were arrested on polygamy charges in January, 2009 (such charges being subsequently dropped), Bountiful's residents, who belong to the Fundamentalist Church of Jesus Christ of Latter Day Saints, have been practicing polygamy for decades without state interference. See Angela Campbell, "Bountiful Voices" (2009) 47 Osgoode Hall L.J. 183; Angela Campbell, "Wives' Tales: Reflecting on Research in Bountiful" (2008) 23 C.J.L.S. 121; Robert Matas and Wendy Stueck, "Polygamy Charges in Bountiful" *The Globe and Mail* (7 January 2009), online: The Globe and Mail http://www.theglobeandmail.com/news/national/article963758.ece. Recently, one of Bountiful's religious leaders who was charged with polygamy last year has even filed a lawsuit against the provincial government for damages due to "unlawful" prosecution. See Keith Fraser, "Polygamist sect leader sues B.C. government" *The National Post* (13 January, 2010), online: National Post http://www.nationalpost.com/story.html?id=2438556.

117. Nicholas Bala *et al*., "An International Review of Polygamy: Legal and Policy Implications for Canada" in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, 2005) 1 at 30. See also Susan G. Drummond, "Polygamy's Inscrutable Criminal Mischief" (2009) 47 Osgoode Hall L.J. 317.

118. Bala, Id. at 40, concludes that "concern about the welfare of vulnerable and dependent individuals may outweigh Charter-based rights of adults to freedom of religion." See also Lisa Kelly, "Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy", (2007) 65 U.T. Fac. L. Rev. 1 at 25.

119. The cases of *Ali v. Canada (Minister of Citizenship & Immigration*) (1998), 154 F.T.R. 285 and *Awwad v. Canada (Minister of Citizenship & Immigration*) (1999), 162 F.T.R. 209 at para. 17, [1999] F.C.J. No. 103 (confirming that immigration officers may take the fact of being in a bigamous or polygamous marriage into account in denying admission to Canada).

120. Kelly, supra n. 118 at 30-37.

121. See *Tse v. Minister of Employment & Immigration* [1983] 2 F.C. 308, 144 D.L.R. (3d) 155 (upholding a polygamous marriage entered into in Hong Kong as valid for purposes of establishing the legal status of a child).

122. *Loi constitutionnelle de 1867*, supra n. 33, s. 91(26).

123. R.S.C. 1985 (2nd Su), c. 3.

124. This issue was at the forefront of the recent Supreme Court of Canada decision in *Bruker*, supra n. 46, discussed in section 4 of this report entitled "The State and Religious Autonomy" at 10-13, above. See generally Jukier and Van Praagh supra n. 46.

B. Religious Arbitration in Family Matters

The issue of the legitimacy of religious arbitration in family matters attracted a great deal of attention in Canada when the Islamic Institute of Civil Justice sought to create a "Shari'a Court" in Ontario in 2003. The purpose behind this proposed religious arbitral body was the settlement of personal disputes involving Muslims related to inheritance and family matters. Key to this proposal was that such decisions would be legally binding and judicially enforceable by Ontario courts.[125] This recommendation resulted in intense controversy[126] "triggering heightened concern for the well-being of vulnerable members of society"[127]such as women and children, as well as "concerns about individual autonomy and community compulsion."[128]

As a result, the Ontario government mandated a study, commonly known as the "Boyd Report,"[129] which concluded that Ontario should allow individuals to choose religious arbitration as a reflection of Canada's multicultural society as long as minimal safeguards, concerning such things as the legitimacy of consent and judicial review procedures, were put into place. The Ontario government did not follow these recommendations, choosing instead to reject all state-sanctioned religious arbitrations. Amendments to the province's *Arbitration Act* were passed requiring all family arbitrations to be conducted exclusively in accordance with Ontario or Canadian law.[130] It is important to point out that despite these amendments, parties are not prohibited from choosing to settle their family matters according to religious norms, or before a religious authority, as any such prohibition would constitute a violation of freedom of religion. The amendments merely assert that such religious arbitration will not be automatically legally binding or enforceable before a state court of law.[131] Given the public order nature of family decisions, the same would be true in the rest of Canada and as such, a secular court will not grant a divorce on terms arrived at by religious mediation or arbitration, or sanction a religious decision on any family matter, unless that court deems it consonant with Canadian law and policy.

C. Civil Effects of Religious Decisions outside the Family Context

The final question to address is what effect does the state give to religious decisions made by religious bodies or courts outside the family context. While it is tempting to assert categorically, as does Justice Deschamps in dissent in the Supreme Court decision

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125. For a summary of the debate concerning the Shari'a Court proposal in Ontario see Jean-François Gaudreault-DesBiens, "On Private Choices and Public Justice: Some Microscopic and Macroscopic Reflections on the State's Role in Addressing Faith-Based Arbitration" in Ronalda Murphy and Patrick A. Molinari, eds., *Doing Justice: Dispute Resolution in the Courts and Beyond* (Montreal: Canadian Institute for the Administration of Justice, 2007) 247 at 249-255 [Gaudreault-DesBiens, "Faith-Based Arbitration"].

126. In June 2005, a "No Religious Arbitration Coalition" was formed which included most Canadian feminist organizations and some Muslim organizations. See Natasha Bakht, "Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy – Another Perspective" in Murphy and Molinari, Id., 229 at 237-38.

127. Lorraine E. Weinrib, "Ontario's Sharia Law Debate: Law and Politics under the Charter" in Moon, supra n. 18, 239 at 260.

128. Id.

129. Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Ontario Ministry of the Attorney General, 2004), online: Ontario Ministry of the Attorney General http://www.attorneygeneral,jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf.

130. See Prithi Yelaja and Robert Benzie, "McGuinty: No sharia law" The Toronto Star (12 September 2005) A1 (QL) (the premier of Ontario, Dalton McGuinty, announced that "there will be no sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians"). As a result, Bill 27, *Family Statute Law Amendment Act, 2006*, 2nd Sess., 38th Leg., Ontario, 2006 (assented to 23 February 2006), S.O. 2006 c-1, was passed amending the *Arbitration Act, 1991*, S.O. 1991, c. 17 and providing that all family law arbitrations must be conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction.

131. Gaudreault-DesBiens, "Faith-Based Arbitration", supra n. 125 at 254. As Bakht points out, supra n. 126 at 245, these amendments do not prohibit family arbitration with religious principles, as long as such principles do not conflict with Ontario or Canadian family law. This is similar to the situation in Quebec. See art. 2639 C.C.Q. which prohibits family matters from being submitted to binding arbitration.

of *Bruker v. Marcovitz*,[132] that civil courts and religious undertakings must operate in non-intersecting spheres, the reality is slightly more complicated.

In general, Canadian courts do decline to intervene in the internal matters of a religious body and in deciding questions pertaining to religious doctrine.[133] Religious organizations are viewed as voluntary associations over which courts are slow to exercise jurisdiction.[134] For example, it was held to be inappropriate for a secular court to interfere with a decision taken by a religious council responsible for supervising and certifying products and establishments complying with Jewish dietary laws.[135] Likewise, courts will generally enforce contractual stipulations pursuant to which parties agree to submit their disputes to religious arbitration.[136]

There are instances, however, where it may be appropriate for Canadian judges to interfere with, or refuse to enforce, decisions taken by religious bodies where it is "necessary to prohibit practices that are harmful, that violate civil or property rights or that infringe a person's constitutional rights."[137] As such, intervention by secular courts occurs in instances where the court finds some procedural irregularity or breach of natural justice.[138] In *Lakeside Colony of Hutterian Brethren v. Hofer*,[139] the Supreme Court of Canada refused to enforce a decision by a religious community to expel one of its members and thereby deprive him of his property in the colony on the ground that such expulsion was invalid for lack of notice and procedural fairness.

The above examination demonstrates that while Canada is said to espouse a separation between secular courts and internal religious decision-making, this principle of non-intervention is somewhat more nuanced and dependent on public order principles related to family law, as well as procedural fairness guarantees for all Canadians.

VIII. RELIGIOUS EDUCATION AND THE YOUTH:

La liberté de conscience et de religion et l'éducation religieuse dans les écoles publiques et privées

A. Private Religious Schools

Le droit de créer et de gérer des écoles religieuses privées et le droit d'envoyer ses enfants dans de telles écoles ne sont pas expressément reconnus dans la *Charte canadienne*. Mais on considère généralement que la Cour suprême a, dans les affaires *Jones*[140] et *Adler*,[141] indirectement fait découler de la liberté de conscience et de religion

132. Supra n. 46 at paras. 101-85.

133. See generally Ogilvie, *Religious Institutions*, supra n. 88 at 217-221; Anne Saris, "Les tribunaux religieux dans les contextes canadien et québécois" (2006) 40 R.J.T. 353; *Levitts Kosher Foods Inc. v. Levin* (1999), 45 O.R. (3d) 147 at para. 31 (Su Ct. J.), 175 D.L.R. (4th) 471 [*Levitts Kosher Foods* cited to O.R. (3d)].

134. See Ogilvie, *Religious Institutions*, Id. at 215; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, 81 Man. R. (2d) 1.

135. *Levitts Kosher Foods*, supra n. 133 (the court stressed that the process of supervision and certification was a religious function, based on religious belief and conscience, into which it could not intervene).

136. See *Popack v. Lipszyc*, 2008 CarswellOnt 5184 (Su Ct. J.) (WLeC) aff'd 2009 ONCA 365, 2009 CarswellOnt 2288 (C.A.) (WLeC) (the Court enforced the parties agreement to submit any disputes that arose in the course of their commercial dealings to the *Beit Din*, a Jewish religious tribunal). See also *Grunbaum c. Grunbaum* (2002), AZ-50110109 (Qc. Su Ct.) (Azimut).

137. Bakht, supra n. 126 at 235-36. Accord Ogilvie, *Religious Institutions*, supra n. 88 at 218.

138. See e.g. *Cohen v. Hazen Avenue Synagogue* (1920), 47 N.B.R. 400 (S.C. (Ch.D)) (a resolution to suspend a member for life was not enforced because of procedural irregularities and lack of notice requirements in calling the meeting where such expulsion was decided by the religious body).

139. Supra n. 134.

140. *R.* c. *Jones*, [1986] 2 R.C.S. 284.

141. *Adler*, supra n. 92. Dans cette affaire, les quatre juges qui se sont prononcés sur l'article 2a) de la *Charte canadienne* (liberté de conscience et de religion) ont souligné que le non-financement de l'enseignement religieux privé ne constituait pas une atteinte à la liberté d'éduquer ses enfants en conformité avec ses croyances religieuses *dans la mesure où il n'existait pas, dans la loi ontarienne, de restriction à l 'enseignement religieux* (dans une école privée ou à la maison). *A contrario*, une loi qui obligerait les parents à envoyer leurs enfants à l'école publique laïque restreindrait cette liberté.

reconnue dans la *Charte canadienne* (ainsi que du droit à la liberté reconnu dans l'article 7 de cette même *Charte*) le droit des parents de ne pas envoyer leurs enfants à l'école publique et de leur faire donner un enseignement religieux dans une école privée ou à la maison, à condition qu'il soit «approprié» (le droit des parents d'envoyer leurs enfants dans une école religieuse privée suppose évidemment le droit de créer et de gérer de telles écoles). Il faut également souligner que certaines lois provinciales sur les droits de la personne prévoient expressément le droit de créer des écoles privées, notamment pour des raisons religieuses, et d'y envoyer ses enfants; il en va ainsi de la *Charte des droits et libertés de la personne* du Québec.[142] Si l'État a donc l'obligation constitutionnelle de permettre la création d'écoles religieuses privées et de laisser les parents y envoyer leurs enfants, il n'est pas tenu, comme on l'a vu dans une section précédente, de venir en aide financièrement à de telles écoles, mais la Constitution ne l'empêche pas de le faire s'il le désire, à condition que ce soit de façon non-discriminatoire.

B. Religion in Public Schools

En se fondant sur la liberté de conscience et de religion et l'obligation de neutralité étatique qui en fait implicitement partie, la Cour d'appel de l'Ontario a jugé inconstitutionnel les exercices religieux (comme la prière)[143] et l'enseignement confessionnel chrétien à l'école publique[144], malgré l'existence d'une possibilité de dispense à la demande des parents. Elle considéré que la pression du conformisme pourrait dissuader certains parents de s'en prévaloir par peur d'une stigmatisation par les pairs. Renvoyant à ces deux décisions de la Cour d'appel de l'Ontario, le juge Sopinka de la Cour suprême du Canada, affirmait dans l'affaire *Adler*[145] que "[c]e caractère laïque [des écoles publiques] est lui-même prescrit par l'al. 2a) de la Charte, comme l'ont statué plusieurs tribunaux au Canada". Autrement dit, la Charte impose que les écoles publiques soient laïques (*secular*), c'est-à-dire qu'elles respectent le principe de neutralité. Par contre, il ne semble pas que l'obligation de neutralité s'imposant à l'État interdise l'existence, au sein du système scolaire public, d'écoles ayant un projet confessionnel si celles-ci sont librement choisies par les parents. Un tel arrangement existe par exemple dans la province de l'Alberta. En outre, l'enseignement culturel des religions (par opposition à l'éducation religieuse confessionnelle) peut être rendu obligatoire à l'école publique à condition qu'il soit dispensé de façon neutre et objective. La Cour d'appel de l'Ontario a défini de la façon suivante les critères qu'un enseignement religieux de type *culturel* doit respecter pour pouvoir être rendu obligatoire à l'école publique sans contrevenir à la liberté de conscience et de religion des élèves[146] :

- l'enseignement doit viser *l'étude*, non la *pratique* des religions;
- il doit présenter aux élèves *toutes* les religions, mais n'en *imposer* aucune;
- l'approche doit être *académique* et non *confessionnelle*;
- le but recherché doit être de rendre les élèves sensibles à l'existence de *toutes* les religions et non pas de leur en faire *accepter* une en particulier.

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142. Quebec *Charter*, supra n. 42, art. 41. L'article énonce «Les parents ou les personnes qui en tiennent lieu ont le droit d'assurer l'éducation religieuse et morale de leurs enfants conformément à leurs convictions, dans le respect des droits de leurs enfants et de l'intérêt de ceux-ci» et l'article 42 reconnaît aux parents ou aux personnes qui en tiennent lieu «le droit de choisir pour leurs enfants des établissements d'enseignement privés, pourvu que ces établissements se conforment aux normes prescrites ou approuvées en vertu de la loi».

143. *Zylberberg* c. *Sudbury Board of Education*, (1988) 65 O.R. (2d) 641 (C.A. Ont.), autorisation d'appel en Cour suprême refusée.

144. *Canadian Civil Liberties Association* c. *Ontario (Minister of Education)*, (1990) 71 O.R. (2d) 341; 65 D.L.R. (4th) 1 (C.A.), autorisation d'appel en Cour suprême refusée. Il faut souligner que les juges ontariens ont interprété la liberté de religion de façon plus exigeante que les normes internationales. Il semble en effet que l'existence d'une possibilité de dispense à l'égard de l'enseignement confessionnel ou l'alternative entre celui-ci et un enseignement culturel ou moral neutre et objectif soit généralement considérée comme suffisante pour assurer la conformité avec la liberté de religion garantie dans les instruments internationaux; dans ce sens, voir l'*Observation générale n° 22 (48) (art. 18) sur la liberté de religion* du Comité des Nations Unies des Droits de l'Homme, Doc. N.U. CCPR./C/21/Rev. 1/add.4, 20 juillet 1993, paragraphe 6.

145. *Adler*, supra n. 92 à la 705, juge Sopinka.

146. *Canadian Civil Liberties Association* c. *Ontario (Minister of Education)*, supra n. 144.

Mais le respect de telles conditions risque d'entraîner un paradoxe: pour éviter le reproche d'inculquer des valeurs religieuses, l'enseignement tendra à présenter les diverses religions de la façon la plus neutre possible et à souligner la pluralité des opinions à leur sujet. Certains parents pourraient alors trouver qu'un tel enseignement véhicule un *relativisme moral* incompatible avec les convictions religieuses qu'ils cherchent à transmettre à leurs enfants et, dès lors, de créer un conflit d'allégeance chez les enfants ou de porter atteinte au rapport de confiance qui existe avec leurs parents. C'est exactement le reproche que font certains parents au cours d'éthique et de culture religieuse (dit cours ECR) introduit dans les écoles publiques du Québec depuis un an. La question est actuellement débattue devant les tribunaux. Si ces derniers acceptent l'argumentation des plaignants, il faudra alors se demander si une exemption doit être accordée aux enfants des parents qui le demandent ou si, au contraire, les autorités scolaires peuvent à bon droit refuser une telle exemption en démontrant qu'elle entraînerait des inconvénients excessifs - ou encore en démontrant que le maintien de l'enseignement obligatoire - sans exemption possible - est justifié. Le gouvernement pourrait par exemple argumenter que le maintien intégral du *curriculum* obligatoire est justifié par la mission de l'école de développer la capacité des élèves de réfléchir de façon critique sur des sujets complexes et controversés afin de les préparer à exercer leurs responsabilités de citoyens, ou encore par la mission de l'école d'éduquer les enfants issus de divers milieux à la tolérance en les habituant à se côtoyer, objectif qui serait contrecarré si les écoles devaient dispenser certains enfants de participer aux activités pédagogiques que leurs parents estiment répréhensibles pour des motifs religieux. Autrement dit, le fait de prévoir un régime d'exemptions pourrait contrecarrer, au moins dans certaines circonstances, la mission de l'école d'éduquer les enfants à la tolérance et à la cohabitation harmonieuse entre membres de groupes religieux et sociaux distincts. Cette dernière considération est importante dans le contexte canadien, car la Cour suprême du Canada, dans l'affaire *Multani* (l'affaire du *kirpan*, qui est présentée plus loin dans le présent rapport) a accordé beaucoup d'importance à cette mission des écoles d'éduquer à la cohabitation harmonieuse et à la tolérance entre enfants de milieux différents.[147]

IX. Religious Symbols in Public Places

A. Religious signs and symbols in public places

Au Canada, la question des symboles religieux dans l'espace public (au sens d'espace propre des institutions étatiques) a été soulevée principalement à propos du port du *kirpan* sikh et du foulard islamique. Le point de vue généralement adopté diffère selon que les porteurs de symboles sont des citoyens ordinaires ou des agents publics. Ainsi, la Cour suprême du Canada a jugé que les autorités scolaires, qui peuvent légitimement interdire la présence des armes dans les écoles, doivent néanmoins autoriser un élève sikh à fréquenter l'école en gardant son *kirpan* (un poignard à lame courbe dont le port est considéré comme religieusement prescrit pour les sikhs orthodoxes), à condition qu'il soit porté dans des conditions qui respectent la sécurité des autres personnes fréquentant l'école (maintenu dans une gaine solidement cousue et porté sous les vêtements).[148] Par contre, le *kirpan* a été interdit dans les palais de justice et à bord des avions, dans la mesure où l'on a jugé qu'il posait dans ces deux derniers contextes un risque pour la sécurité d'autrui plus considérable que dans les écoles.[149] La question du foulard

147. *Multani* c. *Marguerite-Bourgeoys (Commission scolaire)*, 2006 CSC 6, [2006] 1 R.C.S. 256 au para. 76, 264 D.L.R. (4th) 577 ("La tolérance religieuse constitue une valeur très importante au sein de la société canadienne. Si des élèves considèrent injuste que Gurbjaj Singh [le plaignant sikh] puisse porter son *kirpan* à l'école alors qu'on leur interdit d'avoir des couteaux en leur possession, il incombe aux écoles de remplir leur obligation d'inculquer à leurs élèves cette valeur qui est à la base même de notre démocratie […]").

148. Id.

149. Dans *Hothi* c. *R.*, [1985] 3 W.W.R. 256 (Man. Q.B.) conf. à [1986] 3 W.W.R. 671 (Man. C.A.), la Cour du Banc de la Reine du Manitoba a confirmé l'ordonnance d'un juge de la Cour provinciale interdisant le port du *kirpan* dans une salle d'audience. Dans le même sens, voir : *R.* v. *Kaur*, [1997] Q.J. No. 5066 (cour municipale

islamique à l'école n'a pas encore été traitée par les tribunaux, mais la Commission (provinciale) des droits de la personne du Québec, dans un avis publié en 1994, estime que les écoles doivent permettre le port du foulard islamique aux élèves, à moins qu'il ne s'inscrive "dans un contexte de pression sur les élèves, de provocation ou d'incitation à la discrimination fondée sur le sexe" ; elle mentionne un certain nombre de considérations pouvant justifier le refus de l'accommodement : le fait que certains symboles religieux marginalisent les élèves qui les portent (cependant, l'école publique doit éduquer ses élèves au respect des droits et libertés pour, précisément, éviter qu'une telle marginalisation ne se produise); les circonstances où il serait démontré que l'ordre public ou l'égalité des sexes sont en péril; les considérations de sécurité (par exemple, le port du *hijab* pourrait se révéler dangereux dans le cadre d'activités physiques ou de laboratoire).[150]

S'agissant du port de symboles religieux par les enseignants dans l'exercice de leurs fonctions éducatives, la question est plus complexe, car il faut tenir compte à la fois du droit au libre exercice de la religion des enseignants et de l'obligation de neutralité religieuse qui s'impose à eux dans le cadre de leurs fonctions. Dans un contexte où le principe de neutralité religieuse de l'État est interprété de façon rigoureuse, comme en France ou aux États-Unis, il pourrait suffire de l'invoquer pour justifier l'atteinte aux droits des enseignants. Cependant, au Canada, dans la mesure où le principe de neutralité, plutôt que d'être affirmé de façon autonome, découle du libre exercice de la religion, il faudrait plutôt démontrer, pour justifier l'interdiction, que le port de signes religieux par les enseignants est susceptible de restreindre la liberté religieuse des élèves en leur faisant subir une pression religieuse. Or une telle conséquence n'est pas inévitable mais dépend plutôt du contexte, de l'âge des enfants – d'autant plus vulnérables qu'ils sont jeunes – de la discrétion ou, au contraire, de l'ostentation du signe en cause, de la matière enseignée et du comportement de l'enseignant(e) dans son ensemble (si cette attitude en est une de prosélytisme, ouvert ou dissimulé, il y aura atteinte à la liberté religieuse des enfants; si l'enseignant(e) adopte une attitude de neutralité religieuse dans son comportement et ses paroles, le simple fait de porter un signe risquera moins d'avoir un tel effet).[151]

Par ailleurs, soulignons qu'en mars 2007, le Directeur général des élections au Québec a conclu que les électeurs devaient découvrir leur visage pour participer aux scrutins québécois, alors qu'en septembre 2007, le Directeur général des élections du

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de Ville Saint-Laurent). Dans *Nijjar* c. *Lignes aériennes Canada 3000 Ltée*, un tribunal canadien des droits de la personne, constitué en vertu de la *Loi canadienne sur les droits de la personne*, a rejeté la plainte d'un Sikh qui s'était vu refuser l'accès à un avion à cause de son *kirpan*, bien qu'il s'agissait en l'occurrence, selon le plaignant, d'un "*kirpan* de voyage" dont la lame ne dépassait pas 4 pouces de longueur. Le tribunal a tenu compte de l'environnement particulier d'un avion, où il n'est possible d'avoir accès ni à des services médicaux d'urgence ni à une assistance policière. Dans *Pritam Singh* c. *Wokmen's Compensation Board Hospital*, (1981) 2 C.H.R.R. D/459 (Bd. Inq. Ont.), M. Singh avait été informé qu'il ne pourrait pas passer de tests à l'hôpital s'il n'ôtait pas son *kirpan*, ce qu'il avait refusé de faire; la Commission d'enquête a jugé que l'hôpital aurait pu trouver une solution d'accommodement respectant les croyances de M. Singh; elle a ordonné qu'à l'avenir les patients de religion Sikh soient autorisés à conserver leur *kirpan*, à condition qu'il soit d'une longueur raisonnable, pendant qu'ils reçoivent des soins à l'hôpital. Une politique autorise également les députés sikhs à porter le *kirpan* à la Chambre des communes et les visiteurs à en porter un dans la tribune du public.

150. En Ontario également, la Commission provinciale des droits de la personne a adopté en 1996 un exposé de politiques sur la protection des droits en matière religieuse dans lequel elle affirme que les milieux de travail, les services et les établissements sont tenus de respecter les besoins spéciaux en matière de règles portant sur les vêtements, en donnant notamment comme exemple celui d'une école ne permettant pas aux filles de se couvrir la tête. Si pour observer sa religion une étudiante musulmane doit porter un foulard sur la tête, l'école a le devoir de le lui permettre. Dans le même document, la Commission renvoie à la décision *Pandori* (voir note suivante) pour illustrer le devoir des autorités scolaires de modifier leur politiques afin d'accommoder les élèves tenus de porter un *kirpan* pour des raisons religieuses. Voir : Ontario Human Rights Commission, *Policy on Creed and the Accommodation of Religious Observances*, 1996, 9.

151. *Pandori* c. *Peel Bd. of Education*, (1990) 12 C.H.R.R. D/364 (Bd. Inq. Ont) : une commission d'enquête établie en vertu du Code ontarien des droits de la personne arrive à la conclusion, au vu de la preuve de l'absence d'incidents de violence, que le port du *kirpan* doit être autorisé dans cette école, tant pour les élèves que *pour les enseignants et les membres de l'administration*, mais aux conditions qu'il soit d'une taille raisonnable, porté en dessous des habits de façon à être invisible et maintenu de façon assez ferme dans sa gaine pour être difficile, mais pas impossible, à en sortir.

Canada avait déclaré que la loi fédérale n'obligeait pas les électeurs à montrer leur visage. Cette question n'est toujours pas été réglée explicitement par une loi fédérale ou provinciale. Sur la question des symboles religieux dans l'espace public et sur celle, plus générale, des modalités d'application du principe de neutralité religieuse de l'État, on constate une différence sensible des opinions au Québec, d'une part, et dans le reste du Canada, d'autre part.

B. The "reasonable accommodation crisis" in Quebec (2007-2008)

Si la jurisprudence des tribunaux relative à la liberté de conscience et de religion semble assez bien acceptée dans les provinces canadiennes où la majorité est anglophone, elle soulève par contre des réserves au Québec, peuplé majoritairement de francophones, où une partie de l'opinion publique s'inquiète du fait qu'après avoir "chassé" la religion majoritaire de l'espace public, et notamment des écoles publiques (on pense aux décisions déclarant inconstitutionnel l'enseignement confessionnel chrétien qui sont mentionnés dans une section précédente de ce rapport), les tribunaux y favorisent l'expression des religions minoritaires, en particulier celles des immigrants (en permettant par exemple le port du *hijab* ou du *kirpan*). Ce point de vue ignore cependant le fait que l'obligation de neutralité religieuse s'impose aux institutions publiques, mais non aux individus qui les fréquentent et qui peuvent y exercer leur liberté de religion. En fait, la "crise des accommodements raisonnables" qui a eu lieu au Québec en 2007-2008 semble s'expliquer par un "malaise identitaire" de la majorité francophone qui, à cause de son statut de minorité au Canada et dans l'ensemble nord-américain, est portée à considérer que la diversité culturelle grandissante de la société québécoise, due à l'immigration, menace son statut et ses valeurs (c'est aussi la raison pour laquelle la politique canadienne du multiculturalisme est mal reçue au Québec, de même que l'article 27 de la *Charte canadienne*, selon lequel l'interprétation de celle-ci "doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens" ; bien que cette disposition ne se soit vu reconnaître aucune portée significative en jurisprudence, elle est considérée par ses adversaires au Québec comme encourageant le "communautarisme").

Ces inquiétudes amènent une partie de l'opinion publique québécoise à rejeter les accommodements imposés par les tribunaux sur la base de la liberté de religion et à réclamer l'instauration d'une laïcité calquée sur le modèle de la France, dont on pense qu'elle permettrait de justifier l'exclusion de tout comportement religieux de l'espace public, entendu non seulement comme celui des institutions étatiques mais au sens large de l'espace social (les rues, les places publiques, etc.). Il semble que, dans l'esprit de ses partisans, une telle laïcité (que ces derniers qualifient parfois de "républicaine») se voit assigner comme mission d'émanciper les individus par rapport à la religion et de réaliser l'intégration civique (comprise comme une allégeance à une identité civique commune) en neutralisant la religion comme marqueur identitaire qui différencie les citoyens. De telles positions ont notamment été défendues devant une commission créée par le gouvernement québécois pour répondre à la crise des accommodements raisonnables, la *Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles*, présidée par le philosophe Charles Taylor et le sociologue Gérard Bouchard.

C. The Bouchard-Taylor Commission Report

Dans son rapport, publié en 2008,[152] la Commission estime qu'un certain modèle de laïcité (*secularism*), qu'elle qualifie de "laïcité ouverte" est déjà en application au Québec, même s'il a été historiquement défini de façon implicite plutôt que formelle. Pour la Commission, les quatre éléments constitutifs de tout modèle de laïcité sont la liberté de conscience et de religion, le droit des individus à l'égalité morale et religieuse, sans discrimination (directe ou indirecte) fondée sur les convictions de conscience ou les convictions religieuses, la séparation de l'État et des Églises et, enfin, le principe de

152. Bouchard and Taylor, supra n. 20.

neutralité morale et religieuse de l'État. Les deux premiers principes définissent les finalités profondes qui sont recherchées avec la laïcité, alors que les deux autres se traduisent plutôt dans des structures institutionnelles nécessaires pour réaliser ces finalités, mais qui peuvent être aménagées de diverses façons. Une laïcité "ouverte" sera davantage axée sur la défense de la liberté de religion, même si cela exige de relativiser le principe de neutralité.

De ces prémisses, la Commission conclut notamment qu'en général, les fonctionnaires publics doivent être autorisé à porter des symboles religieux dans l'exercice de leurs fonctions, mais qu'une interdiction limitée se justifie dans le cas des agents de l'État qui occupent des postes «qui incarnent [. . .] la nécessaire neutralité de l'État», ce qui s'applique selon la Commission au président et aux vice-présidents de l'Assemblée nationale, aux juges et aux procureurs de la Couronne et, enfin, aux policiers et aux gardiens de prison. Cette recommandation de la Commission n'a pas été suivie jusqu'à présent et il n'existe actuellement au Québec, comme dans le reste du Canada, aucune règle qui interdise de façon générale le port de signes religieux par les agents publics dans l'exercice de leurs fonctions. Au contraire, la Gendarmerie Royale du Canada autorise expressément les sikhs qui servent dans ce corps policier (relevant des autorités fédérales) à porter le turban à la place du chapeau feutre traditionnel. Cette décision de la Gendarmerie royale a été contestée comme contraire à la liberté de religion des membres du public susceptibles d'entrer en contact avec des policiers portant des attributs religieux sikhs. Cette argumentation a cependant été rejetée par les tribunaux.[153]

Dans son rapport, la Commission recommande également que le crucifix accroché au-dessus du fauteuil du président de l'Assemblée nationale (parlement) du Québec soit retiré, parce qu'il laisse penser qu'une proximité toute spéciale existe entre le pouvoir législatif et la religion de la majorité. Le Premier ministre (provincial) Jean Charest, dès le lendemain de la publication du rapport, a fait adopter (à l'unanimité des députés présents . . . !) une résolution pour rejeter cette recommandation et affirmer le maintien du crucifix à l'Assemblée nationale.

X. HATE SPEECH: FREEDOM OF EXPRESSION AND OFFENCES AGAINST RELIGION

This section will examine the extent to which there is, in Canada, particular protection of religion in the public arena against offensive expressions. While the criminal offence of blasphemous libel is still on the books,[154] it has proven to have little consequence in the important intersection between freedom of expression and offences against religion in this country. The true test of this intersection has come in the form of protections against hate speech[155] which, while not limited to speech inciting hate against members of religious groups,[156] certainly encompasses speech that vilifies groups on the basis of their religion.

A. Hate Speech

By way of overview, hate speech in Canada is regulated both at the federal level, through the Criminal Code and the Canadian Human Rights Act,[157] as well as at the

153. *Grant* c. *Canada (Procureur Général)*, [1995] 1 C.F. 158 (Cour fédérale – section de première instance; la décision a été confirmée en appel : (1995) 125 D.L.R. (4th) 556 (C.A.F.).

154. *Criminal Code*, supra n. 115. See Ogilvie, *Religious Institutions*, supra n. 88 at 165-66. There is also an offence of inciting genocide in s. 318 of the *Criminal Code*. See *Mugasera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at paras. 85-89, 254 D.L.R. (4th) 200 [*Mugasera*] for a discussion of its elements.

155. For an excellent report on the status of hate speech in Canada see Richard Moon, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* (Ottawa: Minister of Public Works and Government Services, 2008), online: Canadian Human Rights Commission http://www.chrc-ccdca/pdf/moon_report_en.pdf [Moon, *Report Concerning Section 13*]. See also Ogilvie, *Religious Institutions*, Id., at 150–155.

156. Hate speech can be directed against any identifiable group such as those identified by religion, gender, race or sexual orientation.

157. But see *Warman v. Lemire*, 2009 CHRT 26 [*Warman*] (S. 13 of the Canadian Human Rights Act, R.S.C 1985, c. H-6 [*CHRA*] was the subject of a court challenge and the Canadian Human Rights Tribunal has declared

provincial level, where several provinces have specific provisions aimed at hate speech in their respective Human Rights Codes.[158] Because regulation of hate speech often clashes with the constitutionally protected right of freedom of expression, this area of the law has been fraught with constitutional challenges, several of which have successfully impugned the relevant hate speech provisions,[159] and others which, while upholding such provisions, have divided the Canadian Supreme Court.[160]

In terms of federal criminal legislation, the focus is primarily on section 319(2)[161] of the *Criminal Code*, a provision that recognizes the "power of words to maim"[162] and one that is aimed at suppressing the wilful promotion of hatred against identifiable groups. In the 1990 landmark decision of *R v. Keegstra*,[163] the Supreme Court upheld, by a narrow majority of 4 to 3, the constitutionality of this provision. That case concerned a High School teacher who taught his students that the Holocaust never occurred and that the Jews created the myth in order to gain sympathy.

While the Court agreed that the provision under which Keegstra was charged infringed freedom of expression entrenched in s. 2(b) of the Canadian Charter of Rights and Freedoms,[164] the majority was able to save the provision through the use of s.1 of the *Charter*[165] which allows the State to set limits on rights to the extent that such limits "can be demonstrably justified in a free and democratic society." Section 319(2) was held to constitute a reasonable limit on freedom of expression given Parliament's objective of preventing harm caused by hate propaganda and given that the provision meets the "proportionality test" in that its narrow ambit ensures only the most minimal impairment of such freedom.[166]

It is to be noted that while s. 319(2) has withstood constitutional attack,[167] another provision in the *Criminal Code*[168], one that had made it an offence to "spread false news" and which had also been considered a tool to suppress offensive expressions against religious groups, was held to be unconstitutional by a narrow majority in the Supreme Court decision of *R v. Zundel*.[169]

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the section unconstitutional). For further discussion, see 37-38, below.

158. *Saskatchewan Human Rights Code*, R.S.S. 1979, c. S-24.1, s. 14; *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, s. 3; *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 7; *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 13; *Human Rights Act*, S.Nu. 2003, c. 12, s. 14.

159. See e.g. *R. v. Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) 202 [*Zundel*] (regarding s. 181 of the *Criminal Code*, supra n. 115); see most recently *Warman v. Lemire*, supra n. 157 (impugned the constitutional validity of s. 13 of the *CHRA*, supra n. 157).

160. See e.g. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 114 A.R. 81 [*Keegstra* cited to S.C.R.] (the Supreme Court upheld the criminal hate provisions by a narrow 4 to 3 majority); *Taylor v. Canadian Human Rights Commission*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577 [*Taylor*] (had previously upheld the constitutionality of s.13 of the *CHRA*, supra n. 157, also by a 4 to 3 margin).

161. Supra n. 115, s. 319(2) (aimed at incitement that willfully promotes hatred against identifiable groups). See also s. 319(1) (covers the incitement of hatred where such incitement is likely to lead to a breach of the peace).

162. Maxwell Cohen (Chair), Preface in *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) at xiii. The report also continued to recognize that while freedom of expression must exist, society must "draw[] lines at the point where the intolerable and the impermissible coincide".

163. Supra n. 160.

164. *Charter*, supra n. 25, s.2(b) (section 2(b) reads: "Everyone has the following fundamental freedoms: …(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.").

165. Id., s. 1 ("The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"). See also the further discussion of s. 1, above, at 17-18.

166. For an overview of the role of s. 1 analysis, see *R. v. Oakes*, supra n. 76. For a thorough analysis of the majority and minority opinions in *Keegstra*, supra n. 160, see Lorraine Eisenstat Weinrib, "Hate Promotion in a Free and Democratic Society: *R v. Keegsra*" (1991) 36 McGill L.J. 1416.

167. Its constitutionality has been recently affirmed in *R. v. Sentana-Ries*, 2005 ABQB 260, [2005] A.W.L.D. 2930.

168. Supra n. 115, s. 181 formerly read: "Every one who willfully publishes a statement, tale or news, that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

169.Supra n. 159 (the majority of the Supreme Court of Canada found that unlike in *Keegstra*, supra n. 160,

To make out the elements of the hate speech offence under s. 319(2), the Crown must prove, beyond a reasonable doubt, that the accused, by communicating statements other than in private conversation, wilfully promoted hatred against a group identifiable by colour, race, religion or ethnic origin. The promotion of hatred implies that individuals are to be "despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation"[170] and its wilful nature necessitates a stringent standard of *mens rea*, thereby limiting the offence to the intentional promotion of such hatred. In particular, it is not sufficient that the accused be negligent or reckless as to the result of their words but rather, that he or she desire the promotion of hatred or foresee such a consequence as certain or substantially certain to result.[171] While by the Supreme Court of Canada's own admission, this is a "difficult burden for the Crown to meet,"[172] the Crown need not prove an actual causal link, namely that actual hatred resulted, but merely that the hate-monger had the required intent.[173]

Furthermore, the section provides the accused with a variety of defences including the truth of the statements, as well as the ability to prove that the statements were made in good faith to advance an opinion of a religious subject. Although not a case on s. 319(2) of the Criminal Code, *Owens v. Saskatchewan (Human Rights Commission)*[174] demonstrates how this defence could arise. Owens had placed an ad in a newspaper containing Biblical passages condemning homosexuality, including a passage from Leviticus 20:13 to the effect that homosexuals "must be put to death." The Saskatchewan Court of Appeal did not find Owens to have contravened the relevant provincial hate speech provision and stated that "Mr. Owens published the advertisement pursuant to a sincere and *bona fide* conviction forming part of his religious beliefs."[175] This case demonstrates that while hate speech may at times protect religious groups, in appropriate cases, religious freedom can itself be a defence against hate speech.

In point of fact, the high threshold in the hate speech provision has proven to be difficult to meet by the Crown, and there are very few cases where an actual conviction has resulted. This may be illustrated by the recent and highly publicized case of *R. v. Ahenakew*[176] where Ahenakew, Chief of the Federation of Saskatchewan Indian Nations, alleged in a public speech that the Jews were responsible for starting World War II and later stated to a newspaper reporter that the Holocaust was a measure taken to "get rid of a disease" and an attempt to "clean up the world." Despite the fact that the Court characterized these remarks as "revolting, disgusting and untrue," they did not result in a conviction under the Criminal Code. The Court found the statements were not made with the required intent of inciting hatred, but rather as a response to questions by a reporter whom the accused considered rude and aggressive.

As previously mentioned, hate speech is not only regulated through the Criminal Code but through the Canadian Human Rights Act (hereinafter the "CHRA") as well.[177] Section 13 of the CHRA is aimed at speech, communicated telephonically or over the Internet, that is likely to expose members of an identifiable group to hatred or contempt. While initially held, by a narrow majority of the Supreme Court of Canada, to pass

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the provision in question could not be justified under s. 1 of the *Charter*, supra n. 25, given its overly broad reach).

170. *Keegstra*, supra n. 160 at 777; *Mugasera*, supra n. 154 at para. 101. In addition, in *Mugasera*, the Court states at para. 103: "In determining whether the communication expressed hatred, the court looks at the understanding of a reasonable person in the context".

171. *Keegstra*, Id. at 774-76 as affirmed most recently in *R. v. Ahenakew*, 2009 SKPC 10, 64 C.R. (6th) 389 at paras. 17-20, 329 Sask. R. 140 [*Ahenakew*].

172. *Keegstra*, Id. at 775.

173. See *Mugasera*, supra n. 154 at paras. 102, 104 ("the offence does not require proof that the communication caused actual hatred", just that "the speaker must desire that the message stir up hatred").

174. 2006 SKCA 41, 267 D.L.R. (4th) 733, 279 Sask. R. 161.

175. Id. at para. 54.

176. Supra n. 171.

177. For a more detailed comparison of the two provisions see Jennifer Lynch, *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (Ottawa: Minister of Public Works and Government Services, 2009), online: Canadian Human Rights Commission, http://www.chrc-ccdca/pdf/srp_rsp_eng.pdf.

constitutional muster in the case of *Taylor v. Canadian Human Rights Commission*,[178] it has recently been held to be unconstitutional as an unwarranted restriction on freedom of expression in the recent Canadian Human Rights Tribunal decision of *Warman v. Lemire*.[179] The change in constitutional propriety is due to amendments to the CHRA in 1998. Previously the section carried with it merely the sanction of a cease and desist order whereas the amendments added financial sanctions by way of penalties that could be levied on offenders. That was held to turn the provision, whose main purpose was previously described as "remedial, preventative and conciliatory," into one with punitive and penal consequences, thereby no longer justifying the limit on freedom of expression on the basis of minimum impairment.[180] The result of this recent decision of September 2009 certainly places the regulation of hate speech through non-criminal federal legislation into uncertain territory.

Several provincial and territorial human rights codes[181] also regulate hate speech and one such provision, section 14 of the Saskatchewan Human Rights Code, has been the subject of, but passed, constitutional challenge as being a reasonable limit on freedom of expression.[182] However, as Luke McNamara points out in his exhaustive study of hate speech at the provincial level in Canada, "a lingering unease about the legitimacy of legislative restrictions on the communication of ideas . . . has been manifested in the preference . . . for a narrow construction of the scope of provincial hate speech prohibitions."[183]

B. Group Defamation

Another avenue through which one may pursue offensive speech is through defamation. The major impediment to this approach as a way to redress offensive speech against identifiable groups is that traditionally, defamation is seen as a personal action based on injury to one's own reputation and not injury to the reputation of the group to which one belongs. As such, if the statements target the group and not specific members of a group, defamation will not, according to its established ambit, apply.[184] An interesting decision recently decided by the Quebec Court of Appeal in *Diffusion Métromédia CMR Inc. c. Malhab*[185] has upheld the conventional position that unless the group is very small such that personal prejudice can be shown, racist commentary about a group will not constitute defamation.[186] However, that case has received leave to appeal by the Supreme Court of Canada[187] and it remains to be seen whether the result of that

178. Supra n. 160 (the Supreme Court noted that despite not requiring proof of intention, s. 13 only minimally impairs freedom of expression because the Act's purpose is to prevent discrimination rather than punishing moral blameworthiness).

179. Supra n. 157.

180. See Id. at paras. 248-290. See also Moon, *Report Concerning Section 13*, supra n. 155 (Moon argues that s. 13 of the *CHRA*, supra n. 157, as currently drafted constitutes an unjustified intrusion on the fundamental right of *freedom of expression and should either be repealed or reshaped*); Lynch, supra n. 177 (recommends repealing the penalty provision in s. 54(1)(c) of the *CHRA* and amending the *CHRA* to provide a statutory definition of hatred and contempt in accordance with *Taylor*, supra n. 160.)

181. See list of provisions supra n. 146. Note as well that even where hate speech is not specifically regulated in provincial human rights legislation, most provinces and territories make it unlawful to display notices, signs or symbols that discriminate or intend to discriminate against an identifiable group: see Luke McNamara, "Negotiating the Contours of Unlawful Hate Speech: Regulation under Provincial Human Rights Laws in Canada," (2005) 38 U.B.C. L. Rev 1 (providing an excellent overview of provincial regulation of hate speech).

182. *Saskatchewan (Human Rights Commission) v. Bell (c.o.b. Chop Shop Motorcycle Parts)* (1991), 88 D.L.R. (4th) 71 (Sask. C.A.), 96 Sask. R. 296.

183. Supra n. 181 at para. 230. Accord Moon, *Report Concerning Section 13*, supra n. 155 at 16.

184. See *Bai v. Sing Tao Daily Ltd.* (2003), 226 D.L.R. (4th) 477 (Ont. C.A.), 171 O.A.C. 385.

185. 2008 QCCA 1938, [2008] R.J.Q. 2356, 60 C.C.L.T. (3d) 58.

186. See e.g. *Ortenberg v. Plamondon* (1915), 24 B.R. 69 (Qc. C.A.). The plaintiff succeeded in an individual action for defamation based on racist comments against Jews in Québec City due to the small number of individuals forming the targeted group, the fact that he was specifically identified as the subject of the comments and evidence that he suffered personal, distinct and foreseeable damages following the comments. Id.

187. Leave to appeal to S.C.C. granted, 2009 CarswellQue 2824 (S.C.C.) (WLeC).

decision will nuance the traditional ambit of defamation in a group setting.

The few statutory group libel provisions that exist in Canada[188] have likewise not proven to be effective tools against hate speech directed at religious or other groups. According to McNamara, these statutes have been minimally used due either to the strict nature of the offence (in Manitoba, the publication must not only expose members of the target group to hatred but must also tend to raise unrest or disorder) and/or an underlying concern about constitutional validity.[189]

The result is that while Canada has sought to attack hate speech through a variety of federal and provincial provisions, "free speech sensitivity has exerted a powerful influence"[190] on the legitimacy and efficacy of such attempts.

XI. Conclusion

This Report has presented a multifaceted overview of the interaction between religion, the public and private spheres of Canadian law and everyday life. Despite the myriad of court decisions, many at the Supreme Court level, that seem to settle a great variety of issues dealing with the intersection of religion and the secular state, Canada continues to grapple with difficult questions on this topic.

As recently as March of 2010, there was a highly-publicized clash between secularism and the accommodation of religious observance in an incident involving a Muslim Egyptian woman enrolled in a French language class at a publicly-funded junior college in Montreal. For religious reasons, she wore a niqab, a headdress which covered her entire face with the exception of her eyes. Although this woman had received various accommodations from the school, at one point she was told she had to remove her niqab so that her French pronunciation could be properly tested. When she refused, she was asked to leave the school. In addition to generating a great deal of public controversy over where to draw the line between reasonable and unreasonable accommodation, this incident spurred the Quebec government to propose draft legislation which, if passed, would require employees and clients of educational, health and administrative provincial public institutions and services to interact with each other without face coverings.

In June of 2010, another important issue regarding religion and the secular state arose in the context of education. At issue was the right of a private religious school to teach a compulsory course on Ethics and Religious Culture from the viewpoint of Catholic principles that mirrored the mission of that particular school. The Quebec Minister of Education had refused the school the right to substitute its version of the course on the ground that the course was intended to teach the recognition of others and the pursuit of the common good and therefore had to offer the study of the world's major religious traditions and ethical questions generally. The Superior Court of Quebec held that such refusal was invalid under the Quebec Charter and that it was unreasonable to assume that a confessional program could not achieve the goals proposed by the ministry program. Justice Dugré found that the high school in question was entitled the academic freedom to teach the course from the perspective of the Catholic religion that defines the mission of the school.

These are just two examples that have arisen in recent months and given the increasingly multicultural nature of Canadian society, the incidents in which religion will interact, or clash, with the secular state can only be expected to rise. As this Report has attempted to illustrate, the legal landscape in Canada is already rich with many examples of accommodating this delicate balance. The near future is sure to hold even more developments of this ongoing and interesting intersection between religion, law and life.

188. See *Defamation Act*, R.S.M. 1987, c. D20, s. 19; *Civil Rights Protection Act*, R.S.B.C. 1996, c. 49, s. 2.
189. McNamara, supra n. 181 at paras. 100, 108.
190. Id. at para. 232.

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Religion and Law in the Non-Confessional Chilean State

I. PREVIOUS CONSIDERATIONS

This presentation title prevents the use of the term "secular" as in vogue at a legal level today compared to that corresponds to the Chilean legal and social reality today. This, although full of ambivalences, did not formally include the word in its legislation, and finds little echo in national doctrine and case law. The term appears in the public scene when there is concern about a possible "interference" of religious confessions in legislative debates.

It must be held in mind that, as in other Latin American countries, the end of the Roman Catholic confessionalism was not due the conflict between religions, but to the acceptance of liberal positions comprising an accentuated anti clericalism. In addition, in the country there was no concurrency between the moment of greatest deepening of conflicts (1856) and the end of confessionalism (1925). This period has been of the interest of scholars at historical and legal levels, in particular by the method of the process, given that its immediate background is found as an oral agreement between the Secretary of State of the Holy See and the President of the Republic in exile at the time. It is interesting to note that this mechanism had previously been used, and it will be drawn on other times of the Republican history. This practice, to settle matters before its unilateral regulation by the State, has given rise to the consideration of those norms as "settled laws" by prominent authors.[1]

But even beyond these considerations, we should remember that the term "secularism" was not included or invoked at the time state religion came to an end or

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1. The *precursor* of this denomination has been Professor Precht (cfr. Jorge Precht Pizarro, *Derecho eclesiástico del Estado de Chile. Análisis históricos y doctrinales*, Ediciones Universidad Católica de Chile, Santiago 2001, 23-108) who mentiones the Law of August 24th 1836 for which the President of the Republic was authorized to lead to Rome the *preces* for the establishment of the Archbishopric of Santiago, and the bishopric of Coquimbo and Chiloe. Also, the author gives other examples of laws promulgated by the civil authority preceded by an Exchange and later agreement between the Holy See and the government, as it occurred regarding the Law about the reform of the regulars (1850) or the exchange that came to be with the Law about the conversion of *Tithe* (October 15 1853) in which the Roman Pontiff designated the Archbishop of Santiago to lead the necessary conversations towards a new system for the sustainment of the clergy on behalf of the Holy See. Thru the apostolic letters**,** finally the conversion of *Tithe* was authorized. The local ecclesiastical authorities posture and that of the Holy Congregation of Extraordinary Ecclesiastical Affairs can be recognized in the documents compiled in Fernando Retamal Sources, *Chilensia pontificia. Monumenta ecclesiae chilensis*, Santiago, Catholic University of Chile Ed, 1998, vol. 1, t. 1, 490-493 and 852-859. But, beyond doubt, the example that brings up the biggest agreement among the authors as a paradigm of the so called "concordat laws" would have been Law 2.463 of 1910 that creates the Military Vicariat of Chile**.** In any case, the Law about holydays of 1915, also preceded the end of the state confessionalism, whose modality of consensuate state and religious will was only interrupted in this subject towards the end of the 20th century.

afterwards. The termination of state religion was effected constitutionally in two ways: by not reiterating in the new Constitution the former statements about Catholicism as the official religion, and by recognizing freedom of thought, conscience and free manifestation of all religious beliefs among the list of fundamental guarantees.

Even today, it cannot accurately be argued that Chile is a secular state, neither in the legal sense of the content of its laws, nor in the practical sense of its society. Professor Precht is clear on this point: "Chile has never been a secular State. Whoever studies the genesis of the separation of Church and State agreed in 1925 between the Chilean State and the Vatican, and imposed on the Archbishop of Santiago, Monsignor Crescente Errázuriz, knows that the word secularism is not mentioned and that the spirit of secularism is neither found in texts nor in practices…. The Catholic Church in Chile never understood separation as the creation of a secular State, but rather as the end of regalism or jurisdictionalism, that is, the end of the *patronato* and Church funding at the same time."[2]

At the present time in Chile, public manifestation of belief is not hindered, nor are there hostile encounters between religious and state authorities. Moreover, certain public religious traditions have continued since the colonial period, such as the Cristo de Mayo procession, which has taken place uninterrupted since 1647, and many others in honor of the Virgin or of patron saints in various locales. Nor does an articulate or sustained debate exist in Chilean society on the idea of a secular State (even less about subordinating religion to state regulation) beyond some discussion in newspapers. While it is a subject underlying the discussion of some legal projects, it is at most found in the principles of some NGOs, or corresponds to the interests of academic centers.[3]

II. NORMATIVE CONTEXT

A. *Historical Background*

Before the Spanish arrived in the lands that now comprise the national territory of Chile, these lands were inhabited by indigenous peoples of various ethnicities who were subject to Inca rule from the extreme north to the Maule River in the south. South of the Maule was Mapuche land until the 19th century, while the Yamanas in the extreme south led a nomadic existence with their canoes in the area of Cape Horn. The beliefs of these native peoples included various worldviews of the south and the extreme south that remained quite isolated from the communities of the north. It would strain definition to

2. Jorge Precht Pizarro, "Secular State in four Latin American constitutions," in *Revista de Estudios constitutionals* Num 2-2006, November 2006, 709.

3. Among the organizations that directly favor secularism , although without much public relevance, the Secular Institute of Contemporary Studies (http://www.ilec.cl) can be mentioned. It is about a not-for-profit prívate law corporation, whose authorities are linked to the Great Lodge of Chilean and promote a Latin-American association of international secular institutions. Their Program points out that the institution "watches over for the absolute abstention of the State in religious matters (…). Fights the privileges and advantages of powerful religious institutions that seek to interfere in faith related matters of citizens in favor of their own ecclesiastical interests." In that same orientation lies the Latinamerican Faculty of Social Science (FLACSO), given that from its Equality and Gender Program it is related to other initiatives, as the ibero-american Network for the secular liberties that define "secularism as a process of transition from sacred legitimated forms to democratic or popular will based forms enables us also to comprehend secularism not only in the strict sense of State-Church separation. In fact, there exists many States that are not formally secular, but establish public policies alien to the doctrinal rules of the Churches and sustain its legitimacy more on popular sovereignty that in any form of ecclesiastical reputation" (http://centauro.cmq.edu.mx:8080/Libertades/PagLisSec.jsp?seccion=1). On the other hand, among the academic field, concern has concentrated on efforts to favor the development of ecclesiastic law studies in the country, thru optional classes in diverse Universities. 10 years ago, such classes had already started being dictated in the Faculty of Law of the Pontifical Catholic University of Valparaiso and latter, also in the University of Talca and the Pontifical Catholic University of Chile. Furthermore, the monthly Legal Bulletin of the Religious Freedom Center– UC Law (http://www.celir.cl) serves as a contemporary national legal observatory. The Institute of Religious Studies of the Miguel de Cervantes University (http://www.umcervantes.cl/index.php? modulo=nuestra_religioso.html) contributes to the study of law and religion that promotes minority religious institutions.

consider their structures as monist systems inclusive of political, social and religious aspects. Such categorization is not adequately descriptive of pre-Columbian reality, for which the lack of written sources impedes exhaustive understanding of the content of original native worldviews. Since the arrival of the Spanish, who introduced the writing system, the greatest difficulty in understanding these worldviews at this time lies in the syncretism of some beliefs and the difficulty of comprehending elements of belief that are no longer practiced today, such as polytheism, human offerings (even of children), or polygamy practiced by some communities to provide enough labor caused by the absence of work and slavery.[4] It is difficult, then, to place indigenous beliefs into categories derived from other systems, even though it cannot be denied that there was a cultural, religious, and political identity shared by members of the same ethnic group.

From the European discovery of the region in 1540 until the mid 19th century, there was no significant presence of non-Catholics in Chile, partly because of restrictions established by the Spanish Crown, based on its right of *patronato* and the imperative missionary duty implied by its presence in these places.[5] With the beginning of the independence process in 1810, successive governments claimed for themselves the rights the Spanish king had enjoyed, with the result that the relationship system between Church and State continued to be based on the right of royal *patronato*, in spite of the fact that the Catholic Church did not officially recognize this right as belonging to the post-royal government.[6]

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4. Recent research trying to clear certain unknowns can be found for all subjects. So for example, in relation to the andean deities, cfr. Victoria Castro, *De ídolos a Santos Evangelización de la religión andina en los Andes del sur*, Ediciones de la Dirección de Bibliotecas, Archivos y Museos, Santiago 2009. In a recent research with application of new techniques, which aims to look human sacrifice, cf. Álvaro Sanhueza - Lizbet Pérez - Jorge Díaz - David Busel - Mario Castro - Alexander Pierola, "Paleoradiología: study imaging of the child of Cerro El Plomo" in *Revista Chilena de Radiology* Vol. 11 no. 4, year 2005; 184-190. And to contextualize the practice of polygamy among the Mapuche, it should be recalled that "the Mapuche marriage rules were dominated by war to their society was under conditions." The system of widespread exchange of women tended to make two fundamental issues: high reproduction of the population, and the ability to seal military alliances. "This is why the Mapuche advocated polygamy as central to society" (cf. José Bengoa, *history of the mapuche people: 19th - 20th*, editorial LOM [6ªed. corrected], 2000, 131).

5. For a synthesis that ranges from the Indian *patronato* to the missionary State cfr. Carlos Salinas Araneda, "Las relaciones Iglesia – Estado en América Indiana: Patronato, Vicariato, Regalismo", in Juan Navarro Floria (coord.), *Estado, derecho y religión en América Latina*, Ed. Marcial Pons 2009, 38 – 52.

6. The vast work referred to the Holy See´s relations with the Church of Chile and the national governments, contributes to the profundizations of the relationship style between the Catholic Church and the State. cfr. Fernando Retamal Fuentes, *Chilensia pontificia. Monumenta ecclesiae chilensia*, Santiago, Ed. Universidad Católica de Chile, 1998 vol 1 (vols. 1 – 3), 2002 vol. 2 (vols. 1 – 2), 2006 vol. 2 (vols. 3 – 4). In regards to the constitutional development it must be kept in mind that the period between the 1810 open *Chapter* until the 1818 independence, bring up a series of constitutional texts. In the September 18th, 1810 Minutes, remain the Kings rights, including *Patronage*. The 1812 constitution was more direct establishing that "The Apostholic Catholic religion is and will forever be Chile´s religion", but omitting the "roman" qualification." Then, in virtue of the 1814 Constitution, the power concentrates on the Supreme Director, who should act en some ocations with the integrated Senate agreement, among other, for being ecclesiastical. In 1818, after the declaration of Independence, in the provisory Constitution is declared simultaneously that the catholic religion is the "only and exclusive one of the State of Chile", and that it is not allowed "another cult doctrine against that of Jesus Christ" (art.2).There is an insistency that the catholic Church-State relations are governed by the regimen of the *Patronage*. That will be highlighted in the in the 1822 Constitution, arts. 97 – 98, as in the1823 Constitution, art. 18 Nº 10 and in that of 1828 (art. 83). The Holy See never recognized the right of *Patronage* of the new governors, and for long time avoided referring to Chile as a "State" or "Republic", preferring terms as "region" or "territory." The first pontiff document in which is named directly Chile, dates from 1840: Cfr. Fernando Retamal Sources, *Chilensia pontificia. Monumenta ecclesiae chilensis*, Santiago, Ed. Universidad Católica de Chile, 1998, vol. 1, t. 1, 274 – 283. The constitutional text of 1822, goes beyond the narrow link between the catholic religion and the State duties pointing out that: "Its protection, conservation, pureness and inviolability is one of the first duties of the chief of State, as well as the inhabitants of the territory its greatest respect and veneration, regardless of their private opinions" (art. 10, and the same regulation will be kept in the next Constitution). The State Council conformation according to the 1823 Constitution, must contemplate one ecclesiastic member that intercedes in the draft laws, and in the naming of ministers. The federal laws of 1826-1827, pronounced themselves in some relevant subjects, for example, pointing out that the priest will be chosen in popular vote and proposed for its investiture to the ecclesiastic authority (Law of 29 July 1826). The formula of the 1828 Constitution that established that the religion of Chile is catholic, roman apostolic and excludes the

The Constitution of 1833 contemplated a series of laws that rounded out the relationship system between the Catholic Church and the State of Chile. These included a requirement that the president of the Republic swear an oath upon taking office to observe and protect the Catholic religion. The Constitution also alluded to the possibility that the State of Chile would enter into concordats with the Catholic Church. It went on to establish that "The religion of the Republic of Chile is the Catholic, Apostolic and Roman religion, to the exclusion of public exercise by any other (Article 5)." This particular text became the subject of the interpretive law of 27 July 1865, according to which, "The Constitution allows those who do not profess the Catholic, Apostolic and Roman religion to practice what religion they may within the confines of privately-owned buildings," adding in its Article 2 that non-Catholic foreigners, called dissidents, "could maintain private schools for the teaching of their own children in the doctrine of their religions." However, some objective facts suggest that, notwithstanding the restrictive norms about the public manifestation of non-Catholic beliefs, social reality already included various confessional groups that were not harassed and whose members were not persecuted.[7]

The so-called theological conflicts, whose end came with the promulgation of the secular laws,[8] marked the end in practice of state religion, which acquired legal expression only with the constitutional text of 1925. Although the transition towards a non-confessional State was consolidated normatively at the beginning of the 20th century, the process included a series of laws that tended towards the secularization of Chilean society, among them the Organization and Attributions of the Courts Act, the Cemeteries Act, the Civil Marriage Act and the Civil Registry Act.[9] According to tradition, the secretary of state of the Holy See verbally offered to the president of the Republic, who was in exile at the time, that in order to obtain the Vatican's consent to the separation of Church and State, Chile could not become an atheistic State and freedom of education would have to include private education and not include the word "secular." Other terms of the agreement that were probably also expressed would have included the necessity of expressly repealing all regalist abuses of the 1833 Constitution (and so obtain the absolute end of the law of *patronato*); the need to include the concordats, together with other international pacts, to the end that they might be fulfilled; and the need to establish adequate economic compensation for the elimination of Church funding.[10]

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public exercise of any other, which will be repeated in the constitutional text of 1833.

7. Occasionally this period is sought to be caricaturized by identifying it as religious prosecution, without contextualizing it with facts that realize the social and regulatory tolerance towards other faiths. For example, since 1842 an attempt was made to make Anglican missions in the Araucanía, whose failure is not attributable to the State *confessionalism* but to the same Mapuche. Cfr. André Menard Poupin Jorge Pávez Ojeda (compiladores), *Mapuche y anglicanos, vestigios fotográficos de la Misión Araucana de Kepe*, 1892-1908, Ocho Libros Editores, Colección de Documentos for the Historia Mapuche, Santiago de Chile, 2007.

8. In subjects of Church-State relations, this period is the most treated by national authors. The dispute, though called "religious struggles", was not marked by disagreements between Catholics and members of other faiths as in Europe. As in other Latin American territories, the debate concentrated among Catholics (religious or political) and anti clerical, being therefor an ideologic rather than a religious dispute. The original texts between civil and religious authority exchanges are located in: Fernando Retamal Fuentes, *Chilensia pontificia. Monumenta ecclesiae chilensis*, Santiago, ed. Universidad Católica de Chile, 1998, vol. 1, volume 2, 526 – 586.

9. The first, of 1875, supersedes the ecclesiastical privileges and the use of force. The following will be respectively on august 2nd, 1883, January 16th, 1884 and July of 1884, and thru them shall be secular cemeteries established, civil marriage regulated, and government employees shall be established as ministers of faith of birth, marriage and deaths, instead of Catholic Worship Ministers.

10. This has been a topic of interest of several publications. Among the most recent in the legal sphere, review: Jorge Precht Pizarro, *Derecho eclesiástico del Estado de Chile*, Ed. Universidad Católica de Chile, Santiago 2000, 83 – 107; Carlos Salinas Araneda, *Lecciones de derecho eclesiástico del Estado de Chile*, Valparaíso, Ed. Universitarias de Valparaíso, 2004, 58 – 64; Alejandro Silva Bascuñán, *Tratado de Derecho Constitucional*, Ed. Jurídica de Chile, Santiago 2006, volume XI, 220–223; María Elena Pimstein Scroggie, "Relaciones Iglesia y Estado: una perspectiva evolutiva desde el derecho chileno del siglo XX", in *V Coloquio del Consorcio Latinoamericano de Libertad Religiosa 'Actualidad y retos del derecho eclesiástico del Estado en Latinoamérica*", Ciudad de México, 2005, 75 – – 99. From a historical perspective their background, process, and the scope of the separation between Church and State has been addressed: Sol Serrano, *¿Qué hacer con Dios en la República? Política y secularización en Chile (1845 – 1885)*, Fondo de Cultura Económica, 2008, 376.; and Máximo Pacheco Gómez, *La separación de la Iglesia y Estado en Chile y la diplomacia vaticana*, Ed.

This way, without alluding to actual separation, without mentioning the Catholic Church, and without invoking the idea of a secular State, the confessional State came to an end. The text of the Constitution of 1925, in Article 10, stated that:

> The Constitution ensures to all the inhabitants of the Republic, 2nd:
> The manifestation of all beliefs, freedom of conscience and the free exercise of worship that is not contrary to morality, good customs or public order, and can therefore, respective confessional faiths can erect and maintain temples and its dependencies to the conditions of safety and hygiene determined by law and regulations. Churches and religious institutions of any cult will have the rights granted and recognized with respect to property, by the laws currently in force, but are subject, in the guarantees of this Constitution to the common law for the exercise of their future goods. The temples and its dependencies, destined for a worship service, shall be exempt from contributions.

Perhaps the fact that this took place far from peak moments of conflict, led it to finally be a peaceful time, and in that sense contributed the very attitude of the Chilean bishops who expressed that "In Chile the State is split from the Church; but the Church will not detached from the State and will remain ready to serve it; to attend for the good of the people; to ensure the social order; to come to the aid of all, without exempting adversaries, in times of distress in which all often, during major disturbances, remember it and ask help"[11]. Even in spite of not favoring the term confessionalism, Pope Pius XI stated that "rather than breaking, it seems a friendly coexistence, which means a state of affairs that the Catholic Church may, as we hope, exercise its mission fully and effectively."[12]

B. *At the Constitutional Level*

The current Constitution minimally altered the wording, establishing as a fundamental guarantee in its Article 19 that:

> The Constitution protects: the freedom of conscience, the free manifestation of all beliefs and the free exercise of all worship that is not contrary to morality, good customs or public order. The religious confessions may erect and maintain temples and their dependencies under conditions of safety and hygiene determined by laws and ordinances. Churches and religious institutions of any cult will have the rights granted and recognized with respect to property, by the laws currently in force. The temples and its dependencies, destined for a worship service, shall be exempt from contributions.[13]

At a constitutional level, usually scholars focus the analysis solely in the historical contextualization of the separation of the State and the Catholic Church in 1925, and the establishment of full recognition of freedom of religion, without deepening, for example, in its content and scope in the light of existing international instruments.[14] Chile has

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Andrés Bello, Santiago 2004, 333.

11. Bishops of Chile "Pastoral colectiva de los Obispos de Chile sobre la separación de la Iglesia y el Estado", in *La Revista Católica* 25, [1925] 578, 491.

12. Quoted in George Precht Pizarro *Church of the Chilean State law*, ed. Universidad Católica de Chile, Santiago 2000, 107.

13. Political Constitution of the Republic, art. 19 Nº. 6 (Official Diary, 24 October 1980, last enactment, 20 September 2005).

14. In general, the recent studies of outstanding constitutionalists refer to the religious freedom garantee content, without stopping to question beyond the context and scope of the 1925 separation. Cfr. José Luis Cea Egaña, *Derecho constitucional chileno*, Santiago, Ed. Universidad Católica de Chile, 2004, volume II, 200 – 226; Humberto Nogueira Alcalá, "La libertad de conciencia, la manifestación de creencias y la libertad de culto en el ordenamiento jurídico chileno" in *Revista Ius et Praxis* vol. 12 Nº2 (2006), 13 – 41; Alejandro Silva Bascuñán, *Tratado de Derecho Constitucional*, Ed. Jurídica de Chile, Santiago 2006, volume XI, 220 – 223; Ángela Vivanco Martínez, *Curso de derecho constitucional. Aspectos dogmáticos de la Carta fundamental de*

pledged to the international instruments that recognize religious freedom, and about fifteen treaties relating to it, even if the value is below constitutional, are in force.

Other fundamental guarantees integrate and make effective the exercise of religious freedom. Among them, certainly is included equality before the law and the subsequent elimination of arbitrary discrimination (Article 19 Nº 2); the right to found, edit and maintain newspapers, magazines and newspapers (Article 19 Nº 4 inc. 4th); the right to education (Article 19 Nº 10) and freedom of education (Article 19 Nº 11); or the freedom of expression (Article 19 Nº 12) without the State being able to monopolize the media (inc. 2º); the right to assemble peacefully (article 19 Nº 13) and to associate (Article 19 Nº 15); the right to submit petitions to the authority (Article 19 Nº 14); the right to acquire all kinds of goods (Article 19 Nº 23) and property rights (Article 19 Nº 24).

The citizen is able to apply for judicial relief, the *Recurso de Protección* (constitutional action) (Article 20), against any arbitrary or illegal acts or omissions of privation, perturbation or threat in the legitimate exercise of religious freedom. However, there are scarce situations under the decisions of the Courts of Justice, partly because of the national tendency not to legalize conflicts, and maybe also partly due to the caution with which beliefs are treated, almost as if it were a mere devotional matter. The cases that have had greater publicity in the country refer to Jehovah's witnesses seeking judicial review in cases of blood transfusions. This draws attention, considering their scarce presence in the country, which according to the 2002 Census, traduces in a total of 119,455 inhabitants of 15 or more years of age.[15] Moreover, it has been of greater media coverage, although it does not constitute a real contribution the content of religious freedom, the case in which all national instances denied the possibility of the exhibition of the film "The Last Temptation of Christ." Such decision was quashed by the International Court of Human Rights by considering there was no privation or diminish of religious freedom, and finally ordered, besides the exhibition of the film, a reform to the national law in order to eliminate and moderately condemn the State.[16] To this purpose, maybe the most remarkable is what was mentioned by Professor Ruda Santolaria: "Even though the Court resolves there is no violation to religious freedom in this case, it is worthwhileto remark that religious and conscience freedom are conceived as one of the foundations of democratic society (paragraph 79 of the sentence).[17]

1980, Ed. Universidad Católica de Chile, Santiago 2006, volume II, 365 – 369. This last profesor hands out a synthesis of diverse positions about the regulation range of the international treaties in the barely mentioned work, 95 – 105. In any caso, regarding the international treaties there were some modifications to the respecto of compulsory preventive control and doctor of the Constitutional Court in subjects regarding contitutional organic laws and about the eventual unconstitutionality of one or more of its precepts (cfr. Law Nº 20.381 that modifies Law nº 17.997, *Organic Constitutional law of the Constitutional Court* [Official Diary 28 October 2009], as the decision of the same Court in the exercise of preventive control of the draft law: cfr. Constitutional Court, Ruling Rol 1.288 of 25 August 2009, in http://www.tribunalconstitucional.cl/index.php/sentencias/download/pdf/1214).

15.Among the articles related to the topic, review: Enrique Alcalde Rodríguez, "Derecho a la vida y libertad religiosa: el caso de los Testigos de Jehová", in *Revista ACTUALIDAD JURÍDICA* Nº19, enero 2009, Volume II, 621. The autor resorts to a study of cases ocurred between the years 1991 and 2003, analized by Avelino Retamales, "Lecciones que dejan los pacientes adultos que rechazan transfusiones de sangre a partir de la doctrina de nuestros tribunales" in *Ius Publicum* Nº11 (2003), 75-102. Cfr. also Ana María Celis Brunet, "Libertad de conciencia y derecho sanitario en Chile" in Isidoro Martín Sánchez (coord.), *Libertad de conciencia y derecho sanitario en España y Latinoamérica*, Ed. Comares, Granada 2009 (in press) and regarding a comentary of jurisprudence, cfr: Ángela Vivanco Martínez, "Negativa de un menor de edad y de su familia a que este reciba una terapia desproporcionada o con pocas garantías de efectividad. Appeal of the protection measure granted by the Family Judge of Valdivia. Ruling of the I. Court of Appeal of Valdivia, of 14 March 2009", in *Chilena de Derecho*, vol. 36 N° 2, 399 - 440 [2009].

16. Cfr. Interamerican Court of Human Rights, Case "*The Last Temptation of Christ*" *(Olmedo Bustos and others) v. Chile*, ruling of 5 February 2001. The previous national decisions admitted the protection remedy, finally only in regards the decision of the Council affected the right to honor, and not the right of freedom of conscience. Cfr. Supreme Court, Ruling Rol Nº 519-97, Sergio García Valdés and other against the Film Qualification Council, of 17 June1997 that confirmed the decision of the Court of Appeal, Ruling Rol Nº 4079-96, Sergio García Valdés and others against the Film Qualification Council, of 20 January1997.

17. Juan José Ruda Santolaria, "Una mirada al tratamiento de la libertad religiosa en el sistema interamericano de protección de los derechos humanos", in Juan Gregorio Navarro Floria (coord.), *Estado,*

Although religious freedom is recognized as a fundamental right, and it is protected with the protection remedy (constitutional action), an explicit reference to the Church-State relationship system is not found in the constitutional text, nor is there any mention of preference or privilege of any religious group or internal rules of some religious entity, nor is there any reference to a so-called neutrality of the State. Not even in the explicit recognition of religious freedom, nor in other rules of the Constitution does it refer to the term "secular" or secular State, which perhaps explains that only a few national authors relate directly to the topic of secularism, though without further distinctions between positive secularism or healthy secularism and secularism.[18] In this context, Professor Salinas notes as principle informers of the ecclesiastical law of the State of Chile as follows: "i) the religious freedom principle, ii) the non-confessional State principle, called by some scholars, secularism principle; iii) the equality principle and (iv) and the cooperation principle."[19]

Today, the Church - State relationship system, corresponds to the so-called neutrality model,[20] even though it also appears inappropriate to understand the relevance that the Chilean State grants to the principle of collaboration, expressed in different laws and specific actions in which it seeks support from religious organizations. If in the name of the so-called neutrality, it were to be tried to relegate the religious to the private sphere, it would be contrasting to the given consideration of the religious entities, of which stands out the Catholic Church. However the latter, yet has not been held a Concordat with the Holy See, although obviously recognized as a subject of international law. A proof of this can be demonstrated in his performance as a mediator in the bordering conflict with Argentina and the recognition of the Apostolic Nuncio as Dean of the Diplomatic Corps.[21]

But the principle of cooperation and equality and non-arbitrary discrimination with religious institutions has also been demonstrated while turning to methods of national agreements or to rely on his worship ministers.[22] There are no general or specific explicit norms regulating conscientious objection, though there is no doubt that it is one of the areas that has gradually acquired greater role in the social debate. While legal recognition of the objection is beneficial in terms of legal certainty, it is not an invocation condition. Even before the compulsory military service, there is no exemption for reasons of conscience in Chile, while the relatives of missing political prisoners of the Chilean

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derecho y religión en América Latina, Ed. Marcial Pons 2009, 237.

18. Among recent studies that deal directly with the topic of secularism, we find: Humberto Lagos Schuffenger, *Chile o el mito del Estado laico*, Icthus, Santiago 2005, 82pp.; Carlos Salinas Araneda, "Estado confesional y laicismo" in *Revista de derecho* Year 15 nº1 (2008), 183-202; Jorge Precht Pizarro, "La laicidad del Estado en cuatro constituciones latinoamericanas", in *Revista de Estudios Constitucionales*, Num. 2-2006, November 2006, 697-716.

19. Carlos Salinas Araneda, *Lecciones de derecho eclesiástico del Estado de Chile*, Valparaíso, Ed. Universitarias de Valparaíso, 2004, 203 – 227. The author reiterates this posture in: Carlos Salinas Araneda, "Estado confesional y laicismo" en *Revista de derecho* year 15 nº1 (2008), 183-202.

20. Cfr. Marcos González Sánchez – Antonio Sánchez-Bayón, *Derecho eclesiástico de las Américas. Fundamentos socio-jurídicos y notas comparadas*, Delta Publicaciones, 2008, 34 – 37. The constitutional framework in which the guarantee of religious freedom develops, comprises a conception of the human person and of society that contributes to its foundations.

21. In fact, a clear expression of the international character consideration of the Holy See, has been the Papal Mediation as a special performance of its mission of peace (cfr. Letran Treaty, art. 24). The application for assistance requested by Chile and Argentina concluded with the holding of the Treaty of Peace and Friendship (401 Supreme Decree of 6 May 1985 of the Ministry of Foreign Relations, review at http://www.celir.cl/v2/Otros/tratadochilearg.pdf.

22. In recent times there has been initiatives of cooperation between State and religious institutions, as agreements established by Christian confessions and the National Council for the Control of Narcotic drugs (CONACE) to act together in drug prevention (cfr. Legal Bulletin April 2008 year III, 47 in http://www.celir.cl). But it is of especially relevance the consideration of Cult Ministers between those who were temporarily entrusted with the task to collect information relative to missing political prisoners of the Chilean dictatorship, protected by secrecy (cfr. Law Nº. 19.687 in Official Diary on 6 July 2000). The Catholic Church in Chile collaborated for the handing over of firearms, keeping identity reservation of illegal owners (cfr. Law 20.014 that modifies the Law 17.7798 about firearms control, Official Diary 13 May 2005 and Permanent Committee, *Aporte a la paz y al bien social*, 16 mayo 2005).

dictatorship exempt from compulsory service, or in any case, realize it voluntarily.[23] Even the amnesty granted to those who violated the rules on recruitment may have exploited those considered offenders, who are in reality, objectors.[24]

C. *At the Legal Level*

Norms concerning matters of religious freedom are scattered in national legislation,[25] although in law Nº. 19.638, that sets forth rules on the legal constitution of churches and religious organizations,[26] also known as the Religious Entities Act, are included some aspects corresponding more likely to a law framework of religious freedom. Moreover, it is in this legal text where it is incorporated for the first time the term "freedom of religion" subordinated to the established on the Constitution, stating the principle of equality and non discrimination, and ensuring that freedom at the individual and association level (arts. 1 to 3). The recognition of religious freedom at the individual level is consistent with current national and international regulations and "with the corresponding autonomy and immunity of coercion, means for everyone, at least, the faculties" to

> a) Profess the religious belief that chooses freely or not to profess any; express it freely or abstaining to do so; or change or abandon that which he/she professed; b) Practice in public or private, individual or collectively, acts of prayer and worship; commemorate their festivals; celebrate their rites; observe its weekly day of rest; receive a worthy burial upon its death, without discrimination by religious reasons; not to be compelled to engage in acts of worship or to receive religious assistance contrary to his/her personal convictions and not be disturbed in the exercise of these rights; c) Receive religious assistance of his own confession wherever he may find himself. The way and conditions of access to shepherds, priests, and worship ministers, to provide religious assistance in hospital facilities, jails and detention places and in the facilities of the Armed Forces and Forces of Public Security and Order, will be regulated by standards dictated by the President of the Republic, respectively thru the Ministers of Health, Justice and National Defense. d) Receive and provide religious education or information by any mean, choose for themselves - and parents for not emancipated minors and the keepers for the handicapped under their tuition and care-, the religious and moral education in conformity with their own convictions, and d) Meet or publicly express themselves with religious purposes and associate to communally develop their religious activities, in accordance with the general legal system and this law.

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23. Law 20.045 that modernizes the Mandatory Military Service, on the Official Diary on September 10th, 2005, regarding art. 42 Nº6 (of the Law Decree 2.306 of 1978 that regulates Mandatory Military Service), concerning the linear and until second degree collateral blood descendents, even of those who were victims of human rights violations or political violence (Law 19.123 that Creates the Reconciliation and Repair National Corporation, that establishes a repair pension and gives other benefits in favor to people mentioned on the Official Diary on February 8th, 1992, arts, 18 and 32. However, the Draft law that pretended to settle the conscience objection to the Mandatory Military Service as well as the Alternative Citizenship Service was filed (Bulletin 5042-17) that incorporates a new benefit to law N° 19.992, with the objective that de family of human rights violation victims recognized by Valech Law, choose if they wish or not do the Military Service. The ethical dispositions relative to doctors that establish that: "The doctor who is requested provisión that go against his conscience or clinical conviction, may deny to intervene. In this circumstances, he will see that another colleague continues with the patients" assistance, unless that generates immediate and serious damage to his health. (Ethic Code of the Medical School of Chile A.G., of 25 November 2004, art 20).

24. Law 20.163 that grants amnesty to people who have infringed the dispositions on recruitment of Armed Forces on the Official Diary on 10 February 2007.

25. In René Cortínez Castro s.j. (coord.), *Recopilación comentada del derecho eclesiástico chileno*, Ediciones Universidad Católica, Santiago 2010 (in press), are found all of the constitutional, international and of law Nº 19.638 regulation text on the establishment of religious organizations, their relationship to canon law, an introduction of religious freedom in Chile and an updated Catalog of works dealing with Ecclesiastic Public Law, Ecclesiastic Law of the State, Church State Relations and religious freedom in Chile.

26. Published on the Official Diary on 14 October 1999, even though at the beginning of 2010, the President of the Republic has sent a draft reform to this regulation that must be discussed by the legislators.

Although it was enacted ten years ago, the Act is harmonious with the preceding legislation and puts forward the specification of regulations concerning religious assistance, although it did not consolidate a systematization rules for religious freedom.

Codicial legislation is extremely wide, and in the civil sphere refers to matters regarding from the home of the "bishops priests and other ecclesiastics (Civil Code, Article 66),"to matters that fund the recognition of special legislation governing the Catholic Church since the time of the confessional State: "Nor the provisions of this title are extended to corporations or foundations of public law as the nation, the Treasury, municipalities, churches, the religious communities and establishments of the treasury: these corporations and foundations are governed by special laws and rules (Civil Code, Article 547, inc. 2º)." The same civil legislation lays down to churches and religious communities, a credit of 4th class against their collectors and administrators (Civil Code, Article 2481 Nº 2).

Although in general, there are no labor standards which constitute a special statute given religious freedom, in any case, the inclusion of religion as an eventual discriminatory act on labor matters (Labor Code, Article 2), must be understood at the light of the principle of equality, differentiating from a egalitarianism which distorts reality. In this regard, the normative isonomy must consider equal treatment among those who are actually equal, considering the various realities and rather emphasizing equal access and opportunities. This therefore implies that while hiring a worker, religious organization can weigh the suitability of he who postulates to employment (cfr. in particular, article 19 Nº 16 inc. 3º), and even reserve certain offices for those who hold particular qualities, without estimating this to be an arbitrary and discriminatory act.

Criminal legislation, contemplates punishment of crimes and simple felonies affecting religious freedom, among which are considered those in which through violence or threat it is hampered a cult exercise; It is to be punished those who advocate tumult or disorder, to prevent or delay the cult in a place or certain ceremonies; and penalties are laid down for those who offend against objects of worship or Minister of worship; and in the case of outraging, hitting or injuring Ministers of worship.[27] In addition, at the procedure level, there exist some rules in the Organic Code of Courts, Code of Civil Procedure, Code of Criminal Procedure and Criminal Procedure Code.[28]

In other areas, religious freedom related issues are regulated, as takes place in regards to the civil effects of the religious marriage or concerning the release of the payment of rights, inscriptions, sub-inscriptions, and annotations that should be practiced by real estate administrator referred to movable property transferred to the churches and religious bodies established as public law legal persons.[29]

D. *At the Administrative Level*

At the administrative level, there are rules relating to the content and exercise of religious freedom as the 924 Supreme Decree that establishes the regulation of school teaching of religion,[30] or, those applicable to religious organizations of private law (110 Supreme Decree Official Bulletin March 20th 1979), or in a subject for which there is no further discussion as is the animal preparation ritual. This last case particularly draws attention, due to the consideration of the civil authority of minority beliefs. According to data provided by the last Census, among 10,294,319 fifteen-year-old inhabitants, there are 14,976 (0.13 percent) Jews and 2,894 (0.03 percent) Muslims. Therefore, it appears as a

27. Cfr. Penal Code, arts. 138-140 and 401.

28. Cfr. code organization of courts: arts. 50 No. 2, 98 No. 9, 256 No. 8, 304, 332 No. 2 470, 471; code of civil procedure, arts. 62, 360 360 NO 1 # 1-3, 363, 389. In the code of criminal procedure, see arts. 147, 158, 191 # 1-3, 201 No. 2, 294, while in the criminal procedure code, cf. arts. 209 and 303.

29. In matrimonial subjects there are other relevant allusions: cfr. arts. 10, 11, 20, and 77 of the Civil Matrimony Law 19.947 (Official Diary on May 17th, 2004), and regarding the extension of wages: cfr. unique art. of Law 20.094 that modifies Law 16.271 concerning the charge of wage by real state administrators (Official Diary on 18 January 2006).

30. Published in the Official Diary on 7 January 1984.

sign particular request to the religious fact that it were to be established that "concerning animal preparations for certain religious communities recognized or established in accordance with the law, the ritual methods accepted by such groups may be used."[31]

Moreover, it must be remarked the importance of the Regulations that emerged by virtue of Law Nº 19.638: Regulations for the Registry of religious Entities of public law (303 Supreme Decree of the Ministry of Justice, on Official Bulletin, 26 March 2000); Regulation of Religious Assistance in prison establishments (703 Supreme Decree of the Ministry of Justice, on Official Bulletin, 7 September 2002); Regulation about Religious Assistance in Hospital facilities (94 Supreme Decree of the Ministry of Health, on Official Bulletin, 17 September 2008); Regulation about Religious Assistance in the Armed Forces and Forces of Public Security and Order (155 Supreme Decree Regulation of religious assistance to the Armed Forces and Forces of Public Security and Order, of the Ministry of Defense, on Official Bulletin, 26 March 2008).[32] Beyond the specific rules of each of the Regulations, it should be pointed out that in the case of the Regulation of Religious Assistance in Hospitals, there were two previous versions: the first had issues of constitutionality,[33] and the second incorporated exclusively the places of worship destined to Catholic worship establishing that onwards the places of worship where to be ecumenical.[34] However, there had to be a third text in which there are still some problems, besides adding the Accompanying Spiritual Units as bodies responsible for the coordination of the hospital religious assistance of the various religious entities. In the case of the Regulation on religious assistance in the Armed Forces, this rules over non-catholic entities, since in the case of Catholics, assistance is provided through a military bishopric that enjoys the legal personality of public law.[35] The Roman Pontiff performs, with the agreement of the President of the Republic, the appointment of the military Bishop which is General Official of the Armed Forces with rank of General Brigadier (Religious Service) of the Army, and National Defense Major State Advisor.

III. The State and Religious Organizations

A. *Regulation and Autonomy*

The parliamentary debate of the Religious Organizations Act lasted seven years,[36]

31. Decree of 2008, Ministry of Agriculture to Oficial Diary of 2 June 2009, art. 7 (a) final Inc.

32. In the case of the Regulations of Religious Assitance in Hospitals, it had two previous versions, the first presented problems of constitutionality (René Cortínez Castro s.j., "Regulación de la libertad religiosa en el Derecho Eclesiástico chileno" en *Revista de Derecho de la Universidad Católica del Norte* 9/2002, 177-192) and the second incorporated places of worship destined exclusively to the catholic cult and pointed out that onwards the places of cult would be universal (Supreme Decree 2 of 2006, of the Ministry of Health, on the Official Diary of 9 March 2006). However, there had to be a third text on which there are still some problems, besides adding the Accompanying Spiritual Units as bodies responsible for the coordination of the hospital religious assistance of the various religious entities. In the case of the Regulation on religious assistance in the Armed Forces, this rules over non-catholic entities, since in the case of catholics, assistance is provided through a military bishopric that enjoys legal personality of public law. The Roman Pontiff performs, with the agreement of the President of the Republic, the appointment of the military Bishop which is General Official of the Armed Forces with rank of General Brigadier (Religious Service) of the Army, and National Defense Major State Advisor (cfr. Law Nº 2463, published on the Official Diary of 15 February 1911, which remains valid). 3 April 2009, Chile`s Police Departmen named the Nacional Evangelical Chaplain**,** see: Center of Religious Freedom – UC Law, *Boletín Jurídico*, Year IV nº 11 September, 2009, 11. Cfr. Comentary of profesor Jorge Precht Pizarro, "Asistencia religiosa en Fuerzas Armadas" en Centro de Libertad Religiosa – UC Law, *Boletín Jurídico*, Year V nº 1 October 2009, 83-93.

33. Cfr. René Cortínez Castro, "Regulación de la libertad religiosa en el Derecho Eclesiástico chileno" in *Revista de Derecho de la Universidad Católica del Norte* 9/2002, 177-192.

34. Supreme Decree 2 of 2006, of the Ministry of Health, on the Official Diary of 9 March 2006.

35. Cfr. Act No. 2463, published in the Official Diary of 15 February 1911, which remains valid.

36. On *iter* of Law 19.638 about the legal constitution of churches and religious organizations (Official Diary of 14 October 1999), the various positions and the intense debate on that law cfr. Jorge Precht Pizarro, "La ambigüedad legislativa como práctica parlamentaria: la Iglesia Católica y la ley de iglesias en su art. 20", en *Revista de Derecho 10* (2003), 181-198; René Cortínez Castro, "La personalidad jurídica de las iglesias en el derecho público chileno y la nueva ley sobre su constitución jurídica", *en Il diritto eclesiástico* 1 (2001), 72-78;

and while it did mean a change, it cannot be sustained that only at that point came into existence a regulation, because since 1925 there existed worship freedom and the believers could manifest themselves and associated with the only limit of morality, decency and public order in regard to common law. According to the national ordering, the constitutional denomination refers to the "churches and religious institutions of any cult", that stated by the Article 4 of Law 19.638 would correspond to "the entities integrated by natural individuals who profess a particular faith" of any cult.[37]

To distinguish their legal status,[38] it is necessary to establish whether the State action refers to *constitute* entities, being therefore legal persons under private law that correspond both tofunctional communitarian organizations and to those set up by the common law.[39] On the other hand, when it comes to state *recognition*, being about legal entity status under public law, involving religious entities registered according to the Law 19.638, as well as the Catholic Church, which holds that quality by virtue of the Constitution and the Catholic Apostolic Orthodox Church of the Patriarchate of Antioquia legally recognized.[40]

However the new regulation constitutionally and legally recognizes both entities established by the State and constitutional and legally recognized, have maintained their legal status, every time that "The State recognizes the ordering, the legal personality, be it of public or private law, and the full capacity of enjoyment and exercise of churches, confessions and religious institutions which have it at the publication date of this law, entities that will maintain their own legal regime, without it be the cause of unequal treatment between these entities and those to be constituted in accordance with this law (Law 19.638, Article 20)."

Despite the intention of legislators to bring minority religious institutions into parity with the Catholic Church, the truth is that the type of recognized legal person by virtue of Law 19.638 does not correspond adequately to legality personality under public law because, aside from the need for registration, dissolution is provided by various means apart from the law.[41] During the past ten years, almost two thousand entities have been registered, without an exact registry of them all, given that the law does not require giving

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84-89; 92-95. In any case, precariousness and inequality referred by the confessions was more apparent than real, if considered that religious freedom in Chile is guaranteed beyond a specific legal statute.

37. Cfr. art. 19 Nº 6 of the Political Constitution of the Republic and art. 5 of Law 19.638 . The width of the concept, explains that to submit the draft reform of Law 19.638, the President of the Republic had stopped by the need to better define what is a religious entity, excluding those that still based on faith, are geared towards social welfare ends, research or physical or spiritual health.

38. Cfr. Ana María Celis Brunet, "Reconocimiento jurídico de las asociaciones religiosas o iglesias y su relación con el Estado en la República de Chile", in *V Coloquio del Consorcio Latinoamericano de Libertad Religiosa 'Actualidad y retos del derecho eclesiástico del Estado en Latinoamérica*, Mexico City, 2005, 147 - 156. For a subject update, cfr. Ana María Celis Brunet, "Reconocimiento jurídico de las asociaciones religiosas o iglesias y su relación con el Estado en la República de Chile", in Juan Gregorio Navarro Floria (coord.), *Estado, derecho y religión en América Latina*, Editorial Marcial Pons 2009, 133-137.

39.The first are regulated according to the Law 19.418 about Town Meetings and other communitarian organizations (Official Diary of 20 March 1997, while the seconds are constituted on regard of the arts. 546 to 564 of the XXXIII Title of the Civil Code, and the Standards about concession of legal personality to corporations and foundations of prívate law (110 Sepreme Decree, Official Diary of 20 March 1979).

40. If it is about public legal persons recognized under the Law 19.638, must be provided by the Regulations for the Registry of religious entities of public law. In ten years, there have been registered nearly 2,000 entities, preferably Evangelical Pentecostal. In the case of the Catholic Church, the doctrine considers that the legal nature of legal entity of public law has not changed after the separation of Church and State in 1925, nor has been affected by Law 19.638 (cfr. Jorge Precht Pizarro, "El ámbito de lo público y la presencia de la Iglesia Católica en Chile: de la ley 19.638 a la ley 19.947" in Anales Derecho UC. Minutes of the IV Coloquio del Consorcio Latinoamericano de Libertad religiosa, Colombia: Ed. Legis, 2005, 101-121). In the case of the Orthodox Church, it is recognized by Law 17.725 (Official Diary 25 September 1972). This classification tends to simplify other more complex ones (cfr. Carlos Salinas Araneda, Lecciones de derecho eclesiástico del Estado de Chile, Valparaíso: Ed. Universitarias de Valparaíso, 2004, 280).

41. Doctrinally, the legal nature of the legal persons registered in accordance with the Law 19.638, has been questioned by holding that legally there has been created a new category of legal persons of public law exclusive for religious entities. Cfr. Carlos Salinas Araneda, Lecciones de derecho eclesiástico del Estado de Chile, Ediciones Universitarias de Valparaíso, 2004, 291.

notice to the administrative authority the statement publication, nor any eventual amendments, nor even the dissolution in accordance with their statutes. In the end, the registration work of the State is limited to the verification of certain requirements, and upon its refusal to register an action claim is granted, which must be brought before the Santiago's Court of Appeal and which may be appealed at the Supreme Court.[42] The Special registry of institutions is dependent on the Ministry of Justice, and a Historical Dossier was opened for legal persons of public law that do not require registration (Catholic Church and Catholic Apostolic Orthodox Church of the Patriarchate of Antioquia).

Only since the year 2007 has there been a government body under the Ministry General Secretariat of the Presidency, responsible for institutional relations with religious institutions. The National Office of Religious Affairs[43] has a simple structure with a multidisciplinary team, which has sought to settle also at the municipal level. Their activities have focused on the study and analysis of draft laws that in any way impact religious entities, and specially, what is relative to the reform of the Law 19.638 that they have named "Cult equality law." Their work is preferably destined to Christian and minority entities, favoring their association with Government departments that deal with relevant materials for the entities. In any case, in regards to autonomy, besides the explicit recognition, there has effectively been an advance in various areas: from the cult practice, to that fundamental which enables them to provide themselves their own organization and hierarchy (Article 7). But in particular, it reflects even greater autonomy the possibility to create legal persons in accordance with the legislation in force (Article 8) and also according to their own legislation provided they do not have profit ends (Article 9), as it is recognized for canonical legal persons erected by the Catholic Church.

An aspect that has not been investigates by the dispersion of entities, refers to those constituted at a municipality level that afterwards are those who principally request the recognition in accordance to the Law 19.638.In fact, the law about Town Meetings and other communitarian organizations[44] has sheltered religious organizations that because of a scarce number of members, because of a limited territorial presence, or of scarce patrimony, have adopted this route as a step towards recognition as public law legal persons. These refer to institutions of poor structures in regard to status, goods and especially in regards to their ending. The dispersion and absence of a unique registry, hampers the knowledge of the criterions of the municipal authorities to proceed with their constitution, in particular, to harmonize them with the allusions of the law while referring that religious freedom of their members must be respected, inhibiting proselytism (Article 3). In any case, it is possible to foresee the appearance of difficulties in this area, every time the Comptrollership has pronounced itself regarding religious and political proselytes activities by the neighbor seeds.[45]

B. *Funding*

There is no model of public funding of religious organizations in Chile, nor has there been realized an adequate systematization at either institutional or doctrinal level, that would enable to distinguish between direct and indirect funding.[46] The funding of

42. Cfr. art. 11 inc. end of Law 19.638. This action is similar to the protection remedy (constitutional act) of the art. 20th of the Political Constitution of the Republic and the most known legal decisions are those that fell over the file complaint by the international organization known as the Holy Ghost Association for the Unification of Christianity, known as the church or cult a Moon (for a synthesis of the case, see Ana Maria Celis Brunet, "Reconocimiento jurídico de las asociaciones religiosas o iglesias y su relación con el Estado en la República de Chile", in *V Coloquio del Consorcio Latinoamericano de Libertad Religiosa 'Actualidad y retos del derecho eclesiástico del Estado en Latinoamérica*, Mexico City, 2005, 142 147).

43. Consult at http://servicios.minsegpres.cl/onar/.

44. Law 19.418 published in the Official Diary on 20 March 1997 as rewritten text.

45. Cfr. General Comptroller of the Republic, 19 June 2009, ruling 32.289 of 19 June 2009 that prohibits the execution of political activities in Town Meetings (in Legal Bulletin September 2009 Year IV, 48).

46. Cfr. Ana María Celis Brunet, "Funding of religious organizations in Chile", in *Il diritto eclesiathic*, Anno 142 fasc. 3-4 2006, Giuffrè Milano Editore, Milano 2007, 309-334. In any case, Professor Salinas has been a

religious organizations in Chile is similar to other not-for-profit institutions present in the country. In relation to the State, it may outweigh the absence of agreement that there exists at international or national levels in this matter, and the impossibility of collecting taxes and targeting them to religious entities. And from the perspective of religious organizations recognized according to Law 19.638, they must be not-for-profit and according to the law must self-fund even through fundraising among their congregation,[47] existing for these effects equal tax treatment for public law legal persons. According to current regulations, there exists some sporadic money contribution[48] or the cession of fiscal land for such effect.[49] On other occasions, the contribution in consideration to worship manifests in support of the presence of religious symbols, such as the construction of monuments in which case, the fiscal collaboration may consist on direct money delivery, or instead on legal authorization to perform collects for that purpose benefit. It is also possible to receive State support in the event that individuals play certain services paid with tax funds as religious assistance or religion teaching or when religious institutions collaborate with activities that receive funding or State subsidies.

Certainly, the greatest possibility of funding for religious organizations comes from the possibilities of tax exemptions[50]: some benefits relate to the places of worship and others to the purpose of worship. In addition, Chilean law provides that the President of the Republic can determine the exemption from the income tax, to not-for-profit institutions, and that according to their own statutes have as their main objective material aid and other assistance to people of limited economic resources.[51] If in this case there was the desire to support a generic exemption for religious organizations, it would be necessary to ask if their "line of business" corresponds primarily to a charity institution, which in most cases conform only one aspect of its activity.

In regards to goods, beyond the particular statutes of each entity, by virtue of constitutional guarantees it is allowed the acquisition and property of all kinds of goods (Article 19 nn. 23 and 24). Particularly in relation to goods devoted to the divine cult: it is set that things established to divine worship are governed by Canon law and the use and enjoyment of chapels and cemeteries is regulated[52] there are special rules for the raid of such sites[53] and for the eventual opposition to their entrance and registration;[54] and there

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precursor to such attempts in a chapter dedicated to the "tax regime of confessions and religious entities in the Chilean State law" (Carlos Salinas Araneda, *Church of the Chilean State right lessons*, Valparaíso 2004, 329-380). Even proposed "a possible Chilean model (378-380) 'pose' strengthens the situation of economic cooperation for the State that already exists in Chile (378)."

47. Religious entities may apply for and receive any donations and voluntary contributions, from private and public or private institutions and organize fundraising among their congregation, for their cult, the sustainment of their Ministers or other purposes specific to their duties (art. 15). Offerings provided by its members to the religious organization are not considered income (art. 16).

48. Professor Salinas alludes to an emblematic example occurred in 1972: the State contribution to the reconstruction of a church in the village of Putaendo, whose funds the ecclesiastical authority should pay account to the General Comptroller of the Republic (Cfr. Carlos Salinas Araneda, Lecciones de derecho eclesiástico del Estado de Chile, Valparaíso 2004, 372).

49. Such power to the President of the Republic is provided in Decree Law 574 (Official Bulletin 11 October 1974) and in the case of municipal property, authorization of cession of land was used by special laws, as in the case of Law No. 16.650 (Official Bulletin 12 August 1967), without damage to coexist with the possibility of free transfer to not-for-profit legal persons (Decree Law No. 1939 of 5 October 1977, art. 88).

50. With regard to worship places it should be considered territorial taxes and those related to assignments by cause of death and donations. The 1980 Constitution established an exemption of all kinds of contributions for both temples and their dependencies that are aimed exclusively at the service of a cult (art. 19 nº 6). Law 19.738 fixed the refunded and updated text about territorial tax (Official Bulletin of December 16th, 1998, Annex Table Nº 1) that includes among others places of worship but also cemeteries, schools, colleges, seminars, and orphanages. The Law can be used in advantage of inheritance, maps, and donations tax if the contribution is left for the construction or repair of temples for a cult or for the maintenance of the same worship service (Law No. 16.271, art. 18 Nº 4 in the Official Diary of 10 July 1965).

51. This possibility is provided in the article 40th Nº 4 of the so-called Income Act (Decree Law Nº 824 of the Ministry of Finance, in the Official Diary of 31 December 1974).

52. Cfr. arts. 586 and 587 of the Civil Code.

53. Cfr. art. 155 of the Criminal Code.

54. Cfr. art. 98 No 9 of the Organic Code of Courts.

is even a punishment for those who in wartime attack or destroy temples.[55]

IV. SOCIETY AND RELIGION

A. *Citizens and Faith*

According to the information from the last Census (2002) that counts those over 15 years of age, of a total of 11.226.309 inhabitants, 8.3 percent claimed to have no religion, or to be atheist or agnostic, while those of a certain faith were distributed in the following breakdown: Catholic 69.96 percent; Evangelical 15.14 percent; Jehovah's Witness 1.06 percent; Jewish 0.13 percent; Mormon 0.92 percent; Muslim 0.03 percent; Orthodox 0.06 percent; and 4.39 percent from another religion or faith.[56]

The number of religious citizens in Chile could cause the impression that being religious is a determining or at least a relevant factor as much in social life as in the national legal order, however it is not in fact that way. While waiting for the next Census (2012), other statistics point towards a waning in the Catholic faith while non believers have increased. It is also possible to compare and contextualize collected information with other realities.[57] There exists a high regard for religious support in the community (79.4 percent), although ethical behavior is not identified with religion because it is considered possible to carry out a morally good life although one does not believe in God (75.3 percent). It is worth noting that religious support is a personal choice, and 80.7 percent would prefer that their "children decide for themselves what their religious beliefs are and not try to influence them too much in this respect." There are a few particularities that should be mentioned as well. For example, a third of Catholics believe in witchcraft, a fourth of non-Catholics believe in the Virgin Mary, and 69.5 percent of those without any religion believe in God![58] However, there do not appear to be any very impressive statistics regarding the transition between one religious confession to another, and, in any case, this is produced principally (and without any special intervention or event) from the Catholic religion to the Evangelical religion or to increase the number of atheists or agnostics.[59]

With reference to nationality, this is not normally a requisite for exercising religious freedom, except in the case of those who give religious assistance to the Armed Forces. In effect, the Regulation demands the accreditation of a person's Chilean Nationality to those who give religious assistance to the Armed Forces and those of Order and Public Security and only exceptionally, with prior authorization of the maximum authority in those institutions can authorize the admittance of foreigners to carry out this service.[60]

Among all citizens and believers, ministers of worship have a particular statute, although "Chile does not have any central legal statute that systematically regulates all rights and duties that should apply to ministers of religion. One must turn to distinct and wide-ranging normative texts to approach a correct understanding of the law on this

55. Cfr. art. 261 of the Code of Military Justice.

56. Cfr. Instituto Nacional De Estadísticas, *Census 2002. Synthesis of results*, Santiago de Chile, Empresa Periodística La Nación S.A., 2003, 25-26. Unfortunately, the distinction between Protestants and Evangelicals was eliminated from the previous census (1992), with which, Christians, not Catholics only have the alternative between Evangelical and Orthodox. For the first time the option was given that made the distinction between Jehovah's Witnesses and Mormons. Cfr. with respect to Rene Cortínez Castro, "Regulation of religious freedom in Chilean Ecclesiastical Law", in *Law Review 9* (2002), 191-192.

57. Since 2006 the National Bicentenial Census UC has periodically been carried out and contains a survey of aspects of national identity. In matters of religion, in addition to investigating about the religion that they profess to have, the content of their beliefs (2006), their religious practice (2007), popular religion and the Marians (2008), and religious transitions (2009) are more detailed. Cfr. Pontificia Universidad Católica – Adimark GfK, *Encuesta Nacional Bicentenario*, 2006 (32-44), 2007 (27-49), 2008 (80-101), 2009 (71-81), available digitally at http://www.uc.cl/sociologia.

58. Id.

59. Pontiff Catholic University – Adimark GfK, *Bicentennial National Census*, August 2009, 71-81.

60. Supreme Decree 155 Regulation of religious assistance in the Armed Forces and in Public Security and Order, of the Ministry of National Defence and the Sub-secretary of War (Official Diary 26 May 2008).

question. It is also decidedly difficult to find jurisprudence that, in some manner, allows one to gauge where the major points of legal friction exist concerning these ministers."[61]

The same concept of a minister of worship is not defined by the legislation and not even this determines its rights or duties. In this way it is possible to find particularities regarding their inability to accept responsibilities or exercise certain functions[62]: they cannot be judges, they are exempt from military service for as long as the ministers remain in office, they cannot receive an inheritance or any legal bequest (not even as a fiduciary executor) if the minister has confessed the defunct on his or her death bed or habitually over the last two years before making his or her will and can excuse themselves from being guardians or caregivers.[63] They also have secrecy obligations: "two different types of cases: first, cases where a minister has the right to refrain from testifying at trial in order to maintain the obligation of secrecy which accompanies a confession; and second, cases where, even though ministers may be obligated to testify, ministers do not take the witness stand, but instead are allowed to fulfill this obligation in a different manner."[64] However, the Chilean legislature has recently created an exception to a ministers' right to refrain from going to court in Family Court Law and the newly enacted Criminal Process Law. Ministers of religion have been strongly punished by Criminal Law, as well as have had special offences established for when a victim is a minister of religion.[65]

In the work place, labor norms are applied in proportion to the configuration of a work relationship in accordance with Article 7 of the Labour Code, and on the contrary, the relationship belongs to another order and therefore is not applicable to the labor legislation.[66] In addition, the exclusion or preference for religious reasons as an act of discrimination (Article 2, inc 4º) are included, however, in light of the constitutional guarantee with respect to work freedom, "Any kind of discrimination that is not based on capacity or personal qualifications is prohibited, without detriment that the law can demand Chilean nationality or limit to age in determinate cases" (Constitution, Article 19 nº 16 inc. 3º). Therefore, *qualifications* are criteria that serve in the performance of certain jobs as happens in the case of religious teachers, who, in order to teach classes should "be in the possession of a certificate of qualification granted by the corresponding authorities and whose validity will last while it is not revoked and to accredit as well, the studies realized for said position."[67] This corresponds then, to the religious authority to certify the qualifications of the teacher and to this authority the educational establishments should go in order to contract religious teachers (Article 9, inc. 2º-3º).

In view of a protective resource for the revocation of a certificate of qualification in order to teach religious courses at a school level, it was resolved that the teacher of religion (understood as such, of any religious creed), should have a certificate of qualification granted by the corresponding authorities and "whose validity will last while it is not revoked." In other words, the proper applicable legislation of the sort, authorizes

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61. Cfr. Maria Elena Pimstein, "Ministers of religion in Chilean Law," in 2008 BYU L.Rev. 898.

62. Particularly in this field, there are some differences between Catholic and non-Catholic ministers, although for this article's purposes, there will be not make any distinction. To study this field, see id. at 904-909.

63. Besides, all individuals cannot have a different faith than the child (or ward): id. at 907.

64. Id. at 909.

65. There are some special types if the ministers remove entrusted documents, celebrate marriages prohibited by law, and the prescribed punishment will not be imposed in the lowest grade if they commit a first degree rape, statutory rape, or another sexual crime (Cfr. id. at 912-916).

66. In this way, the Director of Work resolved it through service. (ORD.: Nº649/22 September 9, 2005) that "In these circumstances, one cannot finish without concluding, to judge the subscribed, that the link that unites the Evangelical and Protestant Churches ruled by law N°19.638 that detain the charges of pastors and bishops from them, cannot be qualified as a work relationship to nature ruled by the Work Code and their complementary laws, not giving them rights but resulting in the concession of the benefits and advantages that belong to this."

67. Supreme Decree 924 that establishes the religious classes in educational establishments in the Official Diary 7 January 7 1984, art. 9 inc 1º. Cfr. The report elaborated by Jorge Precht Pizarro, "The qualifications of the religious professors" in Center of Religious Freedom – Law UC, Legal Review Year II, Nº8, July 2007, 26-43.

the corresponding religious organism to grant and revoke the authorization that has been conceded in accordance with their particular religious principles, morals and philosophies; a situation that will depend only on each one of them not having any managerial aspect, not the State or any particular position that the faculty rests on their own creed that has an ample leeway to establish their norms and principles.[68]

B. *Civil Legal Effects of Religious Acts*

By including the latest constitutional reforms, it was normal practice that the enactment of the Constitution was done in the name of God, although in 2005, the President of the Republic only called on his faculties and concentrated on the constitutional text, without invoking the name of God.[69]

From the first civil codification, the possibility of accrediting the civil state before third parties and testing them through the respective entries of marriage, death, birth or baptism was recognized (Civil code, Article 305 inc. 1º).

In this way people can also accredit themselves or prove their age or death (inc. 3º) although in any case, such documents "bear witness to the declaration made by the bride and groom in marriage, by the parents, godparents or other people in the respective cases, but do not guarantee the truth of this declaration in any of its parts. They could, of course, contest this, making a statement that the declaration was false on the point that they were making (Article 308)." The validity of such norms present difficulties with the clandestine immigrants of the extreme north of the country, who ask for the sacrament and then, at the point of taking it, pretend to use the ecclesiastical documentation before the State.

In matrimonial matters, until the first law of civil marriage in 1884, effects of the celebrated marriage before the Catholic Church were recognized. Therefore, as an expression of resistance before the secularization of marriage, it went from 17.882 marriages in the country to only 5,200 in the year when the new law was introduced. With the objective of obligating people to get married civilly, in 1930 the obligatory precedent of civil marriage was introduced.[70]

In 2004 a new Civil Marriage Law was dictated with respect to the celebration, and innovated in three matters. New requisites of the validity of marriage were established, extracted from the Canonical norm.[71] Preparatory courses for marriage were incorporated, of a facultative nature, which had, as an objective, the promotion of freedom and

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68. See: I. Court of Appeals, San Miguel, Sentenced 27 November 2007 on Protective resource presented by religious teacher Mrs. Sandra Pavez Pavez against the del Vicar for the Education of Bishops in San Bernardo, Rol Nº238-2000, considering eighth. Said resolution was confirmed by the Supreme Court. Cfr. in Center of Religious Freedom – Law UC, Legal Review Year III, Nº2, November 2007, 18-24. Also see, Instruction about Religious classes and about who can teach them; people that can grant qualification certificates and other associated themes (Ordinance n° 07/1785, n° 2173 from the Minister of Education), in Center of Religious Freedom – Law UC, Legal Review Year III, Nº3, December 2007, 25.

69. Supreme Decree Nº 1.150, from the Ministry of the Interior, through which the Political Constitution of the Republic was promulgated (Official Diary October 1980), presented the text after invoking "the name of God Almighty." On the contrary the Supreme Decree Nº 100, from the Minister Secretary General of the Presidency (Official Diary 20 September 2005) did not maintain this formula. Cfr. Jorge Precht Pizarro, *Fifteen studies about religious freedom in Chile*, Santiago, ed. Catholic University of Chile, 2006, 43 – 52.

70. Art. 103 of the first edition of the Civil Code recognized religious marriage and the competence of the ecclesiastical authority about its validity. This was reformed by the Civil Marriage Law (Official Diary 10 January 1884) that became valid the following year and afterwards the civil marriage ceremony became obligatory and was established. (Reform to the Civil Registry Law in Official Diary 10 February 1930). For a synthesis of the history of marriage in Chile before the reform of 2004, cfr. Ana Maria Celis Brunet, *The Canonical relevance of civil marriage in light of the general theory of the legal act*, Theoretical contribution of the Chilean legal experience. Rome: Editrice Pontificia UniversitàGregorian University 2002, 232 – 250.

71. Law19.947 establishes the new Civil Marriage Law (published in the Official Diary 17 of May 2004, became valid 6 months later), art. 5: "You cannot get married: … Nº 3. Those that they find who have no sense of reason; and those that have a mental disorder or psychic anomaly, reliably diagnosed, will be completely incapable of forming the partnership that a marriage implies. Nº 4 those that lack sufficient judgment or discernment in order to understand and commit themselves with the rights and essential duties of marriage." It is paradoxical that at the same time divorce has been incorporated. (arts. 42 nº4, 54 y 55).

seriousness of the commitment that one was assuming. The dictation of the courses could be carried out by the Civil Registry & Identification Service as well as religious entities with legal entities of public law, or for institutions of public or private education with recognition of the State or legal entity of a charitable organization whose statutes include activities for the promotion of the well-being of the family (arts. 10-11). The third innovation consisted of giving civil recognition to the marriages celebrated before religious entities that had good legal entities of public law.

However in order to achieve that, a series of previous legal requisites needed to be completed as well as an inscription before an official of the Civil Registry within eight days from the start of the celebration. At the moment of the inscription, one must confirm the consent given before the respective minister of worship, and in the case of not being done within the respective date,the religious celebration will not be recognized as legal.[72] This last requirement does not have a precedent in comparative law and has discouraged religious marriage celebrations with civil effects. Since its validity in November 2004, almost all of the marriages celebrated with conformity to Article 20 have been before the Catholic Church and represent close to 3 percent of all marriages celebrated.

C. *Religion in the Public Arena*

In the country there is no significant presence of believers that identify with certain clothing, and there have not been any cases presented before the Law Tribunals in this respect, which contributes to the better understanding of the little legal attention relative to the dynamic symbols. However, the elaboration of instructions that follow the recommendations of the Organization of International Civil Aeronautics (OACI) is in the process, with the objective of identifying the face of people in their identity documents and passports. The situation has become a reality due to the validity of the Agreement 169 of the OIT in Indigenous Peoples,[73] just like the demands on transsexuals. Meanwhile, a memo is applied that establishes that "the photograph should be taken in street clothes, according to the gender that is noted in our registries, without hats or clothing that could hide the hair totally or partially, except if this article forms part of the person's condition, such as the religious veil or the *trarilonco* of the Mapuche women(…) and keeping in mind that the dimensions be reasonable and do not alter the appearance, aspect or create confusion with respect to the sex of the person."[74]

If, with respect to personal identification, the situation is carried out respectfully and with little conflict, appealing to good treatment and without discrimination, at an institutional level there is no special norm with respect to the use of clothing and symbols in public places. In fact, the use of symbols in state dependencies, from administrative offices to tribunals or hospitals, has not had conflict in the legal (nor at the normative or legal level, and even less in doctrine). There are no obligatory dispositions about the presence of a crucifix, but they also do not appear to be prohibited, and remain at the discretion of the same authorities and employees. Clearly at Christmas time many adornments that refer to Christian elements can be seen as well as representations of the Sacred Family in the manger of Bethlehem in administrative dependencies and all over the streets.

However, the actual dynamism in these matters, many times emulating what happened in Spain, makes one see that this is a latent theme, that for the moment it is not a legal topic but with respect to which it is possible to observe some grade of social

72. Law Nº19.947, art. 20; Law of Civil Registry, art. 40 bis; Regulation of Civil Marriage Law. Nº19.638, art. 20.

73. Agreement 169 of the International Work Organization, on Indigenous Communities and Tribes in independent countries that were ratified by Chile 15 September 2008 and became valid the 15 of September 2009.

74. Circulation DN Nº13, 29 October 29 2001 of the National Directory of Civil Registry and Identification Service, referring to the recent Memorandum SDO Nº 000723 1 September 1 2009 of the Sub-director of Operations of the Civil Registry and Identification Service.

conflict, probably more apparent than real. For example, with regard to the installation of the Pope John Paul II statue in the Central Square, it is possible to make out positions of aesthetic and economic importance, as well as the considerations about its significance to the separation between the Church and State without respecting actual religious diversity. Although it had communal authorization and financing, the unanimous decision of the members of the National Monument Council to not authorize it, principally following the arguments of their technical commissions. It was noted that although it was adequate to commemorate Pope John Paul II, it was important to do so in a representative place as a mediating role for the country, and not in another that did not have a religious significance since the branch of the Law Faculty of the State University established it there.[75]

If one had the temptation to attribute to the decision a germinal significance of the secular tendency in Chilean society, the disappointment would be immediate as, almost simultaneously, the same organism authorized another monument, this time in honor of Brother Camilo Henríquez, considered to be the *father* of the national press.[76]

If one takes into account just the year 2009, five Catholic temples were declared in different regions of the country as national monuments.[77]

In addition, in the country institutional manifestations co-exist simultaneously that not only do not recognize Christian symbols but pay tribute to them, as happened with significant decorations to the images of the Virgin Mary made by the Chilean Army.[78] At a municipal level, the recognition of the festival of the Virgin of Candelaria (in San Pedro de la Paz) was decreed, the Order of the religious festivals of the community of Andacollo was approved and the festival of cultural heritage and religion in Petorca.[79]

In accordance with the valid norm, the religious fact becomes protected by sanctioning it with fines with respect to the publications or transmissions that promote the hate or hostility with respect to people or gatherings among them, religion.[80] Certain suppositions could become an invasion of rights, as from the crime, the following is not exempt "personal appreciation that is formulated in specialized commentaries of political, literary, historical, artistic, scientific, technical and athletic criticism except that if the tenor put in the manifest the purpose of insulting, as well as criticizing."[81]

This has been affirmed by the National Television Council that rejected the complaint against the distributing television cable companies for airing the series "Popetown," indicating that "the Catholic Church is, as any other public institution, subject to criticism carried out through freedom of expression that our Fundamental Order guarantees to all people."[82] On the other hand, a fine was applied for the airing of a program that was

75. Cfr. Extract of the Act of the Ordinary Session on 11 November, 2009 from the National Monuments Council, in Center for Religious Freedom – Law UC, *Legal Review*, Year V, Nº 4, January 2010, 72-80. In any case, in order to contextualize what happened, it is important to realize that habitually law projects are admitted in order to erect monuments in different places in honor of Pope Juan Pablo II, or of the first Chilean Saint, or of an outstanding Evangelical Pastor, with which the collection of funds is authorized for such a cause. In fact during the year 2009 two laws authorized the erection of monuments in honor of Pope Juan Pablo II in different areas of the country. (Cfr. Law 20.350 that authorizes to build a monument to His Holiness Juan Pablo II in Official Diary 2 June 2009 and Law 20. 364 that authorizes to build a monument, in the community of Puyehue in homage to His Holiness Juan Pablo II, in Official Diary 25 July 2009.)

76. Cfr. National Monuments Council, Act of the Ordinary Session on 9 December 2009, 41.

77. See respectively in Center for Religious Freedom – Law UC, *Legal Review*, Year IV, Nº 4 January 2009 – Year IV, Nº 5 March 2009 – Year IV, Nº 6 April 2009.

78. Cfr. Decoration Resolution President of the Republic to the image of the Virgin located in the National Sanctuary of Maipu (7 January 2008) in Center of Religious Freedom – Law UC, Law Review Year IV, Nº 10 August 2009, 51-52. See also Decoration Resolution with the "Victoria Cross" reserved for Chief Commanders to the image of the Virgin Carmen at the Military School at the 50 year anniversary (13 August 2009) in Center of Religious Freedom – Law UC, Law Review Year IV, Nº 10 August 2009, 53.

79. 78 See respectively in Center for Religious Freedom – Law UC, Law Review Year IV, Nº 7 May 2009, 28 – Year IV, Nº 11 September 2009,. 9-10 – Year V, Nº 1 October 2009, 98.

80. Law 19.733 about freedom of opinion and information and exercise of journalism, art. 31 (Official Diary 18 May 2001).

81. Law 19.733 about freedom of opinion and information and exercise of journalism, art. 29 inc. final (Official Diary 18 May 2001).

82. Act of Ordinary Session of the National Council of Television that rejects the accusation presented

considered degrading to the Evangelical minister and creatively crossed the line with respect to a person's fundamental rights.[83]

In relation to the written press, some periodic titles are ironic especially with relation to specific Christian figures and also towards Catholics (for the use of the images of Mary). This happened at the beginning of 2009, at a fashion show called "Virgins," to which a resource of protection was admitted and then rejected stating that it was about artistic creation (immune in the constitutional guarantee 19 nº 25). The Court ministers held that "in any case, it does not indicate that the inappropriate and inconvenient images that make up the work could affect the freedom of conscience of those in attendance nor does the representation have the sufficient importance and aptitude to influence the religious conviction of the citizens."[84]

Other religious manifestations at a social level, referring to holidays, as well as every Sunday of the year, the majority of these correspond to religious celebrations, for example: Good Friday and Saturday (according to the Catholic Church), San Pedro and San Pablo (flexible), July 16 as Virgin del Carmen, August 15 Asuncion of the Virgin, October 30 for the Evangelical and Protestant Churches, All Saints Day on November 1, Immaculate Conception on December 8 and Christmas on December 25. Of all these, only Christmas is inalienable.

Religion also manifests itself socially in different meetings such as the peregrinations. An unthinkable repercussion of the human flu in the country had as a consequence that important religious ceremonies were cancelled. The authorities created the argument that it was necessary to adopt measures to prevent the human flu from spreading with consideration to the crowds that are produced on these days and the difficulty in controlling sanitary conditions. It is important to note that, only these types of gatherings have been suspended and not other events (athletic or cultural). It is understandable that these measures may not have been effective due to lack of hygiene or for the increase in the population, it is certain that this type of holiday continues to attract crowds that are not observed at other events, and that it also lacks the prolongation of these meetings where religious dances are important in honoring the Virgin or a saint. And even when religious freedom of the majority confession in the country was extraordinarily limited, the ecclesiastical authorities and the peregrines collaborated with the sanitary authorities.[85]

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against the distributing television cable companies with respect to the series "Popetown," in Center of Religious Freedom – Law UC, Law Review Year II, Nº 6 May 2007, considering twelfth. To the decision it was added that "in the series, the object of criticism in the satire does not appear to be directed at articles of the Catholic religion faith but to certain aspects of the institutionalized Catholic Church referring to seasonal order (…) the entire series is found to be structured with such an obvious break from reality that it is not possible to recognize in it behaviour that is attributed to the members of the Catholic Church (considering tenth)." However, afterwards and without any prior accusation, the cartoon series where the President of the Republic was characterized was taken off the air by Sony Entertainment TV.

83. Extract from the Act in the extraordinary session from the National Council of Television that applied sanctions to the state television for damaging the dignity of an Evangelical Pastor in: Center for Religious Freedom – Law UC, *Legal Review*, Year II, Nº 6 May 2007, 27-32.

84. Court of Appeals Santiago, rol. 357-2009, 2 June 2009 that rejects the resource of protection considering 7º (cfr. Center for Religious Freedom – Law UC, *Legal Review*, Year IV, Nº 7 May 2009, 22-24).

85. Supreme Decree nº 2.155 of 2009, from the Health Minister in the Official Diary 8 July 2009, adopted preventative measures in order to prevent the spread of the human flu during the festival of the Tirana during the period between 4 July until 21 July in the communities of Pozo Almonte, Tirana, Huayco, Pica, Matillaand the surrounding areas, at the religious festivals pertinent to the 16 of July, Tirana Festival. In addition, the Supreme Decree nº 2.395 de 2009, Health Minister in Official Diary of 31 July 2009, adopted preventative measures in order to prevent the spread of the human flu during the festival of San Lorenzo in Tarapacá from August 1 to 16 in the community of San Lorenzo in Tarapacá, at the religious festival pertinent to the 10th of August. Both festivals prohibited camping, tents or other similar dwellings in both the public and private places in the said localities, as well as the installation of any type of commercial stand. In addition, the administrative measures restricted the municipal transitory premises of installing temporary establishments or areas and restricted the special transport authorities to take passengers to these places; impeding this with the collaboration of Chilean Police, the entrance of non-resident vehicles or those that were not fiscal, municipal or of an emergency nature.

D. *Education and Religious Teaching*

The interpretive law of 1865, in addition to permitting private teaching, authorized foreigners to have private schools where they could transmit their religious ideas. The participation of the diverse religious confessions in educative matters advanced towards the 20th century, where the construction of the churches and schools contributed to identity, common life and future projects in the areas where they were installed. "In some way, the school was a favourable place where each community of immigrants thought and implemented strategies for conserving the identity of origin or to project itself in the future. Two fundamental factors justified the implementation of self educative projects: language and religion."[86]

In reality, the right to education and the special obligation of parents in the education of their children is constitutionally recognized (Article 19 nº 10). In addition, "The freedom of teaching includes the right to open, organize and maintain educational establishments. The freedom of teaching does not have other limitations than those of morality, good customs, public order and national security. Officially recognized education cannot orient itself to spread any particular political tendencies.[87] Parents have the right to choose where their children are educated (Article 19 nº 11)."

Religious education started early in the country and until today public establishments are obligated to provide it and parents should enroll their children if they wish to. The state authority is in charge of approving programs in religion classes that are given in two classes per week, without having them influence the final evaluation of the student.[88] The possibility of giving religious classes is recognized in more than ten religious organizations: Catholic, Adventist, Bautista, Anglican, Lutheran, Methodist, Evangelical Churches and corporations, Jewish religion, Orthodox, Baha'i faith, and Presbyterian.

In relation to school system, these should be in the hands of a school manager, that could be a natural or legal entity and can be public or private, and even these can receive subsidies from the State (voucher system). If no specific restrictions appear in the religious organizations, these can be constituted in religious voucher schools. This occurs with respect to some districts of the Catholic Church and in some parishes or institutes of consecrated life, just like as other religious organizations participate in the educative activities be it through the direct management of some educational establishments, such as the creation of foundations and corporations for the said purpose.[89]

With respect to university education, since 1980 a double modification was produced that allowed the private property of such establishments and ended with the regional branches of the universities that existed then.[90] Now there are twenty five universities that

86. José Manuel Zavala Cepeda, "The colonists and the school in the Araucania: the European Immigrants and the emergence of private, secular and protestant education in the region of the Araucania (1887-1915)" in *Universum Magazine* nº23 volume nº 1 2008, University of Talca, 284.

87. Law 20.370 Establishes the General Education Law in Official Diary 12 September 2009. This norm regulates those matters related to the pre-school, elementary and high school education that is pending the new regulation by the Universities. Within the students' rights it is mentioned that freedom of consciousness, religious conviction, ideology and personal identity should be respected without detriment to the rights and duties that establish laws and conform to the internal regulation of the establishment (art. 10). In addition, it was established that when new students are incorporated, they cannot be discriminated according to the religion of their parents (art. 12).

88. Cfr. arts. 6 and 7 Supreme Decree 924 regulates religion classes in educational establishments in the Official Diary 7 January 1974. To go deeper in the judicial framework: cfr. DOMÍNGUEZ HIDALGO, Carmen, "Freedom in matters of religious teachings in Chile: general notes with special reference to themes of civil responsibility", in *V Colloquial Latin American Consortium for Religious Freedom 'Reality and challenges in Ecclesiastical Law of the State in Latin America*, Mexico City 2005, 1 – 21.

89. The organization for Adventist Education in Chile has existed in the country since 1906, operates in dependence with the Seventh-day Adventist Church, and supports the educational establishments for elementary and high school, and even the Adventist University in Chile has had autonomy since the year 2002.

90. Cfr. Law Decree 3.541. The suppression of the regional branches produced a significant change in the maximum national organism for superior education: the Council of Rectors (Law 11.575 in Official Diary 14 August 1954) that passed from eight original members to the 25 Universities that gave the order for the modification.

are called "traditional", among them are two Pontiff Universities and four Catholic universities that receive state funds. And among the more than thirty private universities, there is one Adventist, one Catholic and some that call themselves "secular."

E. *The Situation of the Aboriginal People*

In reality there subsist cultural elements of the diverse ethnic groups manifested in the practice of rites, traditions, and customs that coexist with their belonging to religious confessions preferentially Christian. According to the 2002 Census 4.6 percent of the total population of the country belongs to an indigenous ethnic group, which corresponds to 692,192 inhabitants.[91] The Mapuche represent 87.31 percent (604,349 inhabitants) and the Aymara to 7 percent (48,501 inhabitants), as well as the so-called "indigenous law"[92] recognizes the Rapa Nui or Pascuense, Quechua, Diaguita, Colla, Kawáshkar or Alacalufe, Yámara or Yagán and Atacameño or Likan Antai. Above and beyond tendencies that are neo indigenous, that stray from the appreciation and care of original beliefs yet pretend to have political claims, the truth is that the cosmo vision of the original peoples is expressed in different areas, such as health, education and places or sacred things.

This way, since the nineties a Health Program and Indigenous Peoples has been progressively implemented,[93] as a way of incorporating some health practices in these groups. In diverse hospital services attention is offered according to traditional Mapuche medicine as well as in pregnancy check-ups and at the moment of birth, one can choose according to the cosmovision of the Aymara or Mapuche people in hospitals in the north of the country as well as those in the south.[94] As well, in the south of the country, construction was initiated for the Intercultural Hospital of New Imperial (since February 2009), that, respecting the original cosmovision, has their principal access facing the east, where the sun rises. This initiative was started at the Hospital Makewe – Pelale (Cañete, IX Region), under the charge of the Indigenous Association for Health Makewe – Pelale. This hospital is part of what used to originally be a dispensary for the Anglican Missionaries (1895), and then was converted into the area hospital (1925).

In educational matters, the indigenous language has been incorporated into the learning sector during the elementary years (1º to 8º grade), including oral and written communication. The establishments that choose to can incorporate it as an option for the student and his/her family, but if there are more than 20 percent of students with indigenous background this should be offered obligatorily.[95]

A recent legal decision, principally for the application of the Agreement 169 OIT and national legislation, accepted a protective resource for the cutting of native forests close to

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91. Cfr. National Institute of Statistics, *Census 2002, Synthesis of Results*, Journalism Company, The Nation, Santiago, Chile 2003, 23-24. See also Ministry of Health, *Politics of Health and Indigenous Communities* Government Document of Chile, Ministry of Health, Division of Rectors and Sanitary Regulations, January 2003.

92. Law 19.253 that establishes norms for protection, promotion and development of the Indigenous in Official Diary 5 October 1993, states in art. 1 that "The State recognizes that the Indigenous people in Chile are the descendents of human associations that have existed in the national territory since pre-Colombian times, that conserve their own ethnic and cultural manifestations with which the earth is the fundamental principle of their existence and culture."

93. Ministry of Health – Fonasa – Health Program and Indigenous Communities *Politics of Health and Indigenous*

Communities, Santiago 2003. See also Pérez Moscoso, M. Soledad – Dides Castillo, Claudia, Health , *Sexuality and reproduction. Systemization of the investigations and experiences in Indigenous Communities in Chile 1990-2004*, Arancibia Hnos. and Cía Ltd., 2005.

94. Cfr. Ana Maria Celis Brunet, "Freedom of Consciousness and Sanitary Rights in Chile" in Isidoro Martín Sánchez (coord.), *Freedom of Consciousness and Sanitary Rights in Spain and Latin America* Editorial COMARES, Granada 2009 (in the press).

95. Cfr. Supreme Decree 280, Ministry of Education, Sub secretary of Education, Santiago, 20 July 2009 that modifies Supreme Decree 40 of 1996, that establishes fundamental objectives and minimal obligatory contents for early education and fix general norms for its application in the Official Diary, 25 September 2009.

streams. Even if freedom of consciousness was not invoked, they were looking to protect the beliefs according to those of sacred forests near streams even though the land did not belong to indigenous communities.[96]

F. *Religious Cultural Heritage*

In this matter, abundant normative dispersion is observed, where regulations coexist, not always harmonious, at a constitutional and international level, legal and regulatory. Among the applicable legislation the following examples can be found: National Monument Law, Law of Urbanism and Construction, Law about General Levels in the Environment, Law of Cultural Donations, Constitutional Organic Law of the Government and Regional Administration, Indigenous Law and Law of National Council of Culture and Arts and National Fund for Cultural Development and Arts. In addition, at a regulatory level, one should consider at least the General Order of Urbanism and Construction and the Regulation of the Evaluation of Environmental Impact. As well, diverse public organisms exist and a considerable amount of private institutions in charge of conserving national heritage.

In any case, national cultural heritage is constituted by many places of worship, preferentially Catholics. They extend from the churches in the high plains to the churches in Chiloe (that are considered Cultural Heritage of Humanity UNESCO) and also religious dances that portray the age of discovery (16th century).

With respect to cemeteries and in accordance with the General Regulation of Cemeteries,[97] "they are private cemeteries, of determined religious worship such as Catholics and others, from foreigner's colonies, religious communities, indigenous, and from corporations or beneficial foundations, etc. (Article 15)." And during the last decade, the Fiscal has returned the indigenous cemeteries that were in his power back to those indigenous communities.

However, without a doubt it is necessary to favor the systematic treatment of religious cultural heritage, which is a challenge to contribute to its study and analysis.

V. FINAL CONSIDERATIONS

In Chile, there are still not any sufficient systematic studies of religious freedom. Some manifestations of it are the absence of a professorship of Ecclesiastical Law in the studies of Law Degrees, or the scarcity of national doctrinal relative works of this matter.

In any case, it is not that clear that an exchange revolving around secularity is pending at a national level. It would be more interesting, to dig deeper in the identifiable criteria in our history that contributed to resolving conflicts in an original and coherent way, without remitting themselves to a precise importation of categories or principles that are not adequate enough to satisfy a solution for national matters. In some way, this corresponds to an invitation set forth by Professor Precht: "The traditional Catholic categories laity and laicism, must be revised by the thought of Chilean Universities in order to face the new social challenges presented by the twenty-first century."[98]

Among us, the indifference towards the norms of Ecclesiastical Law and the amateur creation of them lives harmonically and alternatively. In addition, in some social debates, the support for religious organizations is stopped, based on the separation between the Church and the State in 1925. In particular, this occurs with respect to the themes that have been stereotyped as *valuable debates*, such as those related to the satisfaction of the

96. Cfr. Sentencing of first and second instances of repeated behavior about the protective resources interposed by a *machi* mapuche, for the illegal cutting of native trees and bushes Center of Religious Freedom – Law UC, Law Review Year V, Nº2, November 2009, 60-77.

97. Decree 357l from the Ministry of Health, in Official Diary June 18, 1970, whose last modification is by Decree 54, 15 May 2004.

98. Jorge Precht Pizarro, "Laity and Laicism: Are These Catholic Categories of Any Use in Analyzing Chilean Church-State Relations?", 2009 *BYU L. Rev.* 704.

family, to the right to life and health, and those that express the demands of sexual minorities in virtue of the principle of equality. Even still, in Chile there is a tendency not to litigate conflict, but to resolve them appealing to tolerance and respect in social coexistence with the help of agreements and negotiations. Among the favored elements for a positive and collaborative consideration between the State and religious confessions, there is reference to the absence of a worsening of conflicts as happened in Europe due to religious symbols. In part, this is based on the recognition towards the religious entities for their contribution to the common well-being and peace throughout national history.

The situation in the country corresponds to an anti-confessional State, but not to indifference to religion in general. Although recent manifestations seem to counter the religious feelings of the population, they point to evidence that there is still a lack of appreciation towards religious freedom as a fundamental right and not just a simple sociological fact.

VICENTE PRIETO

Religion and the Secular State in Colombia

I. SOCIAL CONTEXT

The Colombian territory covers 1,140,000 km^2, and the population is approximately 45 million inhabitants (75 percent urban, 25 percent in rural areas).

Independence from Spain in 1819 began the current political system of a unitary (non-federal) presidential republic, and the legislature consists of the Senate and House of Representatives. The Constitution currently in force is from 1991.

The legal system is European-continental; however, in recent years the jurisprudence of the Constitutional Court, created in 1991 has assumed particular importance. Interpretations of the Constitution issued by the Court often go beyond the text itself, searching its "spirit." However, this approach to the common law system has created difficulties in the traditional Colombian legal context, in which laws made by Congress are the main point of reference in courts and administrative settings.

The Colombian population falls into two major religious groups: the Catholic Church (80-90 percent) and non-Catholic Christians of various denominations. This second group is not homogeneous, but includes very different religious communities (differing in such factors as number of members, doctrine, and structure). A small number of Jews and Muslims also reside in Colombia.

II. THEORETICAL AND SCHOLARLY CONTEXT

Colombia is a secular state. Secularism, in Colombia, is understood in connection with the principles of equality and cooperation among different religious communities. Various factors led to this system as adopted in the 1991 constitution.

The first factor was greater sensitivity to the different manifestations and consequences of the right of religious freedom. This sensitivity is linked to the remarkable increase in recent decades of different Christian denominations other than the majority religion, Catholicism. Colombia is no longer homogeneously Catholic, as was the case until the second half of the twentieth century. Religious plurality demanded new approaches and resulted in the 1991 Constitution and subsequent legislation and jurisprudence.

The emergence of new religions opened the possibility of a different system of dealing with religion. One possibility was to continue the system of the previous Constitution (1886): allowing individual and collective religious freedom, while offering State protection of the Catholic Church. Catholicism was the majority religion, and was therefore regarded as "the Nation's religion" and as a fundamental element of social order. In this scheme, the government limited recognition of minority faiths to the regime of private law associations, very different from the status accorded to the Catholic Church.

The system actually established by the 1991 constitution is markedly different from the 1886 constitution. The 1991 constitution welcomes the prospect of the "secular State," in which the State does not adopt any religion, even if it is the church of the majority. The State also declared itself incompetent in religious matters. Furthermore, all religious denominations are equal before public authorities, and the State facilitates and promotes State cooperation with all religions. The reference point in this model has historically been the State's relationship with the Catholic Church because this was the only type of

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institutional relationship between the State and a religion present in Colombia. However, the 1991 constitution has sought to extend to all religions, in many respects, the same legal treatment that was reserved exclusively for the Catholic Church.

Columbia's adoption of the 1991 model left behind two other alternatives that were common in countries with Catholic tradition, and also in Colombian history. One alternative was the confessional state, which could have been more or less intense. The other alternative was the secularism that seeks to relegate religion to the strictly private sphere, often with hostile demonstrations to the institutional and public presence of churches in social life.

III. CONSTITUTIONAL CONTEXT

The following periods in the history of the Colombian Church-State relations can be identified, in a very general way as follows: 1) regime of Catholic confessionalism and "Patronato republicano"[2] (1824-1853); 2) regime of separation between Church and State, understood in a hostile secularist context (1853-1886); 3) regime of protected religion – the Catholic Church (1886-1991); 4) regime established by the Constitution of 1991, which can be described by full recognition of religious freedom, and the aforementioned principles of secularism, equality, and cooperation.

The current regime derives from the Constitution and the Ley Estatutaria de Libertad Religiosa (Religious Freedom Act, Law 133 of 1994). It developed out of an abundant jurisprudence of the Constitutional Court, although it has not been formulated as such in any constitutional or legal text. Its wording reflects the desirability of identifying the "fundamental choices" assumed by Colombian State and Society after the 1991 Constitution in the treatment of the religious factor.

"Principles" are the benchmark, the "touchstone," of the entire system. They inspire the concrete options and solutions (legal, administrative, jurisprudential). Therefore, they also measure the legitimacy of these options. In identifying the principles of Colombia's legal-religious atmosphere, the most helpful texts are the following:

a) "All persons are born free and equal before the law, will receive the same protection and treatment by the authorities and enjoy the same rights, freedoms and opportunities without discrimination based on sex, race, national or family origin, language, religion, political or philosophical opinion. The State shall promote conditions to ensure that equality is real and effective and adopt measures to help disadvantaged or marginalized groups. The State shall provide special protection to persons who by their economic status, physical or mental, are in obviously vulnerable circumstances and punish any abuse or mistreatment committed against them." [3]

b) "Freedom of worship is granted. Everyone has the right to profess freely their religion and to disseminate it individually and collectively. All faiths and churches are equally free before the Law." [4]

c) "No church or religious denomination is or will be official or established. However, the State is not atheist, agnostic or indifferent to the religious sentiments of Colombians. The government would protect individuals in their beliefs, as well as churches and religious groups and facilitate their participation in achieving the common good. Similarly, it will maintain harmonious relations and common understanding with the churches and religious entities existing in Colombian society."[5]

d) "The State recognizes the diversity of religious beliefs, which do not constitute cause for inequality or discrimination before the Law to nullify or restrict the recognition

2. During the colonial period, the regime known as the "Patronato Real" governed in the Spanish domains The Patronato Real was the set of attributes recognized by the Holy See to the Spanish Crown, which allowed control of Church life (appointments, discipline, etc.). With their newly-acquired independence, the new authorities wanted to keep the same system. This is known as the "Patronato Republicano."

3. COLOMBIAN CONSTITUTION, art. 13 (1991).

4. COLOMBIAN CONSTITUTION, art. 19 (1991).

5. Religious Freedom Act, art. 2 (1991).

or the exercise of fundamental rights. All faiths and churches are equally free before the Law." [6]

The principles of secularism, equality, and cooperation are not unique or original to Colombian system. They correspond, in general, to the choices made by countries whose systems of relations with churches, and more generally the legal treatment of religious freedom, are similar to Colombia's. This is the case of Spain, Italy, and Germany.

In Spain and, to a large extent also, in Italy, the contact points with Columbia derive from a similar legal and social reality, specifically in relation to the following: 1) a majority Catholic population and the presence of more or less intense religious minorities; 2) a history marked by the alternation of hostile-secularist and confessional regimes; 3) a system of institutional relations with the Catholic Church, which often resulted in the signing of Concordats; 3) extension of the Agreement system to religious minorities.

The Constitutional Court has repeatedly mentioned the previously discussed principles, but they are listed as such. The following is a particularly eloquent example:

> The 1991 Constitution establishes the character of the social state of law in Colombia, of which religious pluralism is one of the most important components. Similarly, the Constitution precludes any form of established religion and states the full religious freedom and equal treatment of all faiths, since invoking the protection of God, made in the preamble, is general in nature and not related to any Church in particular. This implies that in the Colombian Constitution, there is a separation between Church and State because the State is secular. In fact, this strict State neutrality in religious matters is the only way that public authorities ensure pluralism and equal co-existence and autonomy of different faiths. Obviously, this does not mean that the State is unable to establish cooperative relationships with various religious denominations, provided that the equality is respected.[7]

Finally, according to Article 93 of the Constitution, "Treaties and Conventions ratified by the Congress that recognize human rights and prohibit their limitation in states of emergency have priority domestically. The rights and duties in this Charter shall be interpreted in accordance with international human rights treaties ratified by Colombia."

Among these Treaties we may account, along with the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights (1966, both ratified by Colombia through Law 74 of 1968); and the American Convention on Human Rights (1969, ratified by Colombia with Law 16 of 1972).

According to the jurisprudence of the Constitutional Court, the Human Rights International Treaties are part of the so-called "block of constitutionality." This concept attempts to reconcile two seemingly contradictory constitutional requirements: Article 93 and Article 4 ("The Constitution is norm of norms. In the event of any inconsistency between the Constitution and the law or other norm, the constitutional provision prevails.") For the Court, the "block of constitutionality" consists of "those rules and principles that, not appearing formally in the articles of the Constitution, are used as parameters for the control of constitutionality of laws, as they have been integrated in various ways in the Constitution, under a mandate from the Constitution itself. They are true principles and rules of constitutional value, i.e. norms at the constitutional level." One consequence of this approach is that "the Colombian State must adjust the rules of inferior rank of the domestic legal order to the content of international humanitarian law, in order to enhance the performance of such values."[8]

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6. Religious Freedom Act, art. 3 (1991).

7. Decision C-350 (1994). The Constitutional Court decisions are mainly of two types: the letter "C" indicates decisions of constitutional control; the letter "T" refers to decisions of guardianship (*tutela, amparo*) of fundamental rights. The text of the decisions cited in this work can be found in http://www.derechocolombiano.com/; http://www.notinet.com.co/.

8. Decision C-225 (1995).

IV. LEGAL CONTEXT

A. *Religious Freedom Act (*Ley Estatutaria de Libertad Religiosa*)*

The Religious Freedom Act (*Ley Estatutaria de Libertad Religiosa*, Ley 133 of 1994)[9] developed the freedom of religion and worship recognized in Article 19 of the Constitution.

With the *Leyes Estatutarias,*[10] Congress regulates, among other topics, matters related to fundamental rights and duties of individuals and the procedures and resources for their protection. Approval, amendment, or derogation requires an absolute majority of Members of Congress. It also requires the prior review of the respective draft law by the Constitutional Court[11] as well. The Religious Freedom Act, therefore, has a particular hierarchy, inferior only to the Constitution.

The Act is divided into five chapters: 1) the right of religious freedom; 2) the scope of the right of religious freedom; 3) the legal status of churches and religious denominations; 4) the autonomy of churches and religious denominations; 5) transitional and final provisions. A general description of its contents is as follows:

a) The Act explicitly confirms the positive view of religion, already present in the Constitution. At the same time, it proclaims the secularity of Colombian State: "No church or religious denomination is or will be official or established. However, the State is not atheist, agnostic or indifferent to the religious sentiments of Colombians."[12]

b) The "activities related to the study and experimentation with psychic or parapsychological phenomena; Satanism; magical, superstitious, or spiritist practices" are excluded from the regulation of the Act as being "alien to the religion."[13]

c) It facilitates and promotes the participation of churches in achieving the common good and harmonious cooperation between the State and the various denominations.[14]

d) With regard to the principle of equality, "The State recognizes the diversity of religious believing. This diversity will not constitute grounds for discrimination or inequality before the law that nullify or restrict the recognition or exercise of fundamental rights. All religious communities are equally free before the law."[15]

e) The right to religious freedom is not absolute. Its boundaries are formed by "the protection of the rights of others to exercise their freedom and public rights, and the safeguard of security, health and public morality. All these elements constitute the public order protected by law in a democratic society."[16]

f) The right of religious freedom, in its individual dimension, is widely described in Article 6. It is described with respect to churches and confessions in cf. Article 7 and 13-15. Article 8 calls for collaboration with churches and denominations to the "real and effective application of these rights."

g) The State continues to recognize the legal personality of the Catholic Church and the entities canonically erected according to Article IV, 1 of the Concordat with the Holy See. Churches that register in the Public Register of Religious Entities should notify the Ministry of Internal Affairs of the canonical erection or approval.[17] In relation to other religious entities, Articles 9 and 10 provide that the Ministry of Internal Affairs is competent to recognize legal personality, according to the general requirements established by the Act.

h) Under the principle of collaboration with religious communities, it is also possible to

9. Text available at http://www.secretariasenado.gov.co/senado/basedoc/ley/1994/ley_0133_1994.html.
10. See COLOMBIAN CONSTITUTION, art. 152 (1991).
11. See COLOMBIAN CONSTITUTION, art. 153 (1991).
12. Id, at art. 2.
13. Id. at art. 5.
14. Cf. id. at art 2.
15. Id. at art. 3.
16. Id. at art. 4.
17. Id. at art. 11.

subscribe International Treaties or Internal Public Law Conventions or Agreements[18] with the Ministry of Internal Affairs.

Decree 372 of 1996 established the internal structure of the Ministry of Internal Affairs. In doing so, it determined the Ministry's general functions related to religious freedom to be as follows: formulate and adopt policies on fundamental rights and freedoms and on public order and peaceful coexistence; the protection of freedom of religion and worship.[19]

More specifically, the responsibility of this Ministry[20] is to guarantee freedom of religion and the individual right to practice religion freely; to promote coexistence and tolerance among adherents of different faiths; to recognize special legal status of religious communities; to carry out the Public Registry of Religious Entities; and to manage the development and negotiation of Public Law Agreements with religious communities.

Decrees 200 of 2003 and 3420 of 2004 and Law 888 of 2004 confirmed the general objectives and functions of the Ministry in matters of religious freedom.

The 1991 Constitution does not address the possibility of concluding Agreements with religious denominations. This is different from the Constitution of 1886, which did so in connection with the Catholic Church. Though the 1991 Constitution fails to address the possibility of concluding Agreements with religious denominations, the Religious Freedom Act does so in Article 15: the State may conclude Agreements about religious matters (International Treaties or Internal Public Law Agreements) with churches and religious denominations that enjoy personality and offer warranty of stability.

The Constitutional Court of Colombia[21] has stressed that the determination of whether Conventions with Churches and religious denominations qualify as Public Law Agreements is the consequence of considering the Convention's relation to "matters of public concern," the "public," and the "general interest." Consequently, both the Catholic Church and other faiths are able to conclude Agreements and intervene directly in determining their specific legal situation and the ways to contribute to achieving the common good.

The Act distinguishes between International Treaties and Internal Public Law Agreements. Although not explicitly stated, International Treaties include Agreements with the Catholic Church because they are considered true International Treaties by force of their status as the subject of International Law of the Holy See.

B. *Concordat with the Holy See (1973)*

On 12 July 1973 the current Concordat between the Holy See and the Republic of Colombia was signed. The Colombian internal law approving both of the Concordat and the Final Protocol is Law 20 of 1974.

The Colombian Concordat is structured on the classic themes of Agreements between the State and the Catholic Church. The doctrine of the Second Vatican Council is present.[22] It incorporates elements of the Colombian situation, including the mission, territories, and educational and charitable work of the Church in these territories.[23] Specifically, the Church is committed to working with public education in deprived areas, through contracts between the government and the Episcopal Conference.[24]

Articles II and III proclaim the freedom and independence of the ecclesiastical jurisdiction, and the respect from the civil authorities of the Church. The State recognizes legal personality of the Catholic Church, the dioceses, religious communities, and other

18. Id. at art. 15.
19. Cf. id. at art. 5.
20. Cf. id. at art. 6.
21. Decision C-088 (1994).
22. See art. I: reference to the religious freedom of all faiths
23. Art. VI.
24. Art. XIII

entities that possess ecclesiastical canonical legal personality.[25] Concerning the appointment of bishops and archbishops, which is the exclusive right of the Roman Pontiff, the Holy See shall communicate to the President the names of the elected persons "to see if there are civil or political objections."[26] Something similar happens with the erection of new ecclesiastical districts: the Holy See prior informs the government, and welcomes "fair and appropriate indications."[27] The spiritual and pastoral care of Catholics in the Armed Forces is committed to the Military Ordinariate.[28]

The Catholic Church and other catholic entities with legal personality can acquire property, own property, and manage and dispose of property freely in the manner established by Colombian law for all citizens.[29] Buildings for regular worship, the diocesan curia, bishops' and priests' houses, and seminaries are exempted from taxation. Legislation for nonprofit civil entities applies also to nonprofit ecclesiastical entities.[30] It is recognized to the Church the right of asking free contributions from its faithful.[31] The State's financial contribution to the creation of new dioceses and to support those in the so-called mission territories is referred to future regulation.[32]

The State recognizes the civil effects of catholic marriage,[33] as well as the decisions of canonical marriage, annulment, and dissolution, which are the exclusive competence of ecclesiastical courts.[34] Judges of the State handle causes of separation.[35] State officials, if necessary, cooperate in the execution of ecclesiastical decisions "to protect the rights of people who might be injured by faulty or incomplete execution of such decisions."[36]

In education, the State undertakes to contribute equally in the maintenance of Catholic schools with the aim of making more viable the right of families to freely choose schools for their children.[37] Public schools, will teach the Catholic religion[38] with the understanding that it is not compulsory for Catholic children whose legal representatives have requested waiver of the Catholic religion courses. Waiver is also available for elderly Catholics who make such requests. These waivers are made in accordance with the principles of religious freedom found in II Vatican Council and the norms of the Political Constitution of Colombia.[39]

The Concordat further recognizes in the Catholic Church the freedom to organize and direct educational institutions at every level, as well as the autonomy to establish, organize, and conduct religious schools, seminaries, and formation houses.[40]

With regard to sacred ministers, the Concordat states that they will not be forced to hold public offices incompatible with their ministry and will be exempt from military service.[41] Civil and criminal cases are within the jurisdiction of the courts of the State, except for Bishops, whose criminal cases are judged by the Holy See.[42] In criminal proceedings against clergy, exceptions to the common legal scheme are agreed: the trials will not be public and accused persons will not be detained in common prisons during the trial. However, if the final decision is that of guilty, the common penalty regime is

25. Colombian Concordat art. IV.
26. Id. at art. XIV.
27. Id. at art. XV.
28. Id. at art. XVII.
29. Id. at art. XXIII.
30. Id. at art. XXIV.
31. Id. at art. XXV.
32. Id. at art. XXVI.
33. See id. at art. VII.
34. Id. at art. VIII.
35. Id. at art. IX.
36. Id. at art. XXI.
37. Id. at art. XI.
38. See id. at art. XII.
39. See Exchange of Instruments of Ratification of the Concordat, Vatican City, 2 July 1975.
40. Art. X.
41. Art. XVIII.
42. Id. at art. XIX.

applied.[43] The unlawful exercise of ecclesiastical functions by those who have no canonical mission is seen as a usurpation of public functions.[44]

The Concordat recognizes that the Church has the right to own and operate cemeteries and to exercise its ministry in civil cemeteries.[45] Finally, in cultural heritage, the Catholic Church and the State are committed to developing an inventory of assets that are worthy of attention for joint preservation and display for the purpose of social education.[46]

The 1991 Constitution raised the question of conformity or nonconformity of the Concordat with the new constitutional text. The Constitutional Court declared unconstitutional a number of articles of the Concordat in Decision C-027, 1993. The controversy over the scope of this Decision remains open. In practice, the Concordat continues to be applied in most of its articles. The main reason is that in later years, laws have been rendered wholly compatible with the general provisions of the Concordat, and also applicable to all faiths, particularly in the Religious Freedom Act of 1994.

C. *Convenio de Derecho Público Interno n. 1 de 1997*

In Article 14 of Decree 782 of 1995, the conditions for Public Law Internal Agreements are set out:[47] 1) the religious entity wanting to sign such Agreement must have special juridical personality, recognized by the Ministry of Internal Affairs, or "public ecclesiastical personality" (refers to the distinction between non-Catholic and national Catholic entities); 2) the State keeps its discretion to weigh the desirability of the Convention, depending on the content of the statutes of the religious community, the number of its members, its roots, and its history; 3) if the Agreements deal with matrimonial matters, the community must demonstrate possession of matrimonial law provisions not contrary to the Constitution, and ensure the reliability and continuity of their religious organization;[48] 4) if the Agreement includes the possibility of declaring nullity of marriage, it is required that the religious entity hold substantive and procedural laws to guarantee full respect for fundamental rights.

The competence to subscribe the Agreement corresponds to the Ministry of Internal Affairs, in consultation with other Ministries if the matter requires. The checking of legality is performed by the Board of Civil Service and Consultation of the State Council. The Agreement is then promulgated by its publication in the Official Journal.[49]

Termination of the Agreements may be mutually agreed between the parties or by unilateral decision of the State.[50] The latter may occur in the following situations: 1) cancellation of the legal personality (in the case of Catholic entities, this decision can only be taken by the respective authorities of the Catholic Church); 2) breach of commitments. In any case, termination of the Agreement requires a Government Decree, with a previous judicial Decision.

Agreements can be on any religious issue. However, their existence is required for the recognition of civil effects of religious marriages and of nullity decisions;[51] to offer religious education in denominational schools; to ensure permanent religious assistance in prisons, hospitals, welfare, education, military, and police facilities; and for regulating all matters relating to artistic and cultural heritage. [52]

Furthermore, the Religious Freedom Act provides the existence of Agreements as a

43. Id. at art. XX.
44. Id. at art. XXII.
45. Id. at art. XXVII.
46. Id. at art. XXVIII.
47. Cf Religious Freedom Act, art. 15.
48. Cf. Law 25 of 1992, Art. 1, 2.
49. Cf. Decree 782, art. 15 (1995).
50. Cf. id. at art. 16.
51. Cf. Decree 782, art. 13, paragraph 2 (1995).
52. Cf. Law 25 of 1992, art. 1; Religious Freedom Act, art. 15.

way of regulating the civil recognition of religious study certificates. [53]

By Decree 354 of 1998 the President approved the Internal Public Law Agreement number 1 of 1997, between the Colombian Government and some non-Catholic Christian Religious Entities. It was signed in Bogotá on 2 December 1997. The negotiation and development of the Agreement was carried out by the Ministry of Internal Affairs, in accordance with Article 15 of Decree 782, 1995. It is the only such agreement that has been signed to date.

The Agreement extends to the following religious entities: *Concilio de las Asambleas de Dios de Colombia, Iglesia Comunidad Cristiana Manantial de Vida Eterna, Iglesia Cruzada Cristiana, Iglesia Cristiana Cuadrangular, Iglesia de Dios en Colombia, Casa sobre la Roca-Iglesia Cristiana Integral, Iglesia Pentecostal Unida de Colombia, Denominación Misión Panamericana de Colombia, Iglesia de Dios Pentecostal Movimiento Internacional en Colombia, Iglesia Adventista del Séptimo Día de Colombia, Iglesia Wesleyana, Iglesia Cristiana de Puente Largo, y Federación Consejo Evangélico de Colombia (Cedecol).* All of the preceding religious entities had special juridical personality recognized by the Ministry of Internal Affairs.

The articles of the Agreement follow closely the classical matters contained in the Concordats with the Catholic Church. The covered topics are marriage in Articles I-VI; religious education and freedom of education in Articles VII-XIII; religious assistance to members of the security forces and in prisons in Articles XIV-XVIII; places of worship in Articles XIX-XX; and social assistance programs in Article XXI.

Article XXIII refers only to the Seventh-day Adventist Church. It states that, by agreement between the parties (employee and employer), Saturday can be established as the weekly day of rest. In addition, students are exempt from submitting exams and attending classes on Saturday.

V. THE STATE AND RELIGIOUS AUTONOMY

According to Article 7 of the Religious Freedom Act, various rights are recognized as belonging to religious communities: freedom to establish places of worship; freedom to exercise the ministry, confer religious orders and assign charges; the right to communicate with the faithful and with other churches or religious denominations; the right to establish their own institutions of theological studies; the right to write, publish, receive, and freely use books and other publications on religious matters; and the right to announce, report and disseminate their faith and to perform educational and charitable activities. As seen before, for the civil recognition of study certificates, an Agreement with the religious community is required.

Article 13 of the same Act recognizes the full autonomy and freedom of religious entities. They can therefore set their own rules of organization, internal rules, and dispositions for their members. Confessions with legal personalities can also create and foster partnerships, foundations, and institutions to carry out their ends.[54] Religious entities also have the ability to acquire, sell, and administer property freely, and own artistic and cultural heritage and to request and receive donations and organize collections among the faithful.

VI. RELIGION AND THE AUTONOMY OF THE STATE

In Colombia there are no limitations on religious ministers participating as candidates in elections for public office or being appointed as officers of the Administration, however, the role of judge or magistrate is incompatible with the performance of the ministry in any religious denomination. [55]

Common in recent years is the existence of political parties, more or less religious,

53. Art. 7, paragraph d.
54. See Religious Freedom Act, art. 14.
55. Administration of Justice Act, Law 270 of 1996, art. 151, 5.

linked to non-Catholic Christian churches, and some ministers have been elected to positions of popular representation.

This has not been the case with Catholic priests, under the prohibitions contained in cc. 287, 2 and 289, 2 of the Code of Canon Law.[56] The exceptions in these rules have not been applied in Colombia. The Concordat, as previously discussed,[57] states that clerics will not be forced to hold public offices incompatible with their ministry.

VII. Legal Regulation of Religion as a Social Phenomenon

The 1991 Constitution expressly invokes in its Preamble "the protection of God." This reference indicates that the Colombian State recognizes the existence of God in the origin of its fundamental institutions, without referring, however, to any particular religion. The Preamble expresses, therefore, a positive view of religion.

This positive and "friendly" view of the religious phenomenon is confirmed by the Religious Freedom Act: "No church or religious denomination is or will be official or established. However, the State is not atheist, agnostic or indifferent to the religious sentiments of Colombians. The government would protect individuals in their beliefs, as well as churches and religious groups and facilitate their participation in achieving the common good. Similarly, the State will maintain harmonious relations and common understanding with the churches and religious entities existing in Colombian society."[58] Religious beliefs are, therefore, a "constitutionally protected value."[59]

The recognition of the importance of religious phenomena and their manifestations has led, in the words of the Constitutional Court, to the recognition of "a special regime, different from the rest of the regimes governing other civil liberties, societies, associations and other legal persons, thus highlighting the undeniable importance of religion in contemporary societies."[60]

Colombia has maintained a strong concordatarian tradition with the Catholic Church, which has helped to strengthen the idea that relations with religious groups have a unique character, distinct from the State's relations with private entities. This concept has allowed and facilitated the recognition of other religious entities in similar terms, providing them, for example, the system of Public Law Agreements.

It is not just a pragmatic solution or simple imitation: the coordination model involves the recognition that the existence and activity of religious groups is directly related to the common good and deserves, therefore, a "special" regime, both from the standpoint of legal recognition by the State, and by way of establishing relations with religious entities.

The Colombian system (a real novelty in the Latin American context), also allows a "particularized" treatment in the state's relations with each community, which helps to avoid the danger of indiscriminate egalitarianism. Justice, according to the classical formula, is to "give each his due," not give everyone the same. The difference in treatment can therefore be fully justified, depending on the nature of the confession, legal status, roots, and so on. The system of Public Law Agreements can therefore better ensure the respect of difference, not only for its specific character, but because its production involves the two parties reaching an agreement on what is most consistent with the nature of the community or communities involved.

In Colombia, conscientious objection has no explicit constitutional or legal basis.

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56. Can. 287, 2: clerics "are not to have an active part in political parties and in governing labor unions unless, in the judgment of competent ecclesiastical authority, the protection of the rights of the Church or the promotion of the common good requires it"; can. 289, 2: "Clerics are to use exemptions from exercising functions and public civil offices foreign to the clerical state which laws and agreements or customs grant in their favor unless their proper ordinary has decided otherwise in particular cases."

57. art. XVIII.

58. art. 2.

59. Decision C-350 (1994).

60. Decision C-088 (1994).

There are, however, numerous Decisions of the Constitutional Court. In general, the approach of the Court has been restrictive. The downside in these matters is that sometimes the Court's decision hangs on the definition that the Court itself gives to what is considered a matter of religion or conscience, contrary to what was said by the persons concerned. This approach raises serious concerns regarding proper respect for freedom of conscience.

Recently, the Constitutional Court accepted the conscientious objection to abortion, but only for individuals. The clinic or hospital cannot refuse to perform abortions if legal requirements are met.[61]

VIII. State Financial Support for Religion

In the Concordat of 1887,[62] the Colombian State assumed the obligation to provide financial compensation to the Catholic Church for the expropriation of church property that occurred during the second half of the nineteenth century. Article XXVI of the Concordat of 1973 mantains the same obligation. At present, the various obligations of the Colombian State to the Catholic Church have been unified into a single contribution, included in the annual budget of the Ministry of Foreign Affairs.[63] There is nothing similar for other religious communities.

In taxation matters, Article 7 of the Religious Freedom Act authorizes municipal councils to grant tax exemptions to all faiths on an equal basis.

At the national level, according to Article 23 of the Tax Statute,[64] religious denominations are not payers of income tax. In Decrees 3101 of 1990, 2820 of 1991, 2064 of 1992, 2511 of 1993, 2798 of 1994, 2231 of 1995 and 2300 of 1996, the exemption from income tax is reaffirmed.

In general, the Constitutional Court has established the following principle: "In light of the Constitution, law is forbidden to give different treatment to religious communities, which does not imply the automatic granting of a tax exemption to all when some of them have met the requirements of law to merit that exemption. The law is obliged to establish the same objective conditions for all religious denominations so that they become able to enjoy such exemption. If the collective entities involved meet the objective conditions established by law for the benefit of a tax exemption, that exemption must also be recognized."[65]

IX. Civil Legal Effects of Religious Acts

In Colombia, all religious marriages have civil effects.[66] The same applies to judgments of nullity of religious marriages issued by the authorities of the religious community. In the same sense, no homologation or "exequatur" is required from Civil Courts.[67]

For the Catholic Church, the same recognition is made in Articles VII and VIII of the Concordat. Something similar happens with the entities that signed the Internal Public Law Agreement No. 1 of 1997.[68]

The Concordat sets out in Article IV that the State recognizes the legal personality of the Catholic Church, the dioceses, religious communities, and other canonical legal persons. For this civil recognition to be effective, the ecclesiastical authority certifies the

61. Decision C-355 (2006).

62. Cf. Art. XXII-XXVI.

63. The yearly amount of this contribution (26 million Colombian pesos), is equivalent approximately to US $13,000. Instead of distributing this amount among the dioceses (almost symbolic), the Episcopal Conference decided to use it to cover their own expenses.

64. Law Decree 624 of 1989.

65. Decision T-269 (2001).

66. COLOMBIAN CONSTITUTION, art. 42.

67. See Religious Freedom Act, art. 6, d.

68. Chapter I, art. I-VI.

entity's canonical existence. Decree 1396 of 1997 established in Article 2 that the registration in the Public Registry of entities, mentioned in article IV of the Concordat, shall be subject to norms agreed by the High Contracting Parties. In all cases, registration in the Public Registry of Religious Entities has no effect on the recognition and accreditation of the legal status of these entities. In the case of non-Catholic denominations, they must request recognition of legal personality from the Ministry of Internal Affairs.[69]

X. RELIGIOUS EDUCATION OF THE YOUTH

The outline of the right to education is contained in articles 67 and 68 of the Colombian Constitution. The following principles are worth noting: 1) responsibility in the educational process belongs to the State, society and family; 2) the State is responsible for regulation, final inspection, and supervision; 3) individuals may create educational institutions; 4) parents have the right to choose the type of education for their minor children; 5) religious education cannot be compulsory.

The Religious Freedom Act recognizes the right of parents (or children themselves, if they have reached the age of majority) to choose the religious and moral education of their children according to their own conviction.[70] Schools must provide religious education of the religions to which the students belong, and the students have the right not to be obliged to accept such religious education. Teachers of religion are required to possess a certificate of suitability from the respective church or denomination.[71]

Similar rules are contained in Article XII of the Concordat. It reaffirms the right of Catholic families to have their children receive religious education according to their faith. The Catholic religion is to be taught in public schools. Belonging to the ecclesiastical authority is the responsibility to develop programs, approve textbooks, and monitor the way religious education is taught. Teachers must have a suitability certificate issued by ecclesiastical authority. It also states that the State shall promote higher education institutes and the creation of superior religious science departments, where Catholic students may have the option to improve their culture in harmony with their faith.

On 2 July 1975, in the Exchange of instruments of ratification of the Concordat, it was stated that Catholic religious education is not compulsory for Catholic children whose legal representatives have requested waivers for the Catholic religion classes, or for overaged Catholic students that submit a request to the same effect.

The Internal Public Law Agreement n. 1, 1997, Chapter II deals with "teaching and non-Catholic Christian education and information."

Article VII ("The freedom to choose non-Catholic Christian religious education") warrants to the faithful of the confession's party to the Agreement the right to choose the kind of education they want for their minor children and the freedom not to be compelled to receive religious education different from their own convictions.

Article VIII ("The non-Catholic Christian religious education") establishes specific rules with regard to religion classes in public schools (school curricula, places and means of teaching, specific agreements with the state authorities). It also guarantees the possibility of issuing those classes in educational establishments promoted by the same denominations.

The entities party to the Agreement have the right to establish, organize and direct educational institutions of all levels. Established rules exist on studies, approval, and certificates.[72]

Religious entities must provide to the competent authorities their plans for education

69. See Religious Freedom Act, art. 9-12.
70. Art. 6, h.
71. See id. at art. 6, i.
72. Internal Public Law Agreement n. 1 (1997) Chapter II, art. X.

and institutional projects. The responsibility to monitor the quality of non-Catholic Christian religious education belongs to the religious authorities of the various denominations. The last article of Chapter II includes the requirements to become a teacher of religion.

The General Education Act has confirmed the principles contained in the Religious Freedom Act and in Agreements with religious denominations.[73] Article 23, 6 lists religious education among the key areas and compulsory basic education (which, according to Article 31, are the same in high school). It adds that religious education must be offered in all educational institutions, granting the constitutional guarantee under which no person shall be compelled to receive it. Article 24 emphasizes that the right to receive religious education is granted subject to the constitutional guarantees of freedom of conscience, freedom of religion, and the right of parents to choose the type of education for their minor children. In public schools, religion teachers receive their salary from the State because they are public employees.

XI. RELIGIOUS SYMBOLS IN PUBLIC PLACES

There is no specific legislation in regard to religious symbols in public places. In general, as a result of the traditional Catholic culture of the country, religious symbols are common in public places like courts, schools, and administrative offices. These symbols, in general, have not been controversial.

Something similar could be said about clothing. Some problems have occurred in countries with consistent Muslim minorities. It is not the case of Colombia.

XII. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

According to Article 85 of the Constitution, the right of religious freedom is of immediate application, i.e. it is not required to be legally enforceable. It enjoys the protection action (*tutela, amparo*) before judges, with the conditions set out in Article 86.

In practice, as evidenced by the work of the Courts and the jurisprudence of the Constitutional Court, the most common way to require effective protection of the right of religious freedom has been precisely the *tutela*.

The Constitution provides other protection mechanisms, such as those stated in Articles 87, 89, 90, 91 and 92. The religious fact, or circumstances directly related to religion, is subject to specific protection by the criminal law. The fact that a criminal offense is based on intolerance and discrimination involving race, ethnicity, ideology, religion or belief, sex or sexual orientation, or any illness or disability of the victim is considered as an aggravating circumstance.[74]

Among the circumstances that aggravate a penalty are certain personal qualities, which have been principal in the commission of crimes. The status of being a religious leader is the same.[75]

In crimes of forced disappearance, kidnapping for ransom, torture, forced displacement, and extortion, the status of certain persons, among which also are included "religious leaders," is considered as a circumstance that increases the penalty.[76]

The same Penal Code includes an entire chapter named "Crimes against religious sentiment and against the due respect for the dead." The first category, crimes against religious sentiment, criminalizes the following acts:

a) Violence that compels a person to fulfill a religious ceremony, or interferes with participation in a ceremony of the same nature;[77]

b) To disturb or to impede the conduct of a ceremonial or religious function of any

73. Law 115 of 1994.
74.See Penal Code, art. 58, par. 3.
75. Penal Code, art. 104.
76. Cf.. Penal Code, art. 166, 170, 179, 181, 245.
77. Art. 201.

allowed religion;[78]

c) To cause harm to the objects intended for worship, or to the symbols of any religion legally allowed; to injure publicly such cults or its members by virtue of their office.[79]

In addition, the Penal Code includes "crimes against persons and property protected by International Humanitarian Law."[80] Some of the articles refer to matters relating directly to religious issues. Specifically, it is established that religious staff have the status of special protection.[81] The following articles list behaviors, with their penalties, which involve "protected persons": Articles 136, 138-140, 143, 146, 151, 152, 154, 156.

The National Police Code, Article 209, 4, states that persons who do not keep proper composure in a religious ceremony held in an open public place or public place, may be expelled by the police.

Finally, the Criminal Procedure Code,[82] Article 35, lists the crimes that require complaint. Among them there are the violation of religious freedom,[83] the disturbance of a religious ceremony,[84] and the damage or injuries to persons or things for worship.[85]

78. Art. 202.
79. Art. 203.
80. Title II, unique Chapter.
81. Art. 135.
82. Law 906 of 2004.
83. Cf. Penal Code, art. 201.
84. See Penal Code, art. 202.
85. See Penal Code, art. 203.

ZÁBOJ HORÁK

Religion and the Secular State in the Czech Republic

I. Social Context

The membership of religious communities (denominations) in the Czech Republic is governed by the communities' own statutes, which are set up independently of State authorities. There are no State provisions for registering members of religious bodies. Moreover, there are no official State statistics regarding members of religious communities. The data used in this article were compiled through an anonymous questionnaire – basically, an opinion poll – conducted by the State Statistical Office.

Currently, there are thirty-one religious communities registered in the Czech Republic. By registering with the State, religious communities acquire legal personality and some tax advantages. Among the above mentioned thirty-one religious communities, there are twenty-one with other "special" rights provided by Act No. 3/2002 Sb. on Churches and Religious Societies.[1]

Approximately one-third of the inhabitants of the Czech Republic belong to one of the registered religious communities. In spite of that fact, which, in comparison with other countries, can be considered low, the religious communities play quite an important role in Czech society. Membership in religious communities is more or less an expression of personal profession. The main tendency since the time of the communist dictatorship is to be non-confessional.

The Czech non-denominationalism is then mostly agnostic and only partly atheist. The number of real atheists is about 10–20 percent, according to different opinion polls. The relationship between the main religious stream, Roman Catholicism, and the other denomination is approximately 85 to 15.

To illustrate the demographics of the different denominations in the Czech Republic, we can look to the data published by the Czech State Statistical Office in 2001. The table of religious adherence has thus only relative informative value. A survey of 10.3 million inhabitants of the Czech Republic revealed the denominational breakdown shown in Table 1.

II. Theoretical and Scholarly Context

We can differentiate two main streams in the opinions of Czech intellectuals – including lawyers – regarding church-state relations. One line of thinking is based on a tradition of a great personal distance to all things that are connected with religion. This view stems from the forty years of atheist dictatorship by the communist party from 1948-1989. The second line of thinking is open to the idea of supporting the social importance of religion and is connected with the former opponents of the communist regime. Of course, religious believers, who are only a minority of society, and their sympathizers subscribe to this second viewpoint.

Both groups hold the conviction that neutrality between the State, religion, and non-religion is necessary. There is a common consensus regarding the constitutional principles of religious freedom and autonomy of religious communities in relation to the State, as with the constitutional prohibition of propaganda for some religious community or atheism by state institutions.

Both groups support the idea of a State that is secular but not hostile to religious communities. The idea of severe separation of church and state is not a living issue.

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1. Sb. = Sbírka zákonů, Collection of Laws of Czechoslovakia and since 1 January 1993 only the Czech Republic.

However, the difference between both groups is the question of how far the autonomy of religious communities should extend concerning things such as charitable, social, and health-related activities. The first group, which is more critical to religious communities, is afraid that religious communities can use these avenues to gain more influence. In addition, there is an open question regarding how to fully compensate religious communities for their property that was secularized after 1948.

The polarization is not extreme because there is a lack of information about real life in religious communities. This area was taboo for more than forty years, and therefore, even intellectuals have insufficient knowledge about the history and practical life of religious communities.

Table 1. Religious adherence among 10.3 million inhabitants of the Czech Republic, 2001

Roman Catholic Church	2,740,780
Evangelical Church of Czech Brethren	117,212
Czechoslovak Hussite Church	99,103
Silesian Evangelical Church A. C.	14,020
Lutheran Evangelical Church A. C. in the Czech Republic	5,412
Evangelical Church A. C. in the Czech Republic	14,885
Eastern Orthodox Church in the Czech Lands and Slovakia	22,968
Religious Society of Jehovah's Witnesses	23,162
Church of the Seventh Day Adventists	9,757
Greek Catholics	7,675
Christian Congregations	6,927
Methodist Church	2,694
Church of Brethren (Congregationalists)	9,931
Old Catholic Church	1,605
Union of Baptists	3,622
Unity of Brethren (Moravian Brethren)	3,426
Apostolic Church (Pentecostal Church)	4,565
Federation of Jewish Communities in the Czech Republic	1,515
New Apostolic Church	449
Religious Society of Unitarians	302
Church of Jesus Christ of the Latter-day Saints	1,366
Other responses and imprecise responses	196,712

III. CONSTITUTIONAL CONTEXT

A. *History of Church and State Relations*

The Czech Constitution begins with the words:

We, the citizens of the Czech Republic in Bohemia, Moravia and Silesia, at this time of the reconstitution of an independent Czech State, true to all the sound traditions of the ancient statehood of the Lands of the Crown of Bohemia as well as of Czechoslovak statehood, resolved to build, protect and advance the Czech Republic in the spirit of the inalienable values of human dignity and freedom as

the home of equal and free citizens who are aware of their obligations towards others and of their responsibility to the community, as a free and democratic State .... [2]

The first inhabitants of the three Czech lands – i.e.,Čechy/Bohemia, Morava/Moravia, and Slezsko/Silesia (the Czech part) – were Celtic. The Celtic tribe of Boii gave its name to the Latin expression for Čechy – Bohemia. After the era of the Germanic Markomanns' settlement between the 1st and 5th centuries, the West-Slavonic ethnics penetrated the territory from the North during the 6th century and brought the whole territory of the contemporary Czech lands under their control.

A West Slavonic settlement in the territory of the present Czech lands accepted Christianity under the influence of the Irish, Franconian, and Greek-Slavonic missions during the 9th century. It was the first common state of future Czechs and Slovaks, the Great Moravian Empire, which lasted for about one hundred years.

The later Czech (Bohemian) Principality and Kingdom, ruled by Dukes and Kings from the house of Premysl since the 10th century holders of the St Wenceslas Crown, entered into a free union with the Holy Roman Empire. There were four dynasties at the Bohemian throne: the Premyslides, Luxembourgs, Jagellonians, and Hapsburgs.

From the Hussite Reformation at the beginning of the 15th century, there were two recognised denominations in the Kingdom: the Catholic minority and the Utraquist (Calixtin) majority. During the 16th century, the Utraquist Church came under Lutheran influence. The Unity of Brethren, a small denomination founded in 1457, inclined during the 16th century to Calvinism.

The re-Catholicization after the Battle of White Mountain (1620) was connected with the victorious House of Hapsburg. Protestantism was forbidden. The unification of the Czech lands with the Austrian and other hereditary Hapsburg lands followed. The sovereign of this union appropriated the iura maiestica circa sacra. Consequently, the Catholic Church lost an essential part of its autonomy.

Josef II published his "Letter of Tolerance" for his hereditary lands in the Roman Empire in 1781. At that time, 2 percent of the inhabitants of the Czech lands professed Protestantism – either the Helvetic Confession (the majority) or the Augsburg Confession.

A process of emancipating the religious communities from the State started in 1848. In December 1867 a new liberal constitution came into being for the Cisleithan Regions of the reconstituted Austrian Empire, changed at this time to the Austrian-Hungarian monarchy. The basis of this constitution was a secularized state – on the principle of cooperation with religious communities and on their parity. Administrative provisions in the school and army systems conserved, however, the dominance of Catholicism.

The right to be recognized by the State was given to all religious communities that respected its legal demands (1874). Not only the Protestants, of both confessions, and Jews could join in teaching religion in public schools and taking religious services in the army, but the newly recognised religious communities could also join – e.g., the Old Catholic Church (1877) and Moravian Brethren-Herrnhut Church (1880). The stipends for priests, pastors, and rabbis were financed partly by the religious communities and partly by the State (*congrua* or subsidies). The acknowledged religious communities were supported by the State in proportion to the number of official declarations of religious affiliation made to the municipalities.

The Republic of Czechoslovakia, founded in 1918 with the dissolution of the Austrian Hungarian Empire, adopted the legislation of the Hapsburg monarchy. From 1920, the Constitution declared the freedom of religion to individuals. Children who belonged to religious communities were obliged to attend lessons in religious education in public schools.

Because the suffering of people during World War I was high and the Catholic Church was accused of having too close of a relationship with the Hapsburg dynasty,

2. Constitutional act No. 1/1993 Sb.

more than 20 percent of the Czech people renounced their membership in the Catholic Church. Approximately one half of them founded the new Czechoslovak Church, a smaller part converted to Protestantism, and a much smaller group to East Orthodoxy. The rest became non denominational. A total of 75 percent of the Czech people stayed in the Roman Catholic Church.

On 17 December 1918, the Czech Protestants of the Augsburg and Helvetic confessions unified as the Evangelic Church of Czech Brethren. The legal order of this Church was Presbyterian.

On 8 January1920, the Czechoslovak Church was founded by 150 Catholic priests. This Church united both Catholic and Protestant aspects of worship and teaching and emphasized the spiritual connection with the revived Hussite tradition. This Church has used the name "The Czechoslovak Hussite Church" since 1971.

In 1927, a *modus vivendi* was concluded between the representatives of the Czechoslovak Government and the Apostolic See. It concerned the processes for appointing diocesan bishops in Czechoslovakia.

During the Nazi occupation from 1939-45, Catholics in the Czech lands actively participated in the resistance against the Nazis and were persecuted by them. It helped to rehabilitate their reputation in the minds of the Czech public. Protestant churches and the Czechoslovak Church participated in the resistance as well. Many parsons tried to help Jews by issuing false baptism testimonies of their ancestors and thus saving them from deportation. The East Orthodox Church in Prague hid the Czechoslovak soldiers from the United Kingdom, who killed Reichsprotektor in the crypt of its church.

After World War II, in the time of renewed democracy between 1945 and 1948, religious communities, including the Roman Catholic Church, became popular in Czech society. Almost all State ecclesiastical legal provisions that were in force before 1939 remained in force. Religious freedom was as it had been before 1939.

A radical change came after the Communist coup d'état in February 1948. All spheres of public life had to accept the "scientific" – i.e., the Marxist ideology – which included atheism. During 1948-89, atheism played the role of the state "religion."

Religious communities became the only alternatively thinking institutions whose existence was somewhat tolerated. The ultimate aim of the regime was, of course, the entire liquidation of all religious communities.

New acts establishing state control over the churches came into force on 1 November 1949. That legislation brought obligatory – but very low – stipends for clergy, which were paid by the State, regardless of the wishes of the religious communities, as a compensation for nationalization of Church property (1948), cancelling congrua and dotation subsidies (1949). Any religious activity by clergy or lay preachers needed State permission, which was granted only for a geographically limited territory. Moreover, this State permission could be revoked without explanation. Offenses under this Act were punishable with imprisonment according to the provisions of the Penal Codes of 1950 and 1961.

Obligatory civil marriage was established in January 1950 for the first time in the history of the Czech lands.

During two nights in April 1950, all friars were deported without legal title to centralization camps. Monasteries remained empty and were later used for different civic and military activities. This situation lasted until 1990. During autumn 1950, friars were sent to forced labor units for three or four years and then dispersed as workers.

From August 1950, whole convents of sisters were sent to camps in the remote border regions; they were not allowed to admit novices and were obliged to work mostly in factories. This state of affairs lasted until 1990. During 1950, all Church schools and seminaries were abolished. Clergy training was provided at only three State theological faculties (one for Catholics, one for Protestants, and one for the Czechoslovak Church) and with a limited number of admissions. Hundreds of activists from most religious communities, including Roman Catholics, Greek Catholics, Baptists, Adventists, and Jehovah's Witnesses, were sentenced in framed processes to thousands of years of

imprisonment in 1950s. Almost all the Catholic bishops were imprisoned or interned.

In spite of the prosecution, religious training in schools remained an obligatory subject for all child members of religious communities until 1953 (it was about 90 pecent of all school children). Since that year, it has been permitted only as a voluntary subject; there was a move to have it removed from schools altogether, for lack of interest, which happened in several regions. Children attending religious education lessons were discriminated against.

Only at the time of "the Prague Spring liberalization" in 1968, and even some months after the Soviet and Warsaw Pact occupation of Czechoslovakia of 21 August 1968, could the religious sisters in the border camps admit novices. The number of children attending the voluntary religious education classes increased at that time, and their presence there did not attract adverse consequences for them. Furthermore, friars began to work underground.

However, from 1971, the persecution of religious communities was revived. All religious communities, especially the Catholic Church, became symbols of resistance during the communist regime. They created many underground activities, founded secret religious and lay groups, organized unofficial theological trainings (flat seminars) and ordinations, and printed home prepared religious literature. They were supported by all dissidents, and, on the other hand, many Catholic and Protestant priests and laymen took part in the civic resistance movement Charter 77.

Both the official and underground Catholics organized a Pilgrimage to Velehrad, a famous east Moravian pilgrimage place and memorial to St. Cyril and Methodius mission, in July 1985. About 250,000 Catholics demonstrated their desire for religious freedom. They did it in the presence of the State Secretary of the Holy See and the Czech Minister of Culture.

In 1988, a Moravian railwayman, Augustin Navrátil, prepared a petition of Religious Liberties in thirty-one articles. With the consent of the Prague Archbishop, it was signed by 650,000 Czechoslovak citizens.

Many protest actions were prepared in the time of the canonization of the Blessed Agnes of Bohemia (12 November 1989).

On 17 November 1989, the 50th anniversary of the closure of the Czech universities by the Nazis, communist police brutally interrupted the students' commemorative procession in Prague. The events, later called "the Velvet Revolution," were followed by all of Czechoslovakia. The 10th of December, 1989 may be called a day of upheaval. On that day, the last Communist president appointed a non-communist government. The following day he resigned. The Government voted for a policy of legal continuity and of value discontinuity between the new and old regimes.

Parliament repealed the legal enactments that were contrary to human rights. The Act of December 13, 1989 repealed the anti Church enactments of the Penal Code. In January 1990, the legal provision allowing State interference in the appointment of clergy, preachers, and all Church employees was repealed.[3]

B. *Current Constitutional Provisions*

The Constitution of the Czech Republic, Act. No. 1/1993 Sb., refers to the earlier federal Charter of Fundamental Rights and Liberties from 9 January 1991. The Constitution incorporates it in the constitutional order of the Czech Republic to the date of foundation of the Czech Republic as an independent State on 1 January 1993.[4] The Charter was published again under No. 2/1993 Sb. and has the same legal effect as the Constitution of the Czech Republic. In reality, it has a position as the second part of the

3. See Tretera, Jiří Rajmund, *Die Grundlagen des Verhältnisses von Staat und Religionsgemeinschaften*, in: Potz/Schinkele/Schwarz/Synek/Wieshaider (eds.), Wieshaider, Wolfgang, Tretera, Jiří Rajmund (coord.), Recht und Religion in Mittel- und Osteuropa, Band 2: Tschechien, WUV Universitätsverlag, Wien, 2004, 36–38.

4. See Tretera, Jiří Rajmund, *Church and State in the Czech Republic*, in: Ferrari, Silvio, Durham, W. Cole, Jr., (eds.), *Law and Religion in Post-Communist Europe*, Peeters, Leuven – Paris – Dudley MA, 2003, 82–85.

Constitution.

The main constitutional provisions in Czech State ecclesiastical law are Articles 15(1) and 16of above mentioned Charter of Fundamental Rights and Liberties.

Article 15 Paragraph 1 reads: "Freedom of thought, conscience and religious conviction is guaranteed. Everybody has the right to change his or her religion or faith, or to have no religious conviction."

Article 16 reads:

(1) Everyone has the right to profess freely his or her religion or faith either alone or jointly with others, privately or in public, through religious service, instruction, religious acts, or religious ritual.

(2) Churches and religious societies administer their own affairs, in particular appoint their organs and their priests, and establish religious orders and other church institutions, independently of organs of the State.

(3) The conditions of religious instruction at state schools shall be set by law.

(4) Exercise of the aforesaid rights may be limited by law in the case of measures which are essential in a democratic society for protection of public security and order, health and morality, or the rights and freedoms of others.

According to Article 10 of the Constitution, promulgated international agreements, the ratification of which have been approved by Parliament, are binding for the Czech Republic and constitute a part of the Czech legal order; additionally, should an international agreement make a provision contrary to Czech law, the international agreement is to be applied. An important international treaty that is a source of Czech state ecclesiastical law is the International Agreement on Civil and Politic Rights from 19 December 1966, which was ratified by the Czechoslovak Socialist Republic in November of 1975. Further are the Convention of the Rights of the Child from November 1989, accepted by Czech and Slovak Federal Republic (CSFR) in September 1990, and the European Convention on Human Rights from 1950, accepted by CSFR in 1992.

From 2000-02, the representatives of the Czech Republic and the Apostolic See prepared an international agreement. It was signed in July 2002. However, the House of Deputies of the Parliament did not recommend the agreement for ratification (by 110 votes from 200 members). The proposal for such a recommendation can be repeated at a more favorable time.[5]

State cooperation with religion is not specifically mentioned in Czech law, but there is a cooperative model of relations for (or maybe with) state-religion in the Czech Republic. The term "separation of church and state" has never been mentioned in Czech legal sources. Moreover, there is not a preferred or privileged religion or group of religions in the Czech Republic. Nor is there any reference to religion as a foundation or source of state law. The specific mention of state neutrality on religious issues, and of the principle of equality when dealing with religions, is not specifically mentioned, but it can be derived from the Articles 15(1) and 16 of the Charter of Fundamental Rights and Liberties.

IV. LEGAL CONTEXT

The regulatory framework of Czech state ecclesiastical law is based on the Act No. 3/2002 Sb. of 7 January 2002 on Freedom of Religious Expressions and the Position of Churches and Religious Societies (Act on Churches and Religious Societies), as later amended by the Act No. 495/2005 Sb. Some provisions of the original text of the Act were annulled by the Czech Constitutional Court of 2002.[6] The Act on the Economic Assurance of Churches by the State No. 218/1949 Sb. from the time of communist totality is still valid with its amendment No. 23/1990 Sb., by which the provision on the granting

5. See Tretera, Jiří Rajmund, *State and Church in the Czech Republic*, in Robbers, Gerhard (ed.), State and Church in the European Union, 2nd ed., Nomos, Baden Baden, 2005, 42.

6. Constitutional Court stroke down provisions restricting the Churches in possibility to create charitable organizations and using incomes to other than strictly religious aims.

of State approval for performance of pastoral service was abolished.

The remaining part of the Czech State ecclesiastical law is dispersed throughout different laws, decrees, and administrative regulations on specialized matters relating to religious communities.

There are several church-state treaties on the internal level in present Czech law:

1. The Agreement on Cooperation between the Ministry of Defence of the Czech Republic, the Ecumenical Council of Churches in Czech Republic, and the Czech Bishops' Conference (1998).

2. The Agreement on Cooperation between the Czech Radio, the Czech Bishops' Conference, and the Ecumenical Council of Churches in the Czech Republic (1999).

3. The Agreement on the Participation of Persons Conducting Spiritual Services in the System of Provision of Post-traumatic Interventional Care for Officers of the Police of the Czech Republic between the Ministry of Interior of the Czech Republic, the Ecumenical Council of Churches in the Czech Republic, and the Czech Bishops' Conference (2002).

4. The Agreement on Pastoral Service in Prisons between the Prison Administration of the Czech Republic, the Ecumenical Council of Churches in the Czech Republic, and the Czech Bishops' Conference from 2008, which replaced the older ones from 1994 and 1999.

The Ministry of Culture of the Czech Republic (its Department for Churches) is a competent body of state administration that deals with religious affairs and religious communities. It registers churches, religious societies,[7] and unions of churches and religious societies.

A church or a religious society and their unions acquire legal personality and some tax advantages by this registration.[8] A registered church or religious society has the right to create derived legal persons.

The Ministry of Culture holds three public registers of religious bodies:

1. The register of churches and religious societies.
2. The register of the unions of churches and religious societies.
3. The register of legal persons derived from churches and religious societies, which evidence is taken by the Ministry of Culture.

The third register was created in 1994. Churches and religious societies announce the creation of every derived legal person to the Ministry of Culture. The Ministry has an obligation to enlist such legal persons in the register. Among the derived legal persons, there are "core" religious institutions, like parishes, dioceses, or monasteries, and special institutions for providing of charitable services.

The Ministry of Culture can also grant "special rights" to already registered churches and religious societies. These rights are enlisted in the registry of churches and religious societies. There are the following special rights according to the Act No. 3/2002 Sb.:

– teaching religion in public schools and founding church schools,
– pastoral care in prisons and the army,
– gaining state subsidies for minister's salaries,
– the right to celebrate marriages with civil effects,
– to maintain confessional confidentiality, if the religious community proves that such confidentiality has been practised for at least fifty years.[9]

There are 21 registered churches and religious societies with special rights, ten other

7. In fact, there is not a legal difference in Czech law between the word "church" and the term "religious society."

8. See Act No. Act No. 3/2002 Sb. and Tretera, Jiří Rajmund, *Religious Entities as Legal Persons – Czech Republic*, in Friedner, Lars (edit.), Churches and Other Religious Organisations as Legal Persons, Proceedings of the 17th Meeting of the European Consortium for Church and State Research, Höör (Sweden), 17–20 November 2005, Peeters, Leuven – Paris – Dudley, MA, 2007, 55–59.

9. Art. 7 of the Act No. 3/2002 Sb.

registered churches and religious societies, and two unions of churches and religious societies (The Ecumenical Council of Churches in the Czech Republic and Military Spiritual Service).[10]

The Department of Churches of the Ministry of Culture invites an independent expert advisory council. The actual functioning of this council, in terms of protection of freedom of religion or belief of individuals and communities, is satisfactory.

In cases of necessity, the state organs enter into negotiations with representatives of religious communities and their unions. In the case of the Roman Catholic Church, they contact the Czech Bishop's Conference and the Conference of Superiors of Religious Orders. On the international level, they contact the Apostolic See from the Czech Embassy to the Apostolic See in Rome and the Apostolic nuncio in Prague. The law does not regulate any state duty to a specific form of dialogue with churches and religious societies.

The legally binding instruments for regulating relations between the state and churches are parts of the agreements. For example, according to Article 5 of the Agreement on Pastoral Service in Prisons, the Council for Pastoral Service in Prisons was created in 2008. It is competent for solving basic interreligious and conception questions regarding pastoral service in prisons. The members of the Council include a deputy of Czech Bishops' Conference, a deputy of the Ecumenical Council of Churches, head of the cabinet of general director of the Prison Administration of the Czech Republic, chairman of the Pastoral Prison Service, and a Chief Chaplain. The Council has the right to propose conception solutions to the Commission for Spiritual Care of the Director of Prison Administration of the Czech Republic.

V. THE STATE AND RELIGIOUS AUTONOMY

The public authorities cannot intervene in the life or organization of religious communities, according to Article 15(1) and Article 16(2) of the Charter of Fundamental Rights and Liberties. The secular law protects the autonomy of religious communities, allowing them to govern themselves and act freely in the secular sphere. There are no legal or political instruments designed to control the religious life or choices of citizens.

VI. RELIGION AND THE AUTONOMY OF THE STATE

The autonomy of the State is secured by Article 2(1) of the Charter of Fundamental Rights and Liberties, which declares that the Czech State is founded on democratic values and not bound to a particular ideology or religion. Therefore, no religious community has a specific role in the secular governance of the country, and no particular religion is given power to control other religious communities under State law.

VII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

State law does not exert any pressure on churches and religious societies. It respects individual freedom. Therefore, the State regulates religion specifically in terms that are different from other social phenomena.

There is registration of religious entities.[11] There are also special provisions concerning the legal status of church schools, teaching of religion in public schools, faculties of theology at State universities, property, taxation, slaughtering of animals, etc. Compared to other social phenomena, this specific regulation is neither more restrictive nor more cooperative with religion. Only in certain instances is it more favorable for churches and religious societies (e.g., places of worship are exempt from real estate tax).

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10. See Tretera, Jiří Rajmund, Horák, Záboj, *Czech Republic, Legal Status of Religions*, at Eurel, Sociological and Legal Data on Religions in Europe, http://eurel.info. See also internet pages of the Ministry of Culture of the Czech Republic at http://www3.mkcr.cz/cns_internet.

11. See Part IV, supra.

The State does not have any record of individual's religious affiliations. Moreover, an individual's religious affiliation has no legal consequences under state law. There is not any regulation or conscientious objection in the Czech Republic to exemptions from laws or contractual clauses of general applicability.

VIII. State Financial Support for Religion

The Czech State subsidizes church activities by providing financial support to pay clergy salaries of registered churches and religious societies, which have special rights according to Act No. 218/1949 Sb. The subsidies for clergy salaries are meant as compensation for religious communities' non-restored property that was expropriated during the Communist Regime.[12] State authorities prepared a bill on settlement of property relations in 2008. This bill was prepared with the consent of church and religious society representatives, but it has not been approved by Parliament.

Remuneration for spiritual assistance for members of the armed forces and, partly for prisoners is provided directly to the spiritual ministers, considered State employees, and so not through the headquarters of religious communities. Spiritual assistance for ill persons is not remunerated. The staff of confessional schools are paid from the State budget.[13] Religion teachers at public schools are also paid by the State.

The State subsidizes to some extent maintenance of some religious buildings that have historical or cultural value (churches, monasteries etc.). Also, municipalities can subsidize religious buildings according to their own measures. The State controls or regulations on State funding do not impose constraints on religious autonomy.

IX. Civil Legal Effects of Religious Acts

Czech secular law recognizes legal effects to marriages that were celebrated before registered churches or religious societies with a "special right" to perform marriage ceremonies under the Family Act of 1963. "Nowadays there is a free choice between the religious and civil forms of marriage in the Czech Reublic. But decisions of the Church courts on nullity are not recognized by the State."[14] Secular courts do not enforce decisions adopted by religious courts or hierarchical bodies.

X. Religious Education of the Youth

There are three categories of Czech primary and secondary schools:

1. Public schools (a majority), established by municipalities and regional authorities or, exceptionally, by the State (Ministry of Education, Ministry of Defense, Ministry of Interior);

2. Schools established by churches and religious communities that have a "special right" to create church schools;[15]

3. Private schools, which are established by individuals or by private legal entities, among them also by religious organizations of all types.

The curricula and diplomas of church schools are recognized by secular law. However, church schools are different from private schools. For example, church school costs are mostly paid by the State, and their church founder normally donates a building and appoints a director.

The students are admitted on the results of admission tests, not by reference to their confession. Teachers can be non-denominational or members of another religious

12. See Tretera, Jiří Rajmund, Horák, Záboj, *The Financing of Religious Communities in the Czech Republic*, in: Basdevant-Gaudemet, Brigitte, Berlingò, Salvatore (eds.), The Financing of Religious Communities in the European Union/Le financement des religions dans les pays de l'Union européenne, Peeters, Leuven-Paris-Dudley, MA, 2009, 123.

13. Id. at 126.

14. Supra n. 5 at 50.

15. Art. 7(1), lit. e) of the Act No. 3/2002 Sb.

community, although a basic loyalty to the Church that founded the school is presumed. This arrangement is considered to be suitable for the deeply secularized Czech people: Church schools enjoy great popularity.[16]

There are 138 Church schools in the Czech Republic, 99 founded by Catholic authorities and 39 by authorities of other churches or religious societies.[17]

The public schools' curricula include denominational religious instruction as a specific subject.[18] Yet, it is an optional subject. Teachers must be authorized by some church or religious society from among the 21 religious communities that are registered with special rights. The School Act of 2004 provides the possibility of common authorization of a teacher by two or more registered churches. The teachers are employees by the school, which pays their salary. All students may attend religious classes, even if they are not members of any church. There are two reasons for this: first, there is no public registration of confession (and a school does not know who among its students is a member of a particular church or who is non-denominational). Second, religious communities support this practice because of ecumenical cooperation, common need, and their offer to public. Thus, non-denominational students may also take classes in religious education if they, or their parents, so desire. The reason for this might be the interest in the deepening of education.

XI. Religious Symbols in Public Places

Citizens, and other inhabitants, are free to wear religious symbols in public places. There is no official restriction in this regard, and such a restriction should be considered as a measure contrary to religious freedom, which is secured by the Constitution. On the other hand, it is to be emphasized that inhabitants of the Republic usually do not wear such symbols in extreme ways. There is a tradition to be civil in this regard. Even the Conference of Catholic Bishops recommends that the clergy wear church clothes or collar shirts only to such events when it is socially reasonable (yet, the decision is up to the feeling of a particular clergyman). As to the scarves of Muslim women, it is not clear how these scarves would differ from common usage by women in the Czech countryside.

Institutional use of religious symbols in public facilities has been out of practice for so long that perhaps nobody should want to introduce their usage now. The only exception is the use of the crucifix in some spaces of Catholic theological faculties, church schools or charities, and, in a very reserved form, in church hospitals.

XII. Freedom of Expression and Offenses against Religion

There is no protection of God's honor – i.e., there is no offense of "blasphemy." Further, there is no interest in renewing it after the long period of atheist rule.

There is a protection of the human dignity of believers and their conviction. This protection is applied equally to all religions and beliefs, including atheism.

Defamation of religion or atheism, religious hate speech, and anti-religious hate speech can be punished, if it is used in extreme way.

The new Criminal Code Act. No. 40/2009 Sb., in force from 1 January 2010, contains such provisions as Restriction of Freedom of Religion (§176), Incitement of Hatred to a Group of Persons or Restriction of their Rights and Liberties (§356), Genocide (§400), Assault against Humanity (§401), Apartheid and Discrimination of a Group of People (§402), Founding, Support and Propagation of a Movement Aiming at Oppressing of Human Rights and Liberties (§403), Expression of Affection for a Movement Aiming at Oppressing of Human Rights and Liberties (§404), Denial, Casting Doubts on, Conniving and Justifying of Genocide (§405), Persecution of Inhabitants (§413).

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16. Supra n. 5 at 47.
17. Most of these are Protestant, but there are also Eastern Orthodox, Hussite, and Jewish schools.
18. See art. 16(3) of the Charter of Fundamental Rights and Liberties.

MERILIN KIVIORG

Religion and the Secular State in Estonia

I. SOCIAL CONTEXT

The Lutheran Church has been the largest religious institution in Estonia since the sixteenth century. During the first independence period, which lasted from 1918 to 1940 (before the Soviet occupation), Estonia was more or less religiously homogenous. Most of the population, roughly 76 percent, belonged to the Estonian Evangelical Lutheran Church.[1] The second largest church has been the Estonian Apostolic-Orthodox Church. When Estonia became occupied by the Soviet Union (1940–1942 and 1945–1991) religious life of the country was oppressed and religious freedom was almost non-existent. At the beginning of the 1990s, after regaining independence, Estonia experienced what can be called a "return of the religious," which was quite common in all Eastern European post-communist societies. This was partly an expression of national identity and partly a reaction to the suppression of individual freedom by the Soviet regime. But the religious enthusiasm caused by independence ended quickly and the extensive growth of membership of religious organizations stopped.

Estonia can be considered a highly secularized country today. Most Estonians do not belong formally to any religious organization. According to the last population census from the year 2000, 13.6 percent of the adult population in Estonia considered themselves Lutherans. [2] The majority of the Lutherans are ethnic Estonians. The second largest religious tradition in Estonia is the Orthodox tradition. According to the population census 12.8 percent of the adult population in Estonia considered themselves as Orthodox. However, some new data suggests that the Orthodox community may have grown in numbers and has become a fraction larger than the historically dominant Lutheran church.[3] The Orthodox community in Estonia is divided between the Estonian Apostolic Orthodox Church and the Estonian Orthodox Church of Moscow Patriarchate. The relations between the two Orthodox Churches, one under the canonical jurisdiction of the Ecumenical Patriarchate and the other under the canonical jurisdiction of the Moscow Patriarchate, are complicated due to historical and legal/canonical reasons.

All other Christian churches and religious associations have adherents comprising less than 1 percent of the population. The largest religious communities among those are the Baptists (0.5 percent), the Roman Catholics (0.5 percent), and Jehovah's Witnesses (0.3 percent). There are also different Pentecostal and Charismatic churches, as well as Methodists, Adventists, and The Church of Jesus Christ of Latter-day Saints. The largest non-Christian tradition in Estonia is Islam. The Muslims comprise 0.1 percent of the whole population. The majority of Muslims are ethnic Tatars who arrived in Estonia during the late nineteenth and the early twentieth century. There are two registered Muslim religious associations. The Estonian indigenous religious tradition is represented by the House of Taara and Native Religions. There are also four Buddhist congregations,

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1. According to the national census 1934, there were 874, 026 Evangelical Lutherans in Estonia of a total population of 1,126,413. See http://www.einst.ee/society/Soreligion.htm, 02.02.2000.

2. The total population of Estonia is currently 1,340,678, available at http://www.stat.ee/ (27 October 2009).

3. Information about current membership of religious organizations is based on data from the Ministry of Internal Affairs. Available at http://www.siseministeerium.ee/37356 (27 October 2009). It must be mentioned that religious organizations are not obligated to provide the Ministry of Internal Affairs with statistical information of their membershi Religious organizations have voluntarily informed state officials about the number of their adherents. Although presented figures leave considerable room for any kind of interpretation, it is hoped that they reflect to some extent the objective reality of religious life in Estonia.

three separate associations of indigenous tradition, one Jewish and one ISKCON association registered as religious associations in Estonia.

II. THEORETICAL AND SCHOLARLY CONTEXT

When the Estonian Constitutional Assembly held heated discussions over each provision and meaning of the draft Constitution of the Republic of Estonia in the beginning of 1990 there was no real discussion (theoretical or scholarly) about the provisions relating to freedom of religion or belief and the State and Church relationship. In the process of rebuilding the Estonian Republic after the collapse of the Soviet Union there were more urgent issues to be dealt with.[4] However, a few general theoretical observations can be made. The Estonian constitution is perceived to be a liberal constitution based on natural and inalienable individual rights.[5] At the same time, the preamble of the Constitution states that the idea behind strengthening and developing the state is to guarantee the preservation of the Estonian nation, language, and culture through the ages.[6] The latter is a reflection of the classical German constitutional model, which presupposes the prior existence of a people, united by cultural , language, and ethnic ties.[7] However, it seems that in (legal) scholarly interpretation of the constitution the emphasis is on individual rights. Moreover, the Estonian constitution recognizes collective religious freedom and provides protection for cultural and religious minorities and for their autonomy.[8]

There are a limited number of scholarly works which provide in depth analysis of the relationship between religion and state in Estonia.[9] One of the reasons for this could be that although there are occasional disputes the relationship between religious communities themselves[10] and the State is generally amicable and cooperative.[11] Thus, it has attracted limited academic response. Another possible reason is that Estonia has not been a country for extensive immigration. The questions faced by many European states in regards to the growing numbers in the Muslim community and other groups have not become an issue in Estonia yet.[12] However, one can detect two major areas of academic/public debate: (1) the role of major churches in Estonia and equal treatment of religions; and (2) religious education. In this regard there seem to be at least two different or even opposing views on how Estonia should be modelling its relationship between State and religion. The first one recognizes the historical importance of Christian churches in shaping Estonian culture, values, and identity. However, this view takes into account the fact that Estonia is one of the least religious countries in Europe. This view also places emphasis on individual and collective freedom of religion or belief and sees the privileged position of churches as

4. So far the longest lasting Estonian Constitution was adopted by the referendum of 28 June 1992.

5. R. Narits, "About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia," in *Juridica International* XVI/2009, 56.

6. Id. at 58. See also the Preamble of the ESTONIAN CONSTITUTION.

7. See also J. Reingelheim, "Minority Protection and Constitutional Recognition of Difference," in Verstichel, alen, De witte and Lemmens (eds.), The framework Convention for the Protection of national Minorities: A Useful Pan-European Insturment? (2008).

8. § 50.

9. See e.g. R. Ringvee, *Religion in Post-Soviet Estonia* (Doctoral Thesis, forthcoming); Valk, *Religiooniõpetus – mis? miks? kuidas*? [Religious education – What? Why? How? (Tartu 2009); T. Kalmet, "Main Problems of Religious Law in Estonia" in *Juridica* 2001, No.6, 368-375; M. Kiviorg, *Law and Religion in Estonia* (Kluwer Law International, Forthcoming 2010); M. Kiviorg, " State and Church in Estonia" in G. Robbers (ed.) *State and Church in European Union* 2nd edition, Nomos-Verlagsgesellschaft, Baden-Baden, 2005, 95-114.

10. For example, the Council of Estonian Churches (established in 1989) has amongst its members the Estonian Evangelical Lutheran Church, Roman Catholic Church, both Orthodox Churches (despite their historical and legal disputes), the Estonian Methodist Church, the Estonian Christian Pentecostal Church, the Armenian Apostolic Church, and also the Charismatic Episcopal Church of Estonia.

11. See e.g. observations made by R. Ringvee, "Sallivus ja religioon Eestis" in *Virumaa Teataja* (19.09.2007).

12. Because of the aging population and outward-migration there is a shortage of skilled labor. This has triggered discussions on policy reviews to relax immigration and citizenship rules.

debatable in Estonian society. However, cooperation between religious organizations and state on mutual fields of care is recognized.

The second view is also based on the historical importance of Christian churches in Estonia. Under this view, however, the more active role and privileged position of the churches is seen as necessary to shape Estonian statehood and perhaps its post-soviet identity. This latter view is not so dominant in academic circles, but rather reflects current policy choices and strong symbolic gestures of the key political figures in support of major churches. These two contradicting views were most visible in the recent quarrel over the liberty statue, which was erected to commemorate the Estonian independence war against Bolshevik Russia and *Landeswehr (1918–1920)*, but also to symbolizes Estonian independence generally. Part of the liberty statue is a cross, which triggered heated debate over its symbolic meaning and value in contemporary Estonian society. The religious dimension of the debate was fuelled by the fact that the head of the selection commission (established with the decision of the Estonian Government) was the Archbishop of the Estonian Evangelical Lutheran Church. At the time even the Estonian President mentioned in an interview with a major newspaper that unfortunately the Estonian public had not received a clear answer (from the commission) as to what the cross symbolized in order to assess the proposed idea for the design of the statue.[13]

As Ringvee has observed, generally religion is not perceived as a problem in Estonia as long as it remains in the private sphere.[14] The debates about the role of a religion and specifically of the major churches in the public sphere in Estonia are ongoing.

III. CONSTITUTIONAL CONTEXT

A. *Brief Political History*

The history of the law on religion in the Republic of Estonia may be divided into four main periods. The first started with the formation of the independent State in 1918[15] and with the adoption of the 1920 Constitution, which set forth the principle of a strict separation of State and Church.[16] This was followed by the 1925 Religious Societies and their Associations Act, which reaffirmed the principle of equal treatment of all religious organisations, and the separation of state and church.[17]

The second period (the 1930s) saw significant political changes in Estonian society, which were characterized by the centralization of State administration, the concentration of power, a decline of democracy, and the expansion of State control. In 1934 the Churches and Religious Societies Act was enacted, not by Parliament but by decree of the State Elder (President).[18] This Act established different legal treatment for churches and for other religious societies. The status of some churches, especially large ones, was to a certain extent similar to the status of a State Church. According to section 84(1)(b) of the 1938 Constitution, the leaders of the two largest and most important churches gained *ex officio* membership of the *Riiginõukogu* (Upper House of Parliament).[19] The government of all churches was subjected to control by the State.

The third period began with the Soviet occupation of Estonia. The law on religions in the Soviet Union was based on the 1918 Leninist decree on the separation of church from state and school from church. The bizarre fact is that the separation of state and church (religious organizations) was actually a non-separation because the state controlled all the aspects of religious organizations, including their leaders and sometimes even their members. Estonia became part of the USSR in 1940 and had little legislative

13. Postinees 01.09.2007.
14. See Ringvee, supra n. 9.
15. Prior to the 1917 revolution in Russia, Estonia was part of the Russian Empire.
16. RT 1920, 113/114, 243.
17. RT 1925, 183/184, 96.
18. RT 1934, 107, 840.
19. RT 1937, 71, 590.

independence during the occupation. USSR law dictated the laws on freedom of religion for the entire occupation period.

The fourth period began with the regaining of independence at the beginning of the 1990s and with the adoption of the 1992 Constitution.[20] Estonia started to rebuild its legal order on the principle of restitution, while at the same time acknowledging the changes over time in European legal order and thinking.

B. *Constitutional Provisions and Principles*

The Estonian Constitution provides express protection to freedom of religion. Article 40 sets out that

> Everyone has freedom of conscience, religion and thought. Everyone may freely belong to churches and religious associations. There is no state church. Everyone has the freedom to practise his or her religion, both alone and in a community with others, in public or in private, unless this is detrimental to public order, health or morals.

Article 40 is deemed to protect a wide variety of beliefs. Even during a state of emergency or a state of war, rights and liberties in Article 40 of the Constitution may not be restricted (Article 130 of the Estonian Constitution).[21] Article 41 on the freedom of belief and Article 42 on the privacy of one's religion and belief add strength to the commitment to freedom of religion. In addition, other constitutional provisions complement basic freedom of religion. For example, Article 45 concerning the right to freedom of expression, Article 47 concerning the right to assembly, and Article 48 concerning the right to association all provide specific protection for different aspects of religious freedom.

The right to freedom of religion in Estonia is also protected by international law. Article 3 of the Estonian Constitution stipulates that universally recognized principles and standards of international law shall be an inseparable part of the Estonian legal system. By Article 3 of the Estonian Constitution the universally recognized principles and standards of international law have been incorporated into the Estonian legal system and do not need further transformation. They are superior in force to national legislation and binding for legislative, administrative, and judicial powers. It should be noted that Article 3 incorporates into the Estonian legal system both international customary norms and general principles of law. The international treaties (ratified by Parliament) are incorporated into the Estonian legal system by Article 123(2) of the Constitution. Article 123 states that if Estonian legal acts or other legal instruments contradict foreign treaties ratified by the Riigikogu (Parliament), the provisions of the foreign treaty shall be applied. Estonia is a party to most European and universal human rights documents.[22] Estonia is also a member of many international organizations, including the United Nations, European Council, and OSCE, and has ratified key conventions protecting freedom of religion or belief.

At the beginning of the 1990s the Estonian State clearly expressed its desire to join the European Union. On September 14, 2003, 66.8 percent of Estonians voted in favor of joining the European Union. Estonia joined the European Union on 1 May 2004.[23] The law of the European Union takes precedence over Estonian law, as long as it does not contradict the Estonian Constitution's basic principles.[24]

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20. Eesti Vabariigi põhiseadus [The Constitution of Estonian Republic] (Riigi Teataja toimetuse väljaanne. Tallinn, 1994).

21. However, it is not clear whether Article 130 of the Estonian Constitution offers absolute protection to manifestation of freedom of religion (*forum externum*).

22. *Inter alia*, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and the International Covenant on Civil and Political Rights (1966).

23. Treaty of Accession, RT II, 2004, 3, 8.

24. Prof. Narits has drawn attention to the fact that although fundamental principles are the new standard for legality, it is not entirely clear what these principles of the constitution are, which cannot be overridden by EU

The Estonian Constitution encompasses a few important principles determining freedom of religion and the relationship between State and religious communities:

1. Neutrality

The principle of neutrality is not *expressis verbis* mentioned in the Constitution. Article 40 of the Constitution stipulates the principle of institutional separation of the State and religious associations ("There is no State Church"). However, this has not been interpreted as a rigorous policy of non-identification with religion. Although the cooperation between the State and religious associations is not *expressis verbis* mentioned in the constitution it is an established practice today that state and religious associations can cooperate in the areas of common interest. Thus, the principle "there is no State church" is not interpreted as being similar to disestablishment in the United States or the principle of *laïcité* in France. Judge Maruste, in his book on constitutionalism, has rightly pointed out that Estonian Constitution does not make any reference to secularism as a constitutional principle.[25] He refers to the stipulation "There is no State Church" as representing the principle of neutrality. The principle of neutrality in the Estonian Constitution is a reflection of the neutrality and impartiality principle adopted by the European Court of Human Rights, which could be understood as an obligation of the State to be a neutral and impartial organizer of various beliefs. Judge Maruste makes a cautious reference to the principle of neutrality in German constitutional theory without expressly drawing a link. He concludes that under the Estonian Constitution the State needs to be careful when giving preference to one religious community over another – it has to have objective and reasonable justification, especially when financial subsidises or public services are in question.[26] In this regard he makes special reference to the equality principle. It is probably fair to say that the meaning of the principle of neutrality in Estonian constitutional theory and practice regarding religion is under development.

2. Equality

The religious freedom guarantee of Article 40 of the Constitution has to be interpreted in conjunction with the other articles of the Constitution as one reflects on the relations between State and Church (or, more precisely, the State and religious communities). The principle of equality is anchored in the first sentence of the first paragraph of Article 12 of the Estonian Constitution, which states that all persons shall be equal before the law. The second paragraph of article 12 of the Constitution sets forth the principle of non-discrimination, prohibiting discrimination *inter alia* on the basis of religion or belief. As the Constitution protects both the individual and collective freedom of religion, these principles have to be applied to religious communities as well. In the constitutional interpretation both direct and indirect discrimination are prohibited.[27] There have been debates over preferential treatment of Christian Churches in Estonia.

3. Self-determination/Autonomy

The general right to self-determination of persons (both individuals and groups) stems from Article 19 of the Estonian Constitution. Article 19 (1) of the Constitution states that "all persons shall have the right to free self-realisation." The right to religious (church) autonomy is also considered to be an essential part of collective freedom of religion protected by Article 40 of the Constitution and also by the Articles 48, 19 (1) and article 9 (2).[28]

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law. R. Narits, supra n. 5 at 59.

25. Maruste, R., *Konstitutsionalism ning põhiõiguste ja –vabaduste kaitse*, Tallinn, Juura, 2004, 522.

26. Id.

27. *Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne* [Commentaries on the Estonian Constitution], Tallinn, Juura, 2002, 121.

28. This was expressly stated in the Presidential veto to the 2002 Churches and Congeregations Act in RTL, 03.07.2001, 82, 1120.

Autonomy of religious associations means also the right to self-administration in accordance with religious law and prescriptions.[29]

4. Limits to Freedom of Religion or Belief

Article 40 itself states that freedom of religion, "alone or in community," is assured "unless it endangers public order, health, or morals." Additionally, the Constitution contains four general limitation clauses: the first sentence of Article 3(1),[30] Article 11, Article 13(2),[31] and Article 19(2). Article 11, however, is a central and most important limitations clause, stating that "[r]ights and liberties may be restricted only in accordance with the Constitution. Restrictions may be implemented only insofar as they are necessary in a democratic society, and their imposition may not distort the nature of the rights and liberties." Thus, every case of restriction of rights and liberties has to be justified and pass the test of proportionality. Article 19(2) constitutionalizes the common sense idea that, in exercising their rights and liberties, all persons must respect and consider the rights and liberties of others ("and observe the law").[32] However, it is not entirely clear what standard or level of rigor/scrutiny the courts need to apply in regards to freedom of religion or belief. The current case law leaves an impression that the scrutiny is fluctuating.

IV. LEGAL CONTEXT

A. *Legislation*

The religious freedom clauses in the 1992 Constitution were followed in the 1993 Churches and Congregations Act.[33] On 1 July 2002, the 1993 law was entirely replaced by the new Churches and Congregations Act (CCA).[34] The 2002 CCA expressly states that the Non-profit Associations Act and the 2002 CCA are related as general and special legislation.[35] The law gives considerable room for religious associations to organize themselves in accordance with their own teachings and structure. "The statutes of a religious association may prescribe differences from the provisions of the Non-profit Associations Act concerning membership and management if such differences arise from the historical teaching and structure of the religious association."[36] It also provides specific legal status for religious organizations, declaring "[a] religious association is a legal person in private law ...." Transformation of a religious association into a legal person of a different type is prohibited.[37] This provision is a result of the debate over granting public legal personality to the two largest churches in Estonia.

The 2002 CCA differed from the earlier law principally in the manner in which the government registered religious organizations. Previously, under the 1993 CCA, religious associations were registered by the Ministry of Internal Affairs. According to the 2002 law, religious associations are registered by the registration departments of county and city courts.[38] The legal capacity of a religious association commences at the time the religious association is entered into the register of religious associations. The law does not prohibit activities of religious associations which are not registered. Rather, the main disadvantage for these unregistered entities is that they cannot present themselves as legal persons and, therefore, cannot exercise their rights or seek protections accorded to a

29. Id.

30. "State power shall be exercised solely on the basis of the constitution and such laws which are in accordance with the constitution".

31. "The law shall protect all persons against arbitrary treatment by state authorities."

32. See Alexy, R., "Põhiõigused Eesti põhiseaduses" [Fundamental Rights in the Estonian Constitution], *Iuridica* (2001), Eriväljaanne [the special issue], 3-98.

33. Churches and Congregations Act, RT I 1993, 30, 510.

34. Churches and Congregations Act, RT I 2002, 24, 135.

35. Id., art. 5 (1).

36. Id., art., 5 (2).

37. Id., art., 5 (3).

38. Id., art., 17 (3).

religious legal entity. Nevertheless, they still enjoy their constitutionally protected collective freedom of religion as a religious group.

Under the 1993 CCA, legal authorities could refuse registration of a religious organization only if, upon review by the authorities, its internal statutes were not in accordance with the law. According to Article 14(1) of the 2002 CCA, in order to determine compliance of a religious association with the requirements provided by law, the registrar may now suspend proceedings to request the opinion of the ministry with responsibility for those issues relating to religious associations,[39] or alternatively the registrar may request an expert opinion from another competent agency.[40] One possible interpretation of this provision is that the legislature has tried to expand the potential for *ex ante* control over religious organizations. However, there have been no cases charging an abuse of power on the basis of this provision.

In current law there is no difference in registration of emerging religious entities and historical majority churches. In this sense, there have been no major problems in practice either. There are no cases inhibiting registration or activities of so-called non-traditional or new religious movements. Nevertheless, just before the adoption of the 2002 CCA by the Estonian parliament, the Estonian Council of Churches sent a letter to the parliamentary commission asking it to take measures in the new law to limit the activities of "non-constructive religious communities." Fortunately, these proposals were not enacted into law. The Council's intention was probably a good faith attempt to avoid harmful experiences for individuals, and raises questions about proselytism. Yet, raising this issue created alarm when seen in the Eastern European context, where many countries had obstructed activities of minority groups.

B. *Case Law*

There is very limited Estonian case law regarding religion or belief. Thus, it is difficult to make any general observations about the case law or trends in the judicial reasoning. The Estonian Supreme Court has passed judgment on only three cases dealing with freedom of religion. The first case concerned constitutionality of the Non-profit Associations Act,[41] the second conscientious objection to military service.[42] In the latter, the court found that Art 40 (freedom of religion or belief) of the Constitution did not include the right to refuse alternative service. It was concluded that all persons in accordance with Art 124(2) of the Constitution, who refuse service in the Defence forces for religious or ethical reasons, are obliged to participate in alternative service. The third case concerned a claim of the native religious community (Taara and Earth believers) that local detailed planning laws violated *inter alia* their freedom of religion.[43] The court found it unnecessary to establish whether there was a violation of the religious community's freedom of religion. However, the case was decided in favor of the community, as the court found that the local planning decisions were not sufficiently motivated and thus illegal.

There have been several cases in the lower courts concerning Orthodox Churches in Estonia.[44] There has been one case concerning the rights of prisoners[45] and one about

39. Currently the Ministry of Internal Affairs is in charge of issues relating to the relationship of the state to religious communities (more specifically the department of Religious Affairs), http://www.siseministeerium.ee/8298 .

40. Id., 14 (1).

41. Case no. 3-4-1-1-96, concerning review of the petition by the President of the Republic to declare the Non-profit Association Act, passed on 1 April 1996, unconstitutional.

42. Case no. 3-1-1-82-96 of the Criminal Chamber of the Supreme Court.

43. Case no. 3-3-39-07 of the Administrative Law Chamber of the Supreme Court.

44. These cases dealt with registration and the conflict between two Orthodox Churches, one of which is descendent *in jure* of the Estonian Apostolic Orthodox Church of 1923-1940 (subordinated to Ecumenical Patriarchate of Constantinople) and the other one (subordinated to Moscow Patriarchate) was established with the help of Soviet occupation in 1945 eliminating the EAOC Synod in Estonia. For more detailed analysis see *M. Kiviorg*, Eesti Apostlik-Õigeusu Kirik ja objektiivne kirikuõigus [Estonian Apostolic Orthodox Church and Law on Religions], in: Juridica, 1997, no. 10, 518-523.

limiting the manifestation of religion and right to assembly on the grounds of public order.[46] The former case concerned confiscation of candles from a prisoner. Prison authorities justified their act on grounds of prison security. The prisoner claimed that his religious belief (Buddhism) required using incense candles. He claimed that prison authorities violated his rights under Article 40 of the Constitution and undermined his dignity. Interestingly, the District Court gave an opinion on what Buddhism requires. It stated that although candles are an important part of Buddhist rituals, Buddhism does not require a prisoner to burn candles in his cell. With this, it was established that no unreasonable damage to the prisoner was caused. The grounds for restriction or proportionality of the measure were not discussed at all.

The latter case concerned a small group of believers gathered by Tallinn railway station. They were singing religious songs using microphones and loudspeakers. The organizers of the event did not notify local authorities and did not have permission to carry out this meeting. Although, the religious meeting had a peaceful character, it was established that they were obstructing traffic coming into the railway station and were disturbing people selling flowers at the market nearby. Organizers of the event were asked to stop singing. When they disobeyed six people were arrested. Their activities were found contrary to Article 7 (1 and 2) of the Public Meetings Act, as they were violating public order and obstructing traffic. Neither Articles 9 nor 11 of the European convention on Human Rights or Article 40 or 47 (right to assembly) of the Estonian Constitution were invoked. There was no elaboration on justifications and/or proportionality of the restriction. Most cases where religious communities have filed complaints are related to land reform and restoration of illegally expropriated property. This has been the dominant issue relating to institutional and corporate religious freedom since regaining independence in the early 1990s.

C. *Bilateral Relations*

In Estonia, church-state relations are governed not only by general laws, but also by formal agreements that are negotiated directly between the Government and religious institutions. Some of these agreements are considered to be international treaties, such as the agreement between the State and the Holy See for the Roman Catholic Church. The agreements between the State and religious organizations may also have the nature of administrative agreements or cooperation agreements under civil law. The purpose of these agreements may vary from coordination and cooperation on issues of public interest to contracting for the specific religious needs of a religious community. The agreements are perhaps becoming an increasingly important source for regulating the relationship between religious communities and the State. As a relatively new way of approaching this relationship in Estonia, it is not without difficulties and controversies – mainly concerning the equal treatment of religious communities.

V. THE STATE AND RELIGIOUS AUTONOMY

Autonomy of religious associations is generally respected. However, a couple of regulations can be mentioned, which exclude autonomy in specific areas. The law sets the requirement that a minister of a religious association has to be a person who has the right to vote in local government elections. Other requirements of the minister are set by religious association itself. This provision is mitigated by the allowance that the management board of a religious association has the right to invite a minister of religion from outside Estonia and apply for a work and residence permit for the minister of religion who is an alien pursuant to the provisions of the Aliens Act.[47] Similarly, the law sets forth that board members of a religious association have to be people who have the

45. Tartu Ringkonnakohus, Case No. 3-07-701 (2 May 2007).
46. Harju Maakohus, Case No. 4-05-936/1 (25 October 2006).
47. RT I 1993, 44, 637; RT I 2001, 58, 352.

right to vote in local government elections. However, there is no exemption given in the CCA from this provision. At the same time, the Non-profit Organisations Act requires only half the board members of a non-profit organization (including religious societies), to have residence in Estonia, in another EEA country, or in Switzerland. [48]

The public sector controls funds paid to religious communities. Religious communities do not have exemptions from general accounting obligations and requirements for annual financial reports. Moreover, a review or audit may be called for pursuant to the procedure established in the statutes. The members of the management board and of other bodies shall allow controllers or auditors to examine all documents necessary for conduct of a review or audit and shall provide necessary information (Churches and Congregations Act Art 26). However, privacy of members is respected. Art 42 of the Estonian Constitution states that "state agencies, local governments, and their officials shall not gather or store information about the beliefs of an Estonian citizen against the citizen's free will."

VI. FINANCING OF RELIGIOUS COMMUNITIES

As mentioned above, one of the main principles underlying the state and community relationship is captured in Article 40 of the Estonian Constitution: there is no State Church. However, this does not require strict separation of state and church, or other religious communities. Cooperation with religious communities and financial subsidises by the State for the common good has been accepted; however the extent of it is passionately debated and has caused non-Christian communities to express their concerns about equal treatment. These problems have also been pointed out by the Chancellor of Justice in his annual report. He has rightly stated that "many of the issues in this field tend to remain outside the sphere of the Constitution and a debate and agreement in society is needed to find an answer to them."[49]

The Estonian Council of Churches, which consists of ten Christian Churches, has been very active in determining relations between Church and State. The privileged position of the Council is visible, and perhaps most sensitive, in matters of financial support and education. Since the beginning of the 1990s there has been regular direct financial support to the Estonian Council of Churches by the State. The State does not prescribe how the money has to be used by the Council. In addition, allocations have been made to support the publication of the newspaper of the Estonian Evangelical Lutheran Church. The constitutionality of these allocations and preferential treatment of the Estonian Council of Churches and the Lutheran Church have been questioned by non-Christian religious communities. The Council has been treated as a partner in decision making on religious freedom questions in Estonia. On 17 October 2002 the Government and the Estonian Council of Churches signed the Protocol of Common Concerns. Although it has been argued that other religious organizations have in principle the right to seek for the same type of cooperation, no other religious organization has yet been able (or expressly willing) to establish it. However, a step forward was made in 2005 when a commission consisting of State representatives, representatives of Native religion, and various other experts was formed to draft a State program for the protection of 'Groves' and other natural sacral objects. [50]

Taking into account the fact that sacred church buildings usually have historical, cultural, and artistic value, the State is obliged, according to law, to find additional finances to support the churches and other religious communities in the preservation of these buildings. In addition to that on 11 March 2003 the Estonian government approved a policy paper entitled "Preservation and Development of Sacred Buildings." It is not law,

48. 2004 Amendment to the Non-Profit Organisations Act, RT I, 2004, 89, 613.

49. The Annual Report 2003-2004 of the Chancellor of Justice of Estonia, available at http://www.oiguskantsler.ee/.files/37.pdf.

50. Estonian Ministry of Culture, Directive of Minister of Culture, 11. 02.2005, No. 49.

however, but is a basis for several legislative and financial actions to support the development of churches within 2004 – 2013. According to this policy, allocations are made every year from the State budget. This paper recognises the historic, cultural and communal importance of Christian Churches. The immediate aim is to restore culturally and artistically important buildings. The majority of churches having historical value belong to the Evangelical Lutheran Church and Estonian Apostolic Orthodox Church, but also to other minor communities. However, this policy paper has a wider purpose, as it sees Christian Churches as partners to the State.

For example, it sees an important role for Churches in preserving national identity and cultural heritage, but also in carrying out social work, educating the young, regional development and community life in the countryside with high unemployment, and even in spiritual guidance for people to educate them on religious matters after the vacuum caused by Soviet times and giving them traction in a globalizing world. Thus, financial contributions from the State may extend beyond the mere preservation of sacral buildings. As stated in the policy document, the basis of this wider goal is (in the Estonian constitution) to preserve the Estonian nation and culture. However, this wider goal may potentially conflict with freedom of religion or belief of individuals and other religious communities. It is potentially in contradiction with the constitutional principles the Estonian State is built on. One could see a difference between cooperation with religious communities (not only churches) for the common good and the State's active (financial) promotion of one brand of religion.

It definitely raises more interesting questions about the general role of today's state in preserving, or shaping,[51] national identity, keeping a coherent society and protecting human rights and rights of minorities in a generally multi-religious and secularized context. There has been a long running debate since the breakup of the Soviet Union about whether Estonia has a concept of the State and Church (religious communities) relationship.

There has been hesitation on both sides. Even inside the Lutheran Church there have been conflicting ideas of how much involvement the Church must have with the State and to what extent the Church can use the tools of the State for the fulfilment of its purpose. In addition to that, it could also be said that no church has really won the hearts of Estonians. Although many may identify themselves as believers, most have remained indifferent to the institutional expression of their convictions.

However, there are also several ways in which the State supports all religious associations. There are several tax exemptions. For example, on the basis of the Income Tax Act[52] and by Government of the Republic Regulation No. 279 of 22 March 2006, the Estonian Government has established an order which regulates the list of non-taxable organizations.[53] In accordance with Article 11(10) of the Income Tax Act, religious associations are automatically exempt from income tax.

Other non-profit-making organizations, including humanist associations and religious societies, have to apply to be included on the list of non-taxable non-profit-making organizations.[54] This means that this status can also be refused on certain grounds. In practice, it has not been very difficult to get on the list.

Religious associations are exempt from land (property) tax. Land tax is not imposed on land under the places of worship of churches and congregations (Land Tax Act, Article 4(5)).[55] This exemption does not apply to the properties of secular non-profit-making organizations.

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51. Especially taking into account that Estonia is highly secularized country today.

52. RT I 1993, 79, 1184, RT I 2008, 17, 119.

53. RT I 2006, 61, 464.

54. One should keep in mind the legal distinction between religious associations and religious societies in Estonian law.

55. RT I 1993, 24, 428; RT I 2008, 14, 94.

VII. Civil Legal Effects of Religious Acts

Religious communities have autonomy to regulate their own affairs and their membership. As a rule religious acts do not have a civil legal effect. For example, in accordance with the law a clergyman who has received authorization from the Minister of Regional Affairs is entitled to perform civil marriages. Thus, the State has not recognized the concept of religious marriage *per se* but, rather, has established the possibility of delegating the obligations of the register office to a clergyman of a church, congregation, or association of congregations.[56] It needs to be mentioned that if held separately, the religious marriage as such can be conducted before the civil registration. But only civil registration has a legal effect. Historically, the possibility to enforce decisions by secular institutions (Ministry of Internal Affairs and the Court) existed under Articles 24 and 25 of the 1934 Act on Churches and Religious Societies.[57] Today this kind of option is not provided by law.

VIII. Religious Education of Youth

Article 2 (2) of the Education Act sets forth that the basis of education is *inter alia* respect to freedom of religion or belief. According to Article 4 (4) of the Education Act, the study and teaching of religion in general education schools is voluntary and non-confessional.[58] In accordance with the Act of Basic Schools and Gymnasiums religious education is compulsory for the school if fifteen pupils wish to be taught.[59] The teachers of religious studies are paid from the state or municipal budget. Confessional introduction is provided for children by Sunday schools and church schools operated by congregations. Religious organizations can set up private educational institutions.

There have been discussions to reorganize voluntary religious education into compulsory education to give a non-confessional overview of Christianity and other world religions and to help pupils to understand the impact of different religions in world culture and, perhaps most importantly, to prepare them for life in a pluralistic and multicultural world. There are different arguments made for not implementing the reorganization of religious education. One of the concerns opposing the reorganization goes back to some negative experiences from the first days of religious education in state schools after re-gaining independence. When schools became open to religious education, many eager people without pedagogical experience and professional skills rushed to teach it. Sometimes religious education turned into confessional instruction in schools.[60]

In 2001 representatives of non-Christian religions[61] formed an informal body called the Roundtable of Religious Associations, as a reaction to the proposal to make religious education compulsory in State schools. They criticized the draft curriculum as biased and Christianity centred. The debate has not produced a solution yet. The Chancellor of Justice in his 2003 report expressed an opinion that the State does not have to guarantee absolutely equal presentation of world religions in the curriculum. He stated that it is justified to include Christianity in the curriculum because of the cultural and historic background of Estonia. But he also pointed out that presentation of Christianity should not become the prevailing subject in the curriculum. He warned that the majority of qualified teachers are of Christian background and this can offset the balance. He

56. On 16 January 2008 there were 152 persons with the right to conduct religious marriages with civil validity. The information is obtained from the Ministry of Internal Affairs, http:www.siseministeerium.ee (01.04.2008).

57. RT 1934, 107, 840.

58. RT I 1992, 12, 192; RT I 2007, 12, 66.

59. RT I 1993, 63, 892; RT I 2008, 18, 125; art. 3 (4).

60. VALK, , *Development of the Status of Religious Education in Estonian School. European and Local Perspectives*, Conference on Law, Religion and Democratic Society, Estonia, University of Tartu (1999). Conference materials are available at the Univeristy of Tartu Faculty of Law Chair of Public International Law and EC Law.

61. The Taara and Earth believers, the Baha'i Congregation, local branch of the ISKON, two Buddhist congregations, the Jewish Organizations and the Estonian Islamic Congregation.

emphasised that compulsory religious education would be possible only if State guarantees balanced representation of world religions.[62]

IX. Religious Symbols in Public Places

Wearing of the headscarf or other religious symbols is not prohibited in Estonia and in fact seems to be well tolerated. Currently there are no reported conflicts regarding wearing a headscarf or other religious symbols in public places. The Government Regulation No. 79 (2005) amended the previous regulation concerning photos on identification documents.[63] According to this new regulation a person has a right on religious ground to submit a photo with a head covering for identification documents. However, the face from mandible to upper forehead should be uncovered. This applies not only to Muslim women, but also to Christian nuns. There have been no court cases concerning equal treatment or protection of minority religions. However, there have been heated debates about State neutrality and display of religious symbols in public places.[64]

X. Freedom of Expression and Offenses against Religion

Article 154 of the Penal Code specifically deals with violation of freedom of religion. It lays down the penalty (a pecuniary punishment or up to one year of imprisonment) for interfering with the religious affiliation or religious practices of a person, unless the religious affiliation or practices are detrimental to the morals, rights or health of other people, or violate public order.[65] Compelling a person to join or be a member of a religious association is punishable by a fine or by imprisonment of up to one year.[66] Article 159 of the Penal Code provides more general protection against violations of freedom of association. As some of the religious communities have chosen to register as ordinary non-profit organizations, this provision provides adequate protection to them as well. There are no provisions specifically dealing with "blasphemy." However, activities which publicly incite to hatred, violence, or discrimination on the basis of religion,amongst other grounds, "if this results in danger to the life, health or property of a person are punishable by a fine of up to 300 fine units or by detention."[67] In certain circumstances it may attract more severe punishment. "Interference with or violent dispersion of a lawfully organised public meeting is punishable by a pecuniary punishment or up to one year of imprisonment."[68] There is no provision specifically dealing with proselytizing. Thus, under the law it is considered an offence. General provisions on offences against persons apply to "improper proselytism" (this term is not used by the Penal Code).

XI. Conclusion

The relationship between State and religious communities has been gradually evolving through the heated debates over religious education, imposition of Christian terminology on non-Christian communities, religious symbols in public places, financial support and property matters. There is also limited but emerging case law to provide some clarification on matters of religion or belief. The future of State and religious communities' relationship, however, needs to be seen.

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62. *Õiguskantsleri 2003.-2004. aasta tegevuse ülevaade*, Tallinn, 2004, 169. Available at http://www.oiguskantsler.ee.

63. RT I 2005, 22, 155.

64. See above discussion on the liberty statue, Section II.

65. § 154.

66. § 155.

67. § 151 (1)

68. § 158

MATTI KOTIRANTA

Religion and the Secular State in Finland

I. SOCIAL CONTEXT

The majority of the Finnish population belongs to the Evangelical-Lutheran Church of Finland (80.7 percent in 2008). The second biggest religious group in Finland is the Finnish Orthodox Church (just over 1 percent with 58,445 members). The criteria for belonging to a religious denomination vary to some extent according to the traditions of each denomination.

The Christian Churches and religious communities count their members using the criterion of baptism. Most churches recognize a baptism carried out in another church. Thus, the transfer of membership from one church to another requires only the person's own declaration and participation in the teaching offered by the new religious community. The minority denominations that do not accept infant baptism (e.g., Baptists and several Pentecostal churches) require adult baptism, conditional upon a personal religious confession, from their members. The number of Muslims increased eightfold in Finland from 1990-2008. To begin with, few of them organized themselves into registered religious groups. However, their registrations have clearly increased in the early 21st century (1990, 810; 2000, 1199; and 2008, 6822).

In Finland, it is today (and in fact since 1922[1]) according to the new Freedom of Religion Act (170/2002 vp), *possible to distinguish* between *three different types of religious communities* whose different status under public law also regulates their sources of income and the financial support they receive from the State. According to the new Freedom of Religion Act (2003), such religious communities are (1) the Evangelical Lutheran Church, (2) the Orthodox Church and, as prescribed by the Freedom of Religion Act, (3) the registered religious communities.

When regulating the legal status of religious bodies in Finland, attention must be paid not only to matters of religious freedom but also to the religio-political realities. The most important of these are the *historical legacy* – on the one hand the significance of Lutheranism in the history of Finland, and on the other hand the influence of the state church in the Scandinavian tradition more generally – and the *religious distribution* of the population.[2] Since almost the whole population of Finland once belonged to the Lutheran Church, and the Orthodox Church had a stronghold in Ladoga Karelia, Olonets Karelia, and Russian Karelia, Syväri and Petsamo, these two churches have through the course of history gained a special position in relation to the State.

Finnish membership of registered religious denominations [communities] in 1990, 2007 and 2008 was respectively[3] as shown in Table 1, below.

Between 1980 and 2008 the membership of the Lutheran Church increased

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1. In the old Freedom of Religion Act of 1922, a completely new type of legal person was defined in addition to the Evangelical Lutheran Church and the Orthodox Church, i.e., the "religious community," currently the registered religious community.

2. Emeritus Archbishop *John Vikström* has criticized that, in discussion of Church-State relations, it has from time to time been thought that the distribution of the population by religion should not be taken into account in decision-making. “In support of the idea it has been suggested that the majority of church members are only nominally so, without any genuine religious conviction. Membership of the Lutheran Church, so the critics say, should not be assigned any real significance.” Vikström emphasizes that behind this train of thought is not always concern for the strengthening of the religious convictions of church members, but it is thought to open the doors to altering the Church’s social status in a way that restricts its freedom of movement. *Vikström* J. 1992, 50.

3. Cf Statistical Yearbook of Finland 2008. Statistics Finland 31.12.2008.

considerably; however, due to the increase in total population, its relative share has decreased (1980: 90.2 percent and 2008: 80.7 percent). The Orthodox Church, Jehovah's Witnesses and the Free Church of Finland are among those whose membership has grown. The number of members of the Catholic Church has tripled (1980: 3,051 and 2000: 9,672), yet it is still a relatively small community. The membership of the Pentecostal congregations is at approximately the same level as the Orthodox Church; however, all Pentecostals are not registered as a religious community. The number of registered Pentecostals was 4,638 members in 2008. Because of this, large quantities of its members appear in the statistics with those who do not belong to any religious community. Its total number has almost tripled (1980: 372,640 and 2008: 898,828).

Table 1. Membership of registered religious denominations in Finland, 1990, 2000, 2008

	1990	**%**	**2000**	**%**	**2008**	**%**
Total population	4, 998,478	100	5,181,115	100	5,326,314	100
Evangelical Lutheran Church	4,389,230	87.8	4,408,381	85.1	4,299,186	80.7
Other Lutheran Churches	2,588	0.1	2,228	0.1	1,076	0.0
Greek Orthodox Church of Finland	52,627	1.1	55,692	1.1	58,445	1.1
Other Orthodox Churches	800	0.0	1,088	0.0	2,091	0.0
Jehovah's Witnesses	12,157	0.2	18,492	0.4	18,025	0.3
Free Church in Finland	12,189	0.2	13,474	0.3	14,233	0.3
Roman Catholic Church	4,247	0.1	7,247	0.1	9,672	0.2
Islamic congregations	810	0.0	1,199	0.0	6,822	0.1
Adventist Churches	4,805	0.1	4,316	0.1	3,751	0.1
Pentecostal Church in Finland	-	-	-	-	4,648	0.1
Church of Jesus Christ of LDS	2,883	0.1	3,307	0.1	3,251	0.1
Baptist congregations	2,565	0.1	2,395	0.0	2,382	0.0
Methodist Churches	1,251	0.0	1,260	0.0	1,279	0.0
Jewish congregations	1,006	0.0	1,157	0.0	1,230	0.0
Others	712	0.0	920	0.0	1,204	0.0
No religious community	510, 608	10.2	650,979	12.7	898,828	16.9

II. THEORETICAL AND SCHOLARLY CONTEXT

A. *Actual Situation of Scholarly Context – University Law Schools and Theological Faculties*

Looking at the actual situation of theoretical and scholarly context, how religion and State should relate to each other, it must be stated that on the part of *the legal sciences the Finnish universities* and institutions of higher education *have not shown very organized research on the relations between State and Church*. The relations between State and Church (religious Communities) have been taught in faculties of law – in Helsinki, Turku, and Rovaniemi, as well as the Universities of Tampere and Joensuu – mainly as an issue belonging to domain of constitutional law (the position of the Church according to constitutional law), an issue of administrative law (the Church Act, the Administrative Procedure Act) or from the viewpoint of freedom of religion, and then specifically within the basic rights and liberties. The faculties of law have not had any professorship on

Church-State relations. Thus, *there has not been the corresponding systematic teaching, not to mention schools of thought, or major views, how religion and State should relate to each other.*

Neither have the theological faculties (Helsinki,Turku) had professorship concentrating on Church-State relations. In the theological faculties Church-State relations have been studied and taught both belonging to the domain of ecclesiastical law/theology of law and from the perspective of freedom of religion. More than in the case of Germany, in Finland the research on ecclesiastical law carried out in the theological faculties has already, since the 19th century, been connected first to the domain of Practical Theology and in recent decades to some extent also Church History, although the history of Finnish jurisprudence does also include several distinguished jurists who were well acquainted with ecclesiastical law. *The research on ecclesiastical law carried out in Finland has,* since the days of Frans Ludwig Schauman[4] (1810–1877), *achieved its best result precisely in the field of historical research.* [5] *If one can speak of any school of research in ecclesiastical law,* then on the part of the theological research *it has been the cherishing of the spiritual heritage represented and marked out by Schauman.* From this one can already deduce the almost complete lack in Finland of the dialogue on theology of law, so characteristic of progress in the Central Europe, in which also solutions differing from the existing system of ecclesiastical law would be discussed.

In the Church Law of 1869[6] Schauman's main definition of policy concerning the division between State and Church was that the [Evangelical Lutheran] Church should have its own legislative body, the General Synod. Concerning purely ecclesiastical matters the sovereign [at the present time parliament] had only the right of approval or rejection of legislation. However, both social and ecclesiastical elements were contained in state legislation. *One may state that there has been no change so far in this basic policy in Finland.* The General Synod has retained its position as a source of ecclesiastical jurisprudence. The setting up of the Church's own decision-making body and its canonical right to initiate legislation in matters of Church Law, and its right to issue statements on Church-State issues, created the basic pillars on which State-Church relations (for part of the Evangelical Lutheran Church) still function today in Finland.

It has been typical of the Finnish dialogue on ecclesiastical law to hold to F.L. Schauman's judicial and theological principles which had been highly epoch-making in their own age. *Another* characteristic that has emerged clearly in the last decades is the same as in other Nordic countries; the Church Act has been gradually adjusted to the reforms of a society undergoing a process of democratization. Both ecclesiastical and university jurists, as well as university theologians, have actively participated in this process. Thus, for instance in the preparation of the proposal drafted by the Committee of the Freedom of Religion (1998–2001) for a new Freedom of Religion Act and for an entirely new Burial Act, the Faculty of Theology of the University of Helsinki played a significant role. *Juha Seppo,* professor of Church History, served as the committee's vice president and the Faculty of Theology provided a statement of its own concerning the committee's report which was completed in the winter of 2001. After receiving statements concerning the report the Ministry of Education began the preparation of the final Government bill. Afterwards, the Government passed the bill for a new Freedom of Religion Act and Burial Act entered into force on 1 September 2003. *A third* and most

4. *F. L. Schauman* was Professor of Practical Theology at the University of Helsinki 1847–1865 and Bishop of Porvoo 1865–1877. He was also a member of the Finnish Diet 1863–1872.

5. In the domain of ecclesiastical law some of the most recent Finnish jurisprudential studies are Eeva-Kaarina Nurmiranta's doctoral dissertation *Pappi Tuomiolla* [*The clergyman on Trial,* 1998] and Pekka Leino's doctoral dissertation *Laki kirkosta* [*The Church Act or an Act concerning the Church,* 2002]. Leino's study, pertaining to church administrative law, has as its theme the Evangelical Lutheran Church of Finland's system of ecclesiastical law. He particularly examines the relationship between the provisions of the Church Act and the provisions of general legislation from the point of view of administrative law.

6. In the 1860s the Finnish Senate set up a committee to reform church law. Schauman became a member of the committee and his proposals formed the basis of new ecclesiastical legislation.

recent phase is undoubtedly represented by the challenges brought by the EU's integration process to State-Church relations.

B. *The Parliamentary Clarification Work on Church Policy*

When speaking of research on State-Church relations in the Finnish context one must also not forget the parliamentary clarification work on church policy begun in the early 1970s. Besides church jurists, university theologians and researchers of the theory of law also participated in it as experts. The broadly-based parliamentary assembled Church and State Committee worked from April 1972 until June 1977, that is, for over five years.[7] *The Committee's report*[8] *explained almost all the containing surfaces between State and Church and took a stand on the developing of various areas. With its plentiful facts the report is no doubt a basic document when examining State-Church relations in Finland 1980s and 1990s*.

As a reader can observe from report, *the demands* of the late 1960s and the early 1970s radicalism to change the foundations of Freedom of Religion Act and *to implement radical changes in the relations between the State and Church did not receive sufficient political support*. Only minor adjustments were made to the Freedom of Religion Act, mainly concerning the procedure of secession the Church. Demands for massive changes to the Freedom of Religion Act and for "the separation of Church and State" at the parliamentary level remained as occasional bills, which later miscarried.

However, the pressures for change in religious and church policy did not vanish entirely, but were absorbed into both State and Church-related committee work. The government's Church and State Committee of the years 1972-1977 had the widest and most significant impact. Its policy for change was rather cautious. *The committee did not seek to clearly bring apart State and Church, but rather to strengthen the inner independence of the Churches*.[9]

Afterwards, during the years 1978 and 1979, the Ministry of Education procured a large collection of advisory opinion on the Church and State Committee's report. Later on a relatively large summary of it was also drawn up.[10] With the help of the summary one can get a rather clear picture of how Finnish society reacted to proposals for developing State-Church relations three decades ago. Also, in April of 1981 the Ministry of Education appointed a Church and State working group whose assignment was to make the necessary practical suggestions for action.

Although the immediate legislative changes in the relations between the State and the Churches remained non-existent, *the Church and State Committee did initiate within the Evangelical Lutheran Church of Finland a preparatory process which in three decades has led to gradual changes*. The organizational and administrative links between State and Church have been revoked little by little and particularly in 1990's in such a way that State authorities have gradually given up functioning as decision-makers in Church-related issues.

C. *The EU-integration process, the new Constitution of Finland (2000), the New Law on Religious Freedom (2003) and their Impact on Current State-Church Relations*

Since Finland joined the European Union (in 1995), the issue of State-Church relations has in a new way become a matter of topical interest in Finland. The deepening

7. The committee's president was Aarne Lauriala, former archbishop Mikko Juva was its vice president and Juha Seppo and Lauri Tarasti served as secretaries.

8. See more closely Kirkko ja valtio -komitean mietintö: Komiteamietintö 1977:21. [The Report of the Church and State Committee: Committee Report 1977:21].

9. Kirkko ja valtio -komitean mietintö: Komiteamietintö 1977, 9-11. [The Report of the Church and State Committee: Committee Report 1977:21]. *Seppo* 2000, 213.

10. Juha Seppo, lausunnot kirkko ja valtio -komitean mietinnöstä. Opetusministeriö 1980. [The Advisory Opinion Statements Concerning the Report of the Church and State Committee. Ministery of Education 1980].

integration of the European Union, the associated intergovernmental co-operation, and the development of legislation, have raised in particular the question of the importance of freedom of religion and of the position of the churches and religious bodies in the Finland of the future.

In religiously uniform Scandinavia and Finland there has earlier been no urgent need to re-evaluate Church-State relations. In the Nordic countries, political and social development has taken place without abrupt crises in the position of the churches. A fixed state church system has gradually disintegrated in most Nordic countries.[11] In comparison with Norway and Sweden[12], Finland can be regarded as a good example of a country where traditional Church-State relations have been dismantled in stages without complete separation between Church and State.

The Evangelical Lutheran Church of Finland today is clearly a separate institution from the State, with its own legal status. Nevertheless, in Finland there has been constant debate as to whether and in what sense Lutheran church is a "state church." The Lutheran Church has certain links with the State, and in Finland has retained certain features of the state church. The special position of a state church is clearly shown by certain features of our ecclesiastical legislation, such as the legal status of the Church; until 1995, the State's obligation to maintain the diocesan chapters; until 2000, the President's right to nominate bishops, many economic ties to the government, the right to levy church tax, the employment of chaplains (army, prison and for the blind and deaf), etc. In the true sense of the word the Evangelical Lutheran Church of Finland has not, however, been a state church since the Church Law of 1869 and the Constitution of 1919. The Finnish State is neutral in matters of religion, and the Church is legally and administratively very independent in relation to the State.

In social debate the concept of a state church has often been given a negative ideological shade of meaning. It has been suggested that the majority church, because it is a state church and enjoys certain privileges, is a threat to genuine freedom of religion and the status of religious minorities. An alternative expression to state church that is often mentioned, and a softer one with regard to the social position of the Evangelical Lutheran Church of Finland, is *folk church*.[13] The Evangelical Lutheran Church of Finland has emphasized for decades that it is first and foremost a folk church. In fact the same status is enjoyed in Finland by the Orthodox Church. *With the shift to folk church the traditional state church has been assigned to history*. However, the concepts of state church and folk

11. In this connection, for the sake of clarity, it should be explained that what is called the state church is a model of Church-State relations in which Church and State are almost identical. From the Nordic perspective the essential features of the state church system are: (1**)** *commitment by the State to a particular concession,* and (2) *a particular national church being an integral part of government*. The absolute state church system, where the state religion can be defined as a kind of official ideology, is represented by Norway, in whose constitution "the Evangelical Lutheran religion" is defined as the "public," that is, official religion of the realm ("Statens offentlige Religion §, 2 a). However, citizens and communities have freedom of religion. The king must profess the Evangelical Lutheran religion and "uphold and protect it." The king is also administrative head of the Church of Norway. In practice this leadership belongs to the government and the Ministry of Ecclesiastical Affairs. The organization of the Church is regulated by the Storting, the Norwegian Parliament.

12. In the Nordic countries the pace of development in religious and ecclesiastical policy has been the fastest in Sweden. In our western neighbour, freedom of religion was implemented much more slowly than in Finland, for in Sweden the law of freedom of religion was only enacted in 1951. In Sweden, however, at the end of the 1950s there commenced a study of ecclesio-political conditions, making preparations for change. This work has continued up to the present day. During this process it has, on the one hand, been attempted to "realize" complete separation of Church and State and, on the other hand, the administrative independence of the Church and its readiness for the possible separation has been increased. The latest stage in the Swedish Church-State debate was spring 1994 with publication of the committee report *Staten och trossamfunden* (The State and the community of faith). From the beginning of the year 2000 these changes came into effect that meant the separation of Church and State in Sweden.

13. The unusual English expression "folk church" is often used by Finnish theologians when they refer, in English, to Finland' (Lutheran) national church, wishing to emphasize its nature as the church of the people, as opposed to a mere governmental body. This English concept has been derived from its Swedish and German equivalents (*S.* "folkkyrka", G. "folkskirche" in Finnish. "kansankirkko" In the Finnish language, the word "kansa" can stand for "people," "nation," and "folk."

church express different things. The concept of folk church is indefinite- from the legal point of view, because its legal basis can be organized in very different ways in different countries. To clarify, the concept of state church is mainly to do with ecclesiastical law, while the concept of folk church has more to do with sociology. The concept of folk church illustrates the historical significance of the Church and the way in which this Church understands its position and vision in relation to the people. The Church is always a community within a country and its members are citizens of that country. In planning its activities the Evangelical Lutheran Church of Finland has always emphasized the idea of a folk church which serves the whole people.[14]

Actually, only as recently as the 1990s did the human rights documents of the Council of Europe (CE) and the Organization for Security and Co-operation in Europe (CSCE, now OSCE) and European integration *genuinely force the Nordic churches to evaluate the organization of Church-State relations on the basis of the principle of freedom of religion,*[15]albeit, from quite a new perspective.

On the one hand, in the 1990s Church-State relations were evaluated in human rights documents primarily from the point of view of the religious freedom of the individual. Does the close relationship between the Church and State infringe the religious freedom of the individual – or to what extent does the privileged position of one or two churches in a country encroach upon the rights and freedom of other religious bodies? In this connection it needs to be emphasized that, for example, one of the eccentricities of the Finnish system is that two churches, the Lutheran and Orthodox, to this day occupy a legal and economic position differing from other churches and religious communities. While other religious bodies are required to register on the basis of the law of freedom of religion, the status of the Lutheran and Orthodox churches is based on specific

14. In addition to this idea, largely due to the ecumenical (bilateral) dialogues of recent decades – which have helped The Evangelical Lutheran Church to rediscover its roots – there has been a tendency to emphasize the historical continuity of Lutheranism. The Evangelical Lutheran Church of Finland considers that it represents not only the nations but also more widely the continuity of Lutheranism in Finland. It has never seen itself as a modern local alternative to Roman Catholicism but as the representative in Finland of the whole of western Christendom. Bishop of Helsinki *Eero Huovinen* aptly defines the identity of our Evangelical Lutheran Church as a "Lutheran folk church which lives between East and West and is deeply rooted in both early Christian tradition and the discoveries of the Lutheran Reformation." *Lutheran World Information* 3/1996.

15. Finland is a party to several international human rights treaties which are of relevance for the protection of religious freedom, notably the European Convention of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child and the Convention for the Elimination of Discrimination against Women. As a rule, these treaties also form part of applicable domestic law as they have been incorporated into Finnish Law through a treaty-specific Act of Parliament.

In common with the other Nordic countries, Finland has adopted basically a dualistic model with regard to the relationship between international agreements and the country's internal legislation. The principles laid down in the Constitution and the established practices arising from these oblige the Finnish Parliament both to approve international agreements that are binding upon Finland and to grant them force of law to the extent that they contain provisions that "are of a legislative nature." If an agreement does not contain provisions that are of a legislative nature it may be brought into force simply by means of a statute. If, on the other hand, the discrepancy between the provisions of the agreement and the existing Finnish legislation is of a constitutional nature, it will need to be brought into force by means of a constitutional act of parliament passed with a two-thirds majority (Finnish Constitution § 95: 2). See closely *Pellonpää* 2005, 54.

The provisions of most treaties and other international obligations are brought into law in Finland in the form of "blanket laws" which state that they "shall come into force in the manner agreed upon." The approval of such a blanket or hybrid law (and/or statute) implies "incorporation" of the agreement into the internal legislation of Finland, but in addition to this it is possible and quite common for specific alterations to be made to existing legislation in the same sphere, i.e. this incorporation is supplemented with "transformation." If all the relevant legislation has been altered prior to approval of the international agreement, it is possible to incorporate the agreement by means of a blanket statute alone. It is nevertheless important in the case of human rights agreements, which have an immediate impact on the legal status of the individual, that these should always be incorporated by means of a law.

Once an agreement has been brought into force in the manner described above it is part of Finnish law and applicable in principle in the same manner as any other part of the legislative code. *Pellonpää* 2005, 54.

Finland has also subordinated itself to all existing international control mechanisms under the treaties in question above.

regulations. – The formulation of church policy, as presented in the new Finnish Constitution 2000 (maintaining the *status quo* and thus support the relevant section § 76 concerning the Lutheran Church), does not, however, suggest that the State has adopted a more favorable attitude towards the Lutheran Church in particular. The judicial position of the Church does not reveal the profound nature of relationship between the State and the Church, not to mention the overall value attached to religious values in Finnish society.[16]

On the other hand, the whole discussion of Church-State relations has altered in nature. The old-fashioned idea of "freedom from religion" and an ideological antithesis between Church and State is losing ground, and similarly the antithesis between Christian values and the values of society. They have been replaced by a positive interpretation of freedom of religion that has been in high profile in international documents on the subject of freedom of religion since the Second World War. *Citizens have the right to religion and its communal practice* and not only the right to be unattached to anything to do with religion.

Relations between the State and the Evangelical Lutheran Church of Finland went through a degree of change during the years 1993 to 2000. In the field of politics as well as in the Church, there is now greater independence of the Church on the one hand and the State on the other. For this reason, in 1993 Lutheran Church law was divided into two parts: a Church Code passed by the State regulates the relations between Church and State, while a Church Ordinance passed by the Church regulates the Church itself – its doctrines as well as its life. The latest stage in the Finnish Church Code -work represents two appointed committees: *The Church Act 2010 Committee*[17] (2005) and *The Codification of Church Law Committee*[18] (2007).

During the years 1997 to 2000, new relationships between State, bishops and cathedral chapters have been put into place. This has brought to an end the old tradition dating from the 16th century. The status of bishops has been transformed from state official to church servant. As a sign of this, elected bishops are not now nominated by the Head of State, the President of Finland. Instead, bishops are elected and receive a formal letter of appointment to the bishopric from the cathedral chapter. In addition, the stipends of bishops and the funding of cathedral chapters are now the responsibility of the Church, not the State.

The new Constitution of Finland was passed in 1999. In this Constitution, the freedom of the individual has been emphasized. Because of this, the Law on Religious Freedom (1922) has been updated; a new Law on Religious Freedom was passed in 2003. This Act deals with various issues relating to state and church. *The new Law will make all Christian churches and other religious communities more equal in society. Also the dominant status of the Evangelical Lutheran Church of Finland has decreased.* A sign of this is that exemption from Lutheran religious education no longer requires a request by the family of pupils who are not members of the Evangelical Lutheran Church of Finland. Instead they are automatically exempt unless the family wishes to sign up for education in the Lutheran religion. In addition, teachers belonging to other religions are now permitted to teach Lutheran religious education. Another sign of the equality of all Christian churches and other religious communities is that seceding from a church or religious community has been made easier.

D. *The EU Strategies of the Churches and Religious Communities of Finland*

EU integration is still such a new matter in Finland that most churches and registered religious communities of Finland have so far not produced a detailed EU strategy, nor taken a stance on the ideological goals that the churches want the EU to represent.

16. For the position of churches in the Finnish constitution, see more closely *J.Seppo* 1998, 125-127.
17. See Appendix 1.
18. See Appendix 2.

However, a concrete demonstration of the present open ecumenical atmosphere was a historic incident when representatives of the churches in Finland (Lutheran, Orthodox and Roman Catholic, Finnish Free Church Council and the Finnish Ecumenical Council) together approached the President of Finland at the end of 1995 and suggested that the Finnish delegates take more religio-political initiative at the intergovernmental conference in 1996. During their visit the representatives of the Finnish churches expressed their entire agreement with the efforts of the German Evangelical Church (EKD) and German Catholic Episcopal Conference to have a statement on religious communities appended to the founding document of the European Union. This initiative was repeated a year later at the intergovernmental conference in Amsterdam in June 1997, when it was decided to include in the agreement of the European Union (Maastricht II) a declaration (not article) on the status of churches and religious communities (present Article 17, in The Lisbon Treaty).

The first step forward to direction of detailed EU strategy was taken (and suggested by archbishop Jukka Paarma) on 30 May 2001, when *The Advisory Board on EU Affairs* was established under the Church Board. Its task was to create an EU strategy for Evangelical-Lutheran Church of Finland and to seek to monitor the effects of activities of EU institutions on ecclesiastical life. The Consultative Committee – which *includes a strong academic representation* – functions: (1) as an advisory expert organ in matters related to the EU, (2) participates in the discussion on EU policy towards the Church, (3) related to this, makes proposals to the Church Board, and (4) promotes cooperation with Church and State and local authority organs responsible for EU matters as well as with non-governmental organizations. Related to this, in 2002, the Evangelical Lutheran Church of Finland created its own EU strategy which took a stand on what kinds of ideological goals the Church would want the EU to represent.[19]

The second milestone, producing a detailed EU strategy for churches, was carried out when Finland held the Presidency of the European Union from 1 July to 31 December 2006. In June, on the eve of the start of the Finnish EU-Presidency, Finnish Churches published a brief document *Finnish Churches and the Finnish EU-Presidency 2006*, which was drafted in cooperation with the Finnish Ecumenical Council. It was handed over to Prime Minister *Matti Vanhanen* by representatives of the Church Council and to Foreign Minister *Erkki Tuomioja* at the traditional CEC/COMECE Presidency Meeting in the end of June.

The common objective of the Churches for the Finnish EU-Presidency was to generally present their perspectives and to tell more widely about their work on both a national, ecumenical and international level in issues that are of importance for the Churches.

The Churches wished to support the public administration in issues related to the Presidency. Here Finnish Churches' work in EU affairs has a strong ecumenical dimension. According to the ecumenical declaration *Charta Oecumenica*, signed 2001, the Churches support the integration of the European continent and on the basis of the Christian faith work towards a humane, socially conscious Europe in which human rights and the basic values of peace, justice, freedom, tolerance, participation and solidarity prevail.[20]

The aim of Finnish Churches was also a regular dialogue especially with the Government Secretariat of EU Affairs in issues which are of importance for the Churches and in which they can give added value to the general debate.

In the document *Finnish Churches and the Finnish EU-Presidency 2006*, the Churches emphasized certain key issues, which they felt ought to be prioritized during the Finnish EU-Presidency.

These key issues were:

* Strengthening the value dimension of the Union and keeping the discussion about

19. Document in English see closely *Kotiranta* 2005, 148-152.
20. *Finnish Churches and the Finnish EU-Presidency 2006*, 1.

the future of the Union alive.

* The need for inter-religious dialogue based on mutual tolerance and respect and knowledge of one's own identity and conviction.

*Enhancing the social and environmental dimension of the Union, combating human trafficking and promoting a consequent and human immigration and refugee policy.[21]

The latest stage in the detailed EU strategies represents the document *The Church and the EU – active participation and commitment to common values* (2009), which perceives aims and priorities of the Evangelical-Lutheran Church of Finland in the field of EU affairs.[22] One of the priorities of Church's work in the field of EU affairs is to take part in the debate about the value dimension of the Union (as was already in 2002 document) and its strengthening. The 2009 document emphasizes the importance that Treaty of Lisbon stipulates respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights – including the rights of persons belonging to minorities – as the founding values of the European Union. According to the Treaty, the Member States are characterized by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. According to document the Evangelical-Lutheran Church is strongly committed to these jointly defined values. It wishes to enhance the value dimension within all policy areas and affirms that these values need to be implemented in practice.

The Evangelical-Lutheran Church is also of the opinion that the Lisbon Treaty strengthens the character of the European Union as a community of values, promotes the monitoring and enforcement of human rights and supports the development of the Union's social dimension. "In addition, the Treaty creates better possibilities for participatory democracy. For the churches this culminates in the Union's commitment to maintain an open, transparent and regular dialogue with them (Article 17). The Lisbon Treaty confirms that Church and State relations are to be defined on the national level also in the future. The Treaty also recognizes the specific contribution of churches."[23]

We can only guess what the relationship between the Churches of Finland and the (federal) State will ultimately be like in integrating Europe in the 21st century. *If some conclusions can be drawn from Finnish debate in recent years, the most significant is undoubtedly the change in the general atmosphere of the debate, which is seen as openness to deal with Church-State relations in a new way*. Traditional considerations, implementation of freedom of religion (positive freedom of religion) and the religious neutrality of the State, are to be interpreted in a way appropriate to the civil society of a modern democratic state, when it is genuinely felt that the State, the Church and religious communities must work together because it is ultimately a question of the same citizens.

III. CONSTITUTIONAL CONTEXT

A. *The Current Constitutional Provisions and Principles Governing the Relations between State and Religion*[24]

The fundamental freedoms recognized by the EU are to a great extent consistent with those laid down in the constitutions of its member states and in the provisions of international human rights agreements.[25] The relevant section of the Finnish Constitution of 2000 dealing with Freedom of religion and conscience, Section 11, mirrors the

21. Ibid. at 2–4.

22. See http://evl.fi/EVLen.nsf/Documents/79D92BD6D45C541CC22575CA0038BEA7/$file/ATTF8EBK.pdf.

23. The Church and the EU – active participation and commitment to common values (2009), 6.

24. A brief outline of political history of Finland regarding the relations between State and religion [from the Reformation in Sweden-Finland in the 1520s to the time of the Finnish independence] see more closely *Heikkilä* 2005, 520-523; *Kotiranta* 2000, 240-247 [English translation see Appendix 3].

25. Although admittedly there are some differences between the EU legislation and other systems in the development of the civil rights dimension.

provisions of § 9 of the European Convention to a considerable extent, stating that

(1) Everyone has freedom of religion and conscience, implying the right to profess and practice a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. (2) No one shall be under any obligation to participate in the practice of a religion against his or her conscience.[26]

Supplementing Section 11, the general clause on equality and non-discrimination in Section 6 includes a prohibition against discrimination on account of religion, conviction or opinion.

In the course of the total reform of the Constitution, four separate instruments, each with constitutional status, were replaced by a single Constitution. *Partly as a result of this structural change but partly also reflecting changes in society, the constitutional recognition of the special status of the Lutheran Church is less prominent in the framework of the Constitution than formerly*. Nevertheless, both the traditional special status and the constitutionally protected autonomy of Lutheran Church are still reflected in Section 76 of the new Constitution, which reads:

Section 76 – The Church Act

Provisions on the Organization and administration of the Evangelical Lutheran Church are laid down in the Church Act.

The legislative procedure for the enactment of the Church Act[27] (or Church Code, which is the "Constitution" of the Lutheran Church) and the right to submit legislative proposals relating to the Church Act are governed by specific provisions in that Act.

According to Chapter 2, Section 2, only the General Assembly of the Lutheran Church may propose amendments to the Church Act, and *the role of the President and of Parliament is limited to either approval or disapproval of proposals submitted by the Assembly*. As in the old constitutional framework, *this clause in the Constitution includes a restriction on the sovereignty of the legislator,* to the effect that the procedure for amendment of the Church Act is prescribed by the Church Act itself.

B. *Freedom of Religion and Conscience under the Finnish Constitution*

The committee responsible for preparing the new law on the freedom of religion which came into force on 1 August 2003 (453/2003) discussed in its report the question of freedom of religion as a fundamental civil right and the freedom of religion and conscience as laid down in § 11 of the Finnish Constitution, and concluded that this latter provision should form the basis for all legislation in Finland that concerns freedom of religion and conscience. If the issue of freedom of religion and conscience is linked to the *principle of equality before the law*, enshrined in § 6 of the Constitution, as the committee proposes, the latter can be interpreted as implying an obligation on the public authorities to treat all religious and philosophical associations on an equal footing. Within this ancient category in the genealogy of fundamental rights, the committee's interpretation places particular weight not only on individual religious freedom but also on freedom *as a right pertaining to religious groups*. The external manifestations of the classic fundamental rights of the individual in this respect are specifically expressed in the Constitution, § 11 of which states that every person shall enjoy freedom of religion and conscience, which includes *the right to profess and practice a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. No one shall be under any obligation to participate in the practice*

26. The corresponding § 9 of the European Convention on Human Rights runs:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

27. Act 1054 of 1993.

of a religion against his or her conscience.

Nothing new was actually added in the reform of 1995 to the fundamental rights expressed in the old Constitution, but rather it was possible in the course of legislation to arrive at the same conclusions as on the basis of the earlier provisions. The freedom to pursue a cult was also regarded as belonging to the concept of religious freedom, and the work of preparing a new law on the freedom of religion placed emphasis on the system of human rights as a whole, e.g. in that it attached great importance to the other fundamental rights provided for in the Constitution, e.g. freedom of expression (§ 12), freedom of assembly and association (§ 13) and the right of exemption from military service on grounds of conscience (§ 127), in the practical implementation of the freedom of religion and conviction.

Given the more precise characterization of the "negative dimensions of religious freedom" in the last sentence of § 11 clause 2 of the Finnish Constitution, this sentence may be said to imply a fundamental freedom in view of the position of the majority church under public law, in that it states that no one is obliged to engage in the religious observances against his own convictions. This is in fact the same issue that is raised in the provisions for the range of application of the law on equality, where it is stated that "this law shall not apply to activities connected with the practice of religion within the Evangelical-Lutheran Church."[28]

The new law on religious freedom sets out as before from recognition of the freedom of religion and conscience guaranteed to all under the constitution, and its purpose remains to create suitable conditions for individuals and communities to execute their right to religious freedom, but at the same time a modern interpretation of religious freedom *specifically as a positive right* has gradually appeared in Finland through the approval of international agreements. As general justifications for this, the fundamental human right of freedom of religion and conscience as laid down in the law on religious freedom and certain other related laws has been seen in the context of the prohibition of discrimination on the grounds of religion or conviction providing for in § 6, clause 2, of the constitution to imply among other things an obligation on the public authorities to ensure impartial treatment for all religious communities and ideological persuasions.

In accordance with this line of argument, *the acceptability of the "state church" system is dependent on the state approving other religious beliefs as well and honoring the right of individuals to decide whether or not they wish to belong to a state church.*

IV. Legal Context - Legal Status of Religious Bodies according to the New Freedom of Religion Act

When studying churches and religious bodies as legal persons in Finland the new Freedom of Religion Act approved by Parliament on February 11th, 2003 (HE 170/2002 vp) is its basis in administrative law. Although the purpose of the Freedom of Religion Act is primarily to ensure the freedom of religion enshrined in the constitution (HE 731/1999), the law contains provisions that concern membership of religious associations, the procedure when joining or leaving a religious association, the oath and affirmation, and application of the law of assembly to the public practice of religion.[29] To put it more precisely, the Freedom of Religion Act enacts in detail and exhaustively the legal status and foundation, rights and obligations of churches and registered religious associations.

According to subsection 2§ of the Freedom of Religion Act, the reference to religious associations in the law indicates the Evangelical Lutheran Church, the Orthodox Church and religious associations registered in accordance with subsection 2. Religious activities

15 According to Bruun – Koskinen (1997, 39), "this law should not be taken as applying to the Evangelical-Lutheran Church, for legislative reasons at least, since it is clear from § 31.2 of the Parliament Act and § 15.2 of the Ecclesiastical Law that 'the right to proposed laws that concern the Church's internal affairs rests exclusively with the Church Assembly.'"

29. The Act also includes some changes to regulations concerning religious and moral education in basic education and in high schools.

can also be practiced in the form of an ideological association or entirely without organizing in the form of a legal person. Under the new Freedom of Religion Act the Evangelical Lutheran and Orthodox Churches are also religious associations in the sense intended in the act, concerning associations for which additional special ecclesiastical laws are enacted. However, as concerns registered religious associations, the procedure is that they themselves accept their order of association, and then it must be approved by the authorities, i.e. the National Patent and Register Board, provided it is not illegal.

In the Finnish context three different types of legal person can be distinguished in religious associations: (1) The status of the Evangelical Lutheran Church under public law is ensured in the constitution. (2) In the new constitution there is no direct provision for the Finnish Orthodox Church to regulate its position in society.

In this respect the legislative status of the Orthodox Church differs from that of the Lutheran Church. The Orthodox Church is the subject of the new law concerning the Orthodox Church, 2007 (HE 985/2006). (3) In Finland a registered religious association is, however, a special type of community. Its foundation and legal status are enacted in subsection 2 of the Freedom of Religion Act. Such a religious body gains the status of a legal person, that is, it can acquire property, enter into commitments and be a litigant in court and with other authorities once it is entered in the register of religious associations. In this respect the regulation observes the principle otherwise observed in Finnish community law, whereby the community achieves legal capacity once it is entered in the register of associations kept by the authorities, in this case the National Patent and Register Board.[30] Next I shall briefly examine each type of religious body.

A. *The Evangelical Lutheran Church as a Legal Person*

Differing from the general European ecclesiastical context, the status of the Evangelical Lutheran Church of Finland under public law is still ensured in the new constitution that came into force on 1 March 2000 (731/1999).[31] This strong constitutional status is derived historically from the fact that the legal system of the Evangelical Lutheran Church of Finland, based on the constitution, is older than the 1917 constitution of the Republic of Finland, because Schauman's Church Act (1869) was enacted by the Finnish Diet during the period of Finnish autonomy, the Swedish constitution of 1772 being positive law. Because the church legal system is based on the constitutional principle in existence before the first constitution of the Republic of Finland, this has given the continuity of the system a strong position in later constitutional reforms.

The main hallmarks of the status of the Evangelical Lutheran Church of Finland under public law are considered the special mention of Church Law in the constitution (PL 76§).[32] From the point of view of the Evangelical Lutheran Church, the most important is the order of enactment of Church Law (CL 2:2 subsection 1 §), which includes the exclusive initiative of the General Synod and non-interference by government legislative bodies in the content of ecclesiastical bills introduced by the General Synod. In practice this means that the Church's own organ, the General Synod, has power to introduce bills enacting and changing Church Law. Parliament, which finally

30. In the Finnish system all legal persons – associations, trusts, corporations, limited partnership companies and various bodies – need ratification by the state authorities in order to gain legal status and legal capacity.

31. See http://www.eduskunta.fi. = In English/The Constitution of Finland.

32. PL 76 § reads as follows: "In church law is enacted the constitution and administration of the Evangelical Lutheran Church. As concerns the order of enactment of church law and the initiative concerning church law, that which is in force is laid down in the aforementioned law separately." Subsection 76 § of the present constitution corresponds to the special mention of church law in the old constitution before 2000 (Const. 83 subsection 1 § 1 and Parliament Act (PA 31 subsection 2 § 2). The new constitution does not contain special provisions corresponding to constitution 83 subsections 2 and 3 §, which apply to other religious associations than the Evangelical Lutheran Church. It was considered unnecessary to include the regulation concerning the right to found new associations in the constitution, because regulation 13 § of the constitution concerning freedom of association also applies to the founding of religious associations (PeVM 10/1998 vp).

enacts the law, only has the right to approve or reject an ecclesiastical bill.[33]

The Evangelical Lutheran Church of Finland and its parishes is under public law a self-administered body like the municipalities. Legislatively, church administration is mainly organized with Church Law provisions, but provisions concerning church administration are also contained in other ecclesiastical laws, in general administrative laws and in ecclesiastical statutes with the authority of Church Law.

B. *The Finnish Orthodox Church as a Legal Person*

When comparing the legislative status of the Orthodox Church with the Lutheran Church, one must recognize that the Orthodox Church was affected until 2006 by the Orthodox Church Act (521/1969) and its supplementary statute (179/1970) and in addition the Freedom of Religion Act, and other general administrative legislation. Problems of application between the Orthodox Church Act and Statute and by other regulations in society hardly ever occur, because the Orthodox Church Act was government-enacted law and its content when enacted more clearly as a skeleton law was already adapted to general legislation.[34]According to statute 171§ (521/1969) concerning the Church, the task of the General Synod was to introduce bills to the government on laws and statutes concerning the Church.

Thus, the initiative for new regulations most often came from the Orthodox Synod. The government was not, however, bound to the content of the bill, but the provisions concerning the Orthodox Church could be given in the form desired by the government. Thus the Orthodox Church could not influence the enacting of laws concerning itself with a similar bill procedure as in the case of the (Evangelical Lutheran) Church Lawsystem. Legislation concerning the Orthodox Church usually arises in the process of preparation and enactment. Then it remains at the discretion of the government as to whether during the preparation of the law there was willingness to listen to the Orthodox Church.

The new law concerning the Orthodox Church (to the extent of subsection 125 §) came into force at the beginning of 2007. In the new law the Orthodox Church remained basically as before with special status under public law. According to the bill, the Orthodox Church adopts a church constitution which provides more precise stipulations for church activities and administration. The church constitution is given by the General Synod. The status of the central and diocesan administration of the Orthodox Church is altered more independent of the State so that its expenses are no longer paid directly from state funds. The Church's economic activities are ensured, however, by a corresponding amount of state aid. Some internal affairs and administrative matters which were previously the responsibility of the Ministry of Education are transferred to the Church's own organs. Several changes are carried through the regulations concerning church and parish administration. The basic structure of church administration remains, however, largely as before. The Orthodox Church and parishes shift to one type of employment relationship so that the civil servants of the Central Church Board and parish clergy shift to a contract relationship. The terms of the personnel employment relationship are negotiated with a collective bargaining agreement.

In church administration a procedure of claim for rectification is adopted in which the obligatory preliminary stage of a complaint is to be a claim for rectification to the Central Church Board. Application for alteration to the decision taken by the Central Church Board can be made by complaining to administrative law.

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33. When the 1917 constitution was in preparation the older church law principle was accepted of the exclusive initiative of the General Synod, although it remained in formal conflict with the constitution and parliamentary order.

34. It is interesting to note that in this the legislative arrangement of the Finnish Orthodox Church is in some sense reminiscent of the arrangement adopted in the Church of Sweden in the sense that after the reform of the Church of Sweden at the beginning of 2000 (whereby State and Church were separated and the Church gained the status of an independent legal person) it is affected, in addition to legislation on other faiths, only by a brief skeleton law.

C. *Registered Religious Associations as Legal Persons*

In Finland a registered religious association has its own special type.[35] A registered religious association is a type of independent special legal subject, like a registered association, corporation, co-operative or trust. In subsection 2 (7–28 §) of the Freedom of Religion Act is created a legislative framework for the founding and activities of registered religious associations.

Subsection 7§ 1 lays down the purpose of a registered religious association, which distinguishes registered religious associations from the other aforementioned legal subjects. According to the subsection, "the purpose of a registered religious association is to organize and support individual, corporate and public activities pertaining to religious profession and religious observance, based on confession of faith, Scriptures or other individualized established sacred activities." The bases of the activities of a registered religious association should thus be individualized, established and regarded as sacred by the community.

A registered religious body may be founded and registered as a religious association only if its purpose is in accordance with subsection 7 § 1. A body founded for other purposes, even though it may include religious activities, can be registered, for example, as an association under the law of associations. The right to profess and practice religion or the right to express one's convictions *per se* are not dependent on whether the body in question is registered as a religious association. For some religious bodies the requirement of a basis of faith has been an obstacle to registering as a religious association under the Freedom of Religion Act, because a basis of faith is considered to be contrary to the religious principles of the organization. Not in all religious bodies are activities based on a confession of faith nor is there always a desire to formulate a basis of faith beyond the Scriptures. The purpose of a registered religious association does not, however, require that activities be based on a religious confession. It suffices that the bases of established religious activities can otherwise be sufficiently individualized. Confession, however, is mentioned in subsection 1 as one kind of basis of established activity.

Registration as a religious association does affect, however, among other things, the right to receive religious education.[36] In addition, registration has an effect on taxation, penal protection and the possibility of applying for the right to solemnize matrimony. From this point of view, assessment of the purpose and types of activity of the organization are important for the authorities (the National Patent and Register Board).[37]

Some bodies engaging in religious activities have not organized as registered religious associations but as ideological associations, for example. The largest group are Pentecostal assemblies, which in 1999 had approximately 49,000 baptized members, and if children are included a total of approximately 55,000 members. At present the Pentecostal movement is, however, organizing as religious bodies. From the beginning of 2002 the Ministry of Education received notification concerning the founding of two Pentecostal religious associations.[38]

If the religious association (or any other body) is not registered, it cannot receive

35. Historically the term "registered religious association" goes back to the 1923 Freedom of Religion Act, which defined a specific type of legal person or "religious association." By nature it is a community under civil law and a legal person under civil law, with a great number of features of an ideological association.

36. The organizer of instruction also has the responsibility to arrange *confessional* religious education for other than pupils of the Evangelical Lutheran or Orthodox Churches. This obligation arises if the guardians of at least three pupils of the same faith who are exempted from religious education demand it. Religious education must on the aforementioned terms be arranged in accordance with the basis of faith of a religious association *registered* under subsection 13§ of the Freedom of Religion Act. Confessional religious education need not, however, be arranged on the basis of the teachings of other registered or unregistered religious associations. A pupil from a religious association for whom his or her own religious education is not arranged, may be taught moral education at the request of the guardian.

37. On notification of foundation to the register of religious associations, see in more detail in the appended table page 2.

38. Registration of a religious association was decided before the new Freedom of Religion Act was approved by the Ministry of Education.

competent legal person status nor gain rights and obligations. Persons acting on behalf of such an unregistered body are responsible for all their commitments personally.

There are no regional differences in the legal status of religious bodies as far as registration is concerned, because in Finland there is not a federal system.

V. The State and Religious Autonomy

The Finnish State is neither nondenominational nor denominational. However, there are close institutional and legislative links between the State and the Lutheran Church, and the public school system which is run primarily by the municipalities and partly financed by the State, makes nondenominational religious instruction on the majority religion a part of the curriculum.[39] *Additionally, the Orthodox Church has a special institutional status, while the Constitution and secular laws secure the freedom of religion and the rights of religious and non-religious minorities.*

Members of minority religions and persons not belonging to any religious community have a constitutional right to be exempt from participation in religion. Within the school system this means separate education in the minority religion concerned, or education on ethics, or total exemption.

The Church Act of the Lutheran Church is an Act of Parliament despite the fact that neither the President nor Parliament is allowed to change the wording agreed by the General Assembly of the Church. *The Church Act includes provisions with a clear denominational character.*[40] The confession and structure of the Orthodox Church is also regulated through an Act of Parliament. *Therefore, one may conclude that there still are two State Churches in Finland despite a gradual process towards fewer constitutional or other official links between the State and the two Churches.*

VI. Religion and Autonomy of the State

In Finland any particular religion is not given some power to control other religious communities under the State law.

Actually, the Freedom of Religion Act (2003) enacts in detail and exhaustively the legal status and foundation, rights and obligations of churches and registered religious associations. See above more closely chapters 3and 4.

State financial support for religion

Approx. 81 percent of the Finnish population belongs to the Evangelical Lutheran Church, approx. 1.1 percent to the Orthodox Church and approx. 1.1 percent to registered religious associations. Membership of registered religious associations can be seen in more detail in the appended table.

The most important source of income of Evangelical Lutheran and Orthodox parishes is church tax, which is levied from parishioners on the basis of taxable income in municipal tax. The levy of tax is carried out by the state tax authorities, but parishes pay a proportion of the expenses involved.

In addition, parishes receive a share of the proceeds of corporation tax. In connection with the reform of corporation taxation that came into force at the beginning of 1993 parishes' share of corporation tax was replaced by the previous obligation of associations to pay church tax. Behind the obligation of associations to pay church tax was the fact that the Church did not from the outset make a distinction in taxation between natural and legal persons. Later the obligation of associations to pay church tax and parishes' share of corporation tax began to be justified by the fact that parishes provide a wide variety of social services. As far as burials are concerned, parishes' share of corporation tax is linked

39. The formulation used in the relevant laws is neutral: it speaks of the denomination of the majority of the pupils in any particular school. In practice, all Finnish schools have a Lutheran majority, except for some separate religious schools.

40. See, in the next chapter *The Evangelical Lutheran Church as a legal person*, which includes a short formulation of the confession of the Lutheran Church.

to the responsibility of Evangelical Lutheran parishes for the maintenance of public cemeteries, also in the preliminary work of the new Cemeteries Act.

Parishes' present share of the proceeds of corporation tax has been altered several times during the time that the Income Tax Act has been in force. At present parishes' share is 1.94 percent. The adjoined table sets out the amount of corporation tax income received by parishes. Parishes' share is divided between Evangelical Lutheran and Orthodox parishes so that Evangelical Lutheran parishes receive 99.02 percent and Orthodox parishes 0.08 percent.

Parishes' corporation tax income by payment, mill. euros
(source: VM, corrected to 2003 value on the basis of the cost of living index)

Year	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Average corporation tax income	39	59	85	106	149	144	130	127	93	89	89	101

The expenditure of the central and diocesan administration of the Orthodox Church is paid principally from state funds. In addition, the government has supported some Orthodox parishes and institutions with state aid. The 2005 budget of the Central Church Board assigns to activities 1.787 million euros and, to the aforementioned aid, 152,000 euros.

On 9 May 2005 the Ministry of Education's *"State aid to registered religious associations" working group* delivered its report on the extension of state financial aid to include not only the Evangelical Lutheran and Orthodox Churches but also registered religious associations. The working group introduced a proposal to put the system into practice. From the beginning of 2008 the registered religious associations have received financial aid from government to support their activities. Associations had earlier funded their activities principally through donations, membership fees and their own fund-raising activities. According to the State Aid Act, state aid is received by registered religious associations on a numerical basis according to the number of members. State aid is not to be granted to associations with fewer than one hundred members and not to associations that in fact do not have any or have very few activities. The goal has been to provide clear criteria concerning aid so that as little assessment-based discretion as possible is required.

The state aid to registered religious associations does not require special regulation. The amount of state aid is decided in connection with the annual government budget. The starting-point is the amount of corporation tax income received by Evangelical Lutheran parishes with burial expenses deducted. Then the amount of state aid is approx. 5-7.7 euros per member of the association.

VII. Civil Legal Effects on Religious Acts

In Finland secular law recognizes legal effects to acts performed according to religious law. Matrimonial and family law are worth mentioning here.

On the subject of matrimonial and family law,[41] the interests of Church and society have always been widely disparate in Finnish history. Only under Swedish rule did the Finnish Church obtain the right to conduct marriages for its members (with effect under secular law as constituting a marriage) by the Swedish Law of 1734. Because of the close connection between the kingdom and the church, the church wedding became in practice the only official form of marriage. This situation continued under Russian rule until the beginning of the twentieth century. Orthodox marriage was seen as an exception (the Orthodox Church was also granted an official right to perform marriages).

After the independence of Finland in 1917 the register office wedding became an alternative to the church wedding through the Laws on Civil Marriage of 1917, on the Freedom of Religion of 1922 and on Marriage of 1929. The State also granted several

41. This section based on *Knuutila* 2005, 530-532.

church and religious communities, which had been given equal standing by the Law on the Freedom of Religion, the right to conduct marriages for their adherents. According to these laws, marriage by a church or religious community represents a more natural form of marriage, whereas civil marriage was an alternative for certain special cases. These are where the bride and bridegroom are not members of a church or religious community; bride, bridegroom, or both belong to a religious community that does not have the right to conduct the marriages of its members; or bride and bridegroom simply prefer to have a register office wedding. In addition to this, the various churches and religious communities have their own preconditions for church marriages.

In the twentieth century, marriage by the Lutheran Church, the largest religious community with the right of marriage, was the most popular form of marriage. Every member of a religious community who has had a civil wedding may if he or she so desires obtain a church blessing on the marriage. A bride and bridegroom belonging to two different communities are married (constituting the legal marriage) in the Church in which the banns have been called, then the other Church – for instance the Roman Catholic Church which regards marriage as a sacrament – blesses the marriage according to its own practice.

The Law on Marriage of 1929 also governs the preconditions of marriage (e.g. capacity to marry, the banns), the legal position of family members, and divorce, which has been possible in Finland since the end of the 16th century. These rules clearly reflect a Christian point of view. In spite of the changes in matrimonial law introduced in the twentieth century (the last important amendment being made in 1987) the basic principles have remained the same throughout the process of social development. All the amendments represent a retreat from traditional Christian concepts of marriage and family in favor of new concepts in society especially in the last decades of the twentieth century, for instance, in the equality of man and woman and a more generous definition of the term "family."

Matrimonial and Family Law was the subject of lively discussion at the turn of the 21st century on two counts, both touching on relations between State and church.

Because cohabitation has become widespread, many new problems have become apparent. For example, cohabiting partners do not have the same right to inherit as do married partners. A working party has been set up by the Finnish Ministry of Justice to consider how the inheritance of cohabiting partners who are widowed should be remedied. When the same legal right to inherit is given to cohabiting and married partners, society will be seen and understood to consider marriage and cohabitation as equal. This is not in accordance with the Lutheran doctrine of marriage: the Evangelical Lutheran Church of Finland does not, for example, sanction clergy cohabitation.

Cohabitation of persons of the same sex was agreed by the Finnish Parliament in 2001 to have the same legal status as marriage. In accordance with this law, persons of the same sex can formalize the relationship by contracting a civil marriage. This has given rise to much discussion especially in the Evangelical Lutheran Church of Finland as to the extent to which the Church can approve of this kind of partnership. Some bishops, pastors and laypersons would like to bless such a partnership. On other hand, some bishops, pastors and laypersons would deny this kind of blessing because they do not approve of homosexuality and homosexual partnerships at all.

VIII. Religious Education of the Youth

The communal system of comprehensive schools carries the main responsibility for providing compulsory education in Finland. Compared with the total number of schools, the proportion of licensed private schools is small. The English school in Helsinki is a Catholic foundation. Licenses have also been granted for a few comprehensive schools which are based on religious confessions.

According to the current law, every child under school-age has a right to day care arranged by the municipality. Religious and ethical teaching is a statutory part of the day care. In order to enable the participation of as many children as possible, religious

education is broadly Christian in scope. As the variety of children's nationalities and cultures increases, there are more and more children in day care whose religious and cultural background differs from the Finnish tradition. This creates further challenges for religious education in day care.

Based on the law of religious freedom (453/2003) and the current school laws, every student in comprehensive and upper comprehensive schools has a right to religious teaching according to his or her own confession. The communal school system is responsible for its Organization and funding. Students who do not belong to a church or religious community participate in world view studies (ethics). In the matriculation examination, it is possible to take either a test of one's own religion or of world view studies. The increasing number of the students representing different cultures has created a need to train teachers for Muslim religious education.

The introduction of a new law on religious freedom in Finland in 2003 meant above all the removal of certain restrictions, which has so far ensured that no cases of infringements of the First Supplementary Protocol to the European Convention on Human Rights (§ 2)[42] with respect to education in accordance with one's religion and convictions have yet been brought before the Supreme Court. The new law differs in many respects from its predecessor, passed in 1922.[43]

The new law and the consequent changes to the compulsory education law and the law on upper secondary schools[44] mean a considerable strengthening of the position of the teaching of religion in schools and a clarification of its nature and purposes. This is very clearly reflected not only in the laws themselves but also in the statement issued by the Parliamentary Education Committee and the report of the Constitutional Committee. It may be concluded from these and from the discussions held in Parliament that a very large majority of representatives were extremely favorably disposed towards pupils receiving teaching in their own religion.[45]

In the first place, the right to instruction in religion or the philosophy of life had been clearly defined in the Constitution, so that the receiving of such instruction could be seen to be in agreement with the Constitution. Secondly, a distinction was made between instruction in one's own religion and religious observance as referred to in the Constitution. Those who emphasized the nature of religious instruction as a form of religious observance during the preparation of the new law were of the opinion that teaching of this kind should be made optional, with the alternative of teaching in the philosophy of life, or even that it should be replaced by a form of teaching on the world's religions that would be common to everyone. The minimum requirement was the right to

42. Article 2 provides for the right not to be denied an education and the right for parents to have their children educated in accordance with their religious and other views.

43. It is very similar in structure, however, being divided into four main sections, the first containing provisions of a general nature, mostly connected with the individual's freedom of religion and the use to be made of it, the second dealing with registered religious communities, their purpose, foundation procedures and forms and conditions of activity, the third containing regulations for application of the law on public assembly to the practice of religion and setting out sanctions for infringements of the law on requiring communication of data on the membership of religious communities to the authorities, and the fourth containing details of when and how the law should come into force and transition regulations.

44. § 13 of the law on compulsory education and § 9 of the law on upper secondary schools contain both old and new provisions on the rights of individuals and certain groups to receive instruction in their own religion or philosophy of life. As heretofore, the instance responsible for arranging compulsory education is obliged to ensure that those belonging to the majority religious group receive appropriate instruction. A new feature, however, is the provision that pupils or students who do not belong to any religious community shall attend classes in the majority religion only if they so desire, as indicated by their parents in the case of compulsory schooling or the students themselves at the upper secondary school.

Teaching in their own religion shall also be guaranteed to minority groups of at least three pupils belonging to either the Evangelical Lutheran Church or the Orthodox Church, while corresponding teaching shall be arranged for groups of at least three pupils belonging to some other religious group only on application from a parent or guardian or from the students themselves at the upper secondary school. The upper secondary school legislation grants students entering that level of schooling the right to choose between religious instruction or teaching in the philosophy of life. Seppo 2003, 183.

45. Seppo 2003, 182-183.

opt out if the teaching contained events or rituals of a kind that could be regarded as religious observances.[46]

Parliament nevertheless established firmly that *religious instruction should not be equated with religious observance* and quashed all interpretations to that effect. This also brought years of wrangling on the subject to an end and removed the uncertainty experienced on this point in schools. It is important that no one among those obliged to attend classes in religious instruction should be able to demand exemption on the grounds of it taking on the nature of religious observance.[47]

Parliament also laid down that all syllabi should be examined upon the new law coming into force to ensure that they met the requirement for instruction in the pupils' own religion in an impartial manner, and also to ensure that the religion and philosophy of life syllabi for the upper secondary school contained "the foundations of the major religions of the world to the extent required for a good general education." This latter aim has now clearly been taken into account, at least as far as instruction in the majority religion is concerned.[48]

The new law is also clearer than its predecessor from a material point of view, in that it transfers the regulations applying to individual detailed issues from the law on religious freedom to the relevant points in the general legislation. In places this tendency towards clarification has created a need for entirely new legislation as far as the church is concerned, the most notable example being the legislation on burials (457/2003).

IX. Religious Symbols in Public Places

In Finland citizens are free to wear religious symbols in public places. There are two exceptions to this rule. The first comes from safety regulations. The labor law obliges employer and employees to follow safety instructions. It is possible for instance, that such instructions would not allow an employee to tie a scarf, if that person is working with machinery and this may be injurious to health.

The second exception considers hurting one's religious feelings. The current penal provisions no longer protect God's honor, but rather religious convictions and feelings and religious peace. Religious peace means religious order, related to the general category "law and order." This means for instance that is not allowed to be dressed in insulting way, which affronts openly one's religious conviction.

X. Freedom of Expression and Offenses against Religion

As was mentioned above, the current penal provisions no longer protect God's honor, but rather religious convictions and feelings and religious peace. The offence of breach of the sanctity of religion was reformed in 1998. The provisions have been placed in Chapter 17 on Offences against public order (563/1998), which means that these provisions have finally lost their position as the opening chapter of the penal code, as well as their separate nature as offences with a religious content. The specific offence of violation of the sanctity of religion requires intent on the part of the perpetrator, meaning that as the requirement of culpability one form of so-called *dolus* must be present.[49]

The provisions (see below) distinguish between public blasphemy against God and publicly defaming or desecrating what is held to be sacred by a church or religious community. This structure arose because parliament, at a very late stage, amended the government bill by reintroducing God as a figure into the provision. The original proposal, which was prepared as part of a larger law reform project, had not provided for such a distinction – the idea being that protection of the Christian God would fall under a single formula. Both the law committee and the constitutional committee of parliament

46. Seppo 2003, 183.
47. Seppo 2003, 183.
48. Seppo 2003, 183.
49. Nuotio 2008.

shared this view. The law committee was explicit in mentioning that the penal legislation also needed to be acceptable from the point of view of those who do not share a belief in God (see, Report of the Law Committee, 3/1998; Report of the Constitutional Committee 23/1997).

With regard to blasphemy against God, no specific form of intent is required. No intent to offend needs to be present, whereas in other instances, such purposive intent is required. This difference indicates that the protection of God against blasphemy covers a wider range of actions than the second act description. The point is that in the case of deliberately offensive action even those not sharing the religious belief itself will regard the action as offensive, namely hurting the religious feelings of the community. For this reason, efforts have been made to abolish the special clause on blasphemy against God, but the legislature has not yet been persuaded to do so.[50]

> Chapter 10 – *Breach of the sanctity of religion* (563/1998):
> A person
> who (1) publicly blasphemes against God or, for the purpose of offending, publicly defames or desecrates what is otherwise held to be sacred by a church or religious community, as referred to in the Act on the Freedom of Religion (267/1998), or
> (2) by making a noise, acting threateningly or otherwise, disturbs worship, ecclesiastical proceedings, other similar religious proceedings or a funeral,
> shall be sentenced for a *breach of the sanctity of religion* to a fine or to imprisonment for at most six months.

It seems that there is no case law involving Finland as a respondent state at the ECtHR as concerns alleged violations of ECHR Article 9.

Appendix 1

THE CHURCH ACT 2010 COMMITTEE

On 25 October 2005, the Church Council of the Evangelical Lutheran Church of Finland appointed a committee whose task was – by 31 December 2006 – to: (a) inspect the basic principles of Church Law with special attention to that part of the material field of the Church Act that would also in the future be necessary to enact according to the order prescribed for the enactment of the present Church Act, and (b) to delineate an elemental solution about the regulatory level and the order of enactment to be used for the rest of the norms concerning the Church.

The committee named itself the Church Act 2010 Committee and submitted its report *Kirkkolaki 2010, Kirkkolainsäädännön perusteita ja kirkkolain alaa tutkineen toimikunnan mietintö* [Church Act 2010, the report of the committee investigating the basic principles of Church Law and the legal field of the Church Act] on 20 December 2006.[51]

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50. Nuotio 2008.

51. Suomen ev.lut. kirkon keskushallinto. Sarja C 2006:9 [The Central Administration of the Evangelical Lutheran Church of Finland. Series C 2006:9]. In its summary of the field of the Church Act, the committee took the view that the Church Act should contain regulations on seven thematic fields. In this context, it is worth pointing out the first four of these; the first three of them are closely linked to the new Constitution of Finland (2000):

1. The basic principles concerning the constitution and administration of the Church as stated in subsection 76 § of the Constitution. This means that minor regulations and details supplementing the Church Act could follow the order of enactment of the Church Order and the Order of Church Elections. Also the autonomy of a religious community included in subsection 11 § of the Constitution supports a wider norm introduction authority for the Church.

2. The regulations in the field of the Church Act that require the level of law as prescribed in section 2 of the Constitution about civil liberties.

According to the proposition of the committee, attention in Church Law codification work must in addition to the regulatory level be paid to the systematic development of the regulations with an aim to reach as harmonious a system of regulations as possible. The Church Act, the Church Order and the Order of Church Elections must be structured so that there is a better chance than thus far to make use of a harmonized set of norms about Church administration at all levels. Such norms concern especially the principles and procedures of administration and the different church elections. This way it would also be possible to make use of new laws enacted after the Church Act, such as the general laws and regulations concerning administration, the Municipal Law and the Election Law. Furthermore, the regulations should be written in as general a form as possible with an aim to avoid an overly casuistic regulation.

In its final report, the committee emphasized the fact that the codification work could be realized according to the order of enactment prescribed for the present Church Act.

Appendix 2

THE CODIFICATION OF CHURCH LAW COMMITTEE

In its plenary meeting on 27 February 2007 the Church Council appointed a committee with a task to make a proposal on the codification of Church Law according to the guidelines set by the Church Act 2010 Committee. This committee was to submit its proposal by 31 December 2008.

The report proposes that a new Church Act be enacted for the Evangelical Lutheran Church of Finland to replace the presently effective Church Act passed in 1993. The proposal suggests a total codification of Church Law with an aim to reach a Church Act that is structurally more logical than the present law and clearer from the perspective of those who exercise it. It takes into consideration the amendments required by the Constitution and other legislation and, in particular, the regulatory level of the Church Act and the Church Order as prescribed by the Constitution. Because of the codification nature of the proposal, no changes in the Church-State relations are included in the report. The proposal is primarily related to the technical legislative procedure.

It is proposed that the Church Order be renewed in a similar fashion. The Church Order should be passed in the same way as at present by the General Synod within the authority given to it by the Church Act. The Church Order should include the regulations concerning the constitution, administration and function of the Church that are below the level of general law. The Church Order should as far as possible follow the same structure and division as the Church Act. There would be no need to enact a separate Order of Church Elections, but the regulations concerning church elections that are below the level of law would be included in section 3 of the Church Order.

The proposal also contains suggestions about the content of the law. The Church administration should be streamlined by dissolving certain subordinations. The subordination obligation of the parishes when alienating real property should be restricted in planned zones. In addition, the submission obligation should be abandoned with respect to the cemetery plan, the cemetery land use plan, and the changes in the starting times of church services. The regulations concerning church elections take into consideration the development of the general Election Law and the decisions of the General Synod.

The archive services of the Church should be developed by incorporating new and more extensive regulations about church archives in the Church Act and in the Church Order. To the appropriate extent, the Church should follow the general legislation concerning archives.

The proposal contains the technical reform of the regulations concerning the liability

3. The regulations concerning the basic principles of the rights and responsibilities of individuals as prescribed in subsection 80 § 1 of the Constitution.

4. The basic issues about the Church-State relations that are not regulated by a separate law.

of an individual parish member to pay parish taxes. This should be done by repealing the law concerning the official buildings and funds of the Evangelical Lutheran parishes and by enacting a new law concerning the liability of the members of Evangelical Lutheran parishes to pay taxes to their parish. At the same time the law concerning the legal basis of certain payments to the parishes should be abrogated. It is also proposed that the law passed on the Church Central Fund should be repealed. The required regulations concerning the Church Central Fund should be included in the Church Act and the Church Order. The proposal also contains technical readjustments to the law concerning the Collective Bargaining Contract of the Workers of the Evangelical Lutheran Church and the Evangelical Lutheran Church Pensions Act.

The committee completed its work on 20 April 2009 by submitting its report. The proposal was intended for the spring 2010 General Synod, which could accept it during its term. This way the new Church Act and the rest of church legislation could take effect no later than the beginning of 2013.

For further planning, opinions on the committee proposal have been requested from the various administrative parties of the Church as well the Ministries of Education, Justice and Finance.

Appendix 3

(*Kotiranta* 2000, Kirche, Staat und Religionfreiheit in Finland.
English translation from pages 240-247)

THE HISTORICAL DEVELOPMENT OF CHURCH-STATE RELATIONS IN FINLAND

The historical roots of Church-State relations in Finland are in the great social, religious and ecclesiastical change caused by the Reformation in Sweden-Finland in the 1520s. With the coronation of Gustav Vasa in 1523, and the Diet of Västerås in 1527, Sweden broke with Rome. The connection with the supranational Papacy, with its independence of the State and its legal system, was now severed, and in its place a national church was born. Its position was regulated by new ecclesiastical regulations and social legislation. While in Sweden the mediaeval Catholic Church was affected by both internal canon law and the external ecclesiastical code contained in contemporary provincial laws, with the Reformation canon law did not entirely disappear but its sphere was considerably reduced.[52] In practice the Reformation was introduced by state decisions. At the Synod of Uppsala in 1536 the Church of Sweden became a national evangelical church. At the Diet of Västerås in 1544 Sweden declared itself an evangelical kingdom. The important church constitution of *Laurentius Petri*[53] (1561) was published with approval by the king in 1571. With the Reformation in Sweden-Finland, as in other Lutheran countries, the Church became an integral part of the State. From the legal point of view the change was very considerable.

The Reformation created the doctrine of the secular and spiritual realms in which the secular power was responsible for maintaining peace and order and thus protecting the Church (*officium circa sacra*), but it was not permitted to interfere in doctrinal matters and the life of the Church (*in sacris*). When we speak of Luther's doctrine of the two realms, this was not part of his political and social program of reformation, as is often thought. The matter of the two realms goes to the center of Luther's biblical theology. Above all Luther wanted to fight for the purity of the Gospel, which he though had been obscured because the medieval Catholic Church had attempted to extend its authority to all areas of life and make the Church all-dominating. This was apparent in the demand

52. See *Ylikangas* 1967; *Kvist* 1998.

53. *Laurentius Petri* (1499–1573) was the first Lutheran archbishop of Sweden (from 1531). The 1541 Swedish Bible translation was largely his work. He also drew up the 1572 church constitution and wrote a two-part book of homilies.

that the secular sword (authority) be subjugated to the spiritual. Although Luther was naturally unacquainted with the modern democratic system of government, and although his doctrine of two realms was not in the slightest a political and social program, it had a significant political and social dimension and influence.

This was apparent in two things, first in the changed attitude towards secular authority, and second in the changed attitude towards secular vocation. When Luther and later Lutheranism, on the basis of the idea of two realms, emphasized that both secular and spiritual government were God-created reality, this was likely to emphasize, in contrast with the past, the intrinsic value of secular authority, not subordinate to the spiritual sword but alongside it and independent of it. The goal of the secular realm was also love, but by means of legislation and, if necessary the sword, to protect the weak. Thus the realms are related but different. Accepting secular authority as "the actions of God's left hand," and thus justified, made possible the growth of all secular authority, an increase in the power of the princes, the birth of national monarchies, which historians regard as the hallmarks of the beginning of the modern period. All these are, however, factors which have created tensions within the Lutheran state church system, as can be seen in the later history of the system.

The development of Church-State relations initiated by Gustav Vasa became settled with the Church Law of 1686, during the reign of King Charles XI. It obliged all citizens of the realm to hold to the Lutheran Confession (so-called "compulsory confession"). In this period of ecclesiastical discipline and order, population registers began to be kept. Lutheranism had become a state religion at the Synod of Uppsala[54] in 1593, and this principle was also written into the constitution of 1634. In it the Lutheran Church and its doctrine (*Confessio fidei*) was given secure status in the constitution. Although freedom of religion in the full sense of the word was not recognized, after the Peace of Stolbova in 1617 religious minorities – Orthodox, Reformed and Anglican – were, due to the pressure of circumstances, given concessions and granted the right to private religious observance.[55] The importance of religious uniformity with its cohesive influence on the State was clearly stated in the constitution of 1634, in the words "Unanimity in faith and right worship are the strongest foundation of worthy, harmonious and enduring government." These words were later repeated in all constitutions up until Finnish independence in 1917.

The 1686 Church Law signified in principle the end of the Church's independence and the concentration of power in the hands of the king. This was apparent, for instance, in the sovereign's right to influence the appointment of bishops. The roots of our church's present-day taxation rights and the right of the sovereign (now president) to nominate bishops derive from this period. Due to compulsory confession, membership of Church and State became the same thing. Church Law was in fact regulation of actions of State in ecclesiastical form.

As a state institution, during the period of autocracy (early eighteenth century) the Church exercised influence through the State. The clergy formed one of the four estates of the Finnish Diet, along with the aristocracy, the bourgeoisie and the peasants. A step in the direction of a more independent church was taken in 1723 with the privileges granted to the clergy. These set certain limits to the power of the sovereign.

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54. *Westmann* 1943, 3, 27–29; *Gnattingius* 1942, 135–136 and *Kvist* 1991, 219–222.

55. In particular, this affected the Orthodox population of Käkisalmi and Ingria. At first attempts were made to convert the Orthodox to Lutheranism, but the pressure exerted on the Orthodox population did not lead to the desired result. In 1658 the Orthodox were granted the right to their own clergy and services according to the Orthodox rite. The general policy was, however, that concessions in the seventeenth and eighteenth centuries solely concerned foreigners residing in the country. In the 1780s freedom of religion was extended to members of all Christian denominations. Jews were also given permission to practice their religion.

Development towards Freedom of Religion

1. Finland's Religious Policy during the Period of Autonomy

Finland's centuries-long state connections with Sweden were severed in 1809, and Finland was incorporated into the Russian Empire as an autonomous Grand Duchy. The 1686 Church Law was still in force and thus became part of the legislation of the Grand Duchy of Finland. The Orthodox Czar of Russia became head of the Lutheran Church of Finland. However, there was no change in the legal status of the Church. The Evangelical Lutheran Church of Finland retained its doctrine and order in accordance with the decree issued by Czar Alexander I at the Diet of Porvoo.

In the Finnish church, however, there was fear concerning the religious policies of the sovereign of another faith. After Old Finland was annexed to the rest of Finland in 1811, the Orthodox population increased tenfold to approximately 30,000 members. In 1827 an imperial edict opened up military and civil posts in Finland to members of the Orthodox Church. Because the Orthodox professed the "Czar's faith," they enjoyed his special protection. All attempts to convert the Orthodox to Lutheranism were forbidden. The confessional Lutheran thaw instantaneously became an Orthodox cold spell in spring. In this altered religio-political situation it was felt that the Finnish Lutheran Church should be given a more independent position. Afer the Czar gave his approval in the 1860s, the Finnish Senate set up a committee to reform Church Law. *Frans Ludvig Schauman*[56] (1810–1877), a professor of theology, became a member of the committee and his proposals formed the basis of new ecclesiastical legislation.

Schauman's main definition of policy concerning the division between Church and State was that the Church should have its own legislative body, the General Synod. Concerning purely ecclesiastical matters the sovereign had only the right of approval or rejection of legislation. However, both social and ecclesiastical elements were contained in state legislation. One may state that there has been no change so far in this basic policy in Finland. The General Synod has retained its position as a source of ecclesiastical jurisprudence. The setting up of the Church's own decision-making body and its canonical right to initiate legislation in matters of Church Law, and its right to issue statements on Church-State issues created the basic pillars on which Church-State relations still function today.

The Church Law of 1870 meant that once again the Church became a community under public law separate from the State. The new Church Law was also a significant step towards freedom of religion. Compulsory confession was abandoned, and the State's commitment to the Lutheran confession was relaxed. Although the law was enacted solely for members of the Lutheran Church, it recognized that there were members of other faiths than the Lutheran Church living in Finland. Special mention was introduced into the law that citizens could not be tied to membership of the Lutheran Church contrary to their convictions, nor prevent them from leaving the Lutheran Church and joining another denomination. The law did not by any means recognize full freedom of conscience and religion. In the Church Law of 1869 freedom of religion meant primarily freedom of religious observance. A religiously neutral state was still an unknown concept in the 1869 Church Law.

To sum up, Finland's connection with Russia during the Period of Autonomy created, paradoxically enough, the basis for independence for the Church, too.[57] When the Church

56. *F. L. Schauman* was Professor of Practical Theology at the University of Helsinki 1847–1865 and Bishop of Porvoo 1865–1877. He was also a member of the Finnish Diet 1863–1872.

57. This development could not be changed even by the Period of Oppression. The Period of Oppression means the periods of Finnish history 1899–1905 and 1908–1917, when Russia attempted to eradicate the autonomous status of Finland. The first Period of Oppression, known in Finland as the "years of frost," began with the February Manifesto. The language manifesto of 1900 dictated that Russian was to be the internal language of the central and provincial administration of Finland. In 1901 the law of military service was passed, according to which Finns were required to do military service. Censorship was tightened and freedom of

emphasized the western ecclesiastical tradition in its Nordic form alongside the different church of the Czar, holding that it was the representative of western Christianity in Finland, it was successful in ensuring for itself a new, legally guaranteed status of non-interference. Before the increasing integration of the European Union the Finnish church and the associated co-operation with the State had no need to open this preserve to outsiders in any significant way.

From the point of view of the Finnish Lutheran Church, the aforementioned developments have meant that the Church has not been primarily an instrument and vassal of government religious policy, but with its own *constitution*[58] it has been able to form its own perception of its nature and mission as a servant of the people. In Finland, in the course of history church work has taken on such forms that in spite of the ruler-centered system democratic elements have naturally become part of our ecclesiastical system from within the situation in which the Church is placed. At the same time the independence of the Church in relation to the State has been sufficiently ensured.

2. The Issue of Freedom of Religion during Finnish Independence

The principles of Western democracy include guarantees of religious freedom as one of the basic civil rights. The meaning of freedom of religion becomes clear from its connection with the constitution, with the State´s ideas of justice and freedom on the constitutional level. What is essential in freedom of religion as a basic right is that public authority does not interfere in matters of religious conviction nor make distinctions between citizens on the basis of religion or similar convictions (or their lack) when assigning rights or duties. Since the turn of the twentieth century the concept of freedom of religion has usually involved three basic elements: freedom of confession, freedom of worship, and freedom of membership.

In Finland conditions for full freedom of religion were created with the declaration of Finnish independence (1917). The republican constitution of 1919 marked a decisive turning-point in this matter. Paragraph 8 § of the constitution guaranteed Finnish citizens freedom of conscience and religion:

> Finnish citizens have the right publicly and privately to practice religion, providing that law and good manners are not infringed, and also, as is specifically laid down, freedom to leave the religious community to which he or she belongs, and freedom to join another religious community.[59]

The constitution gives equal civil rights and civil obligations to all, irrespective of whether they belong to a religious community or not. When the constitution was drawn up there was a long debate as to whether the special status of the Lutheran Church in relation to the State should be mentioned in the constitution. The full implementation of the principle of freedom of religion in the Constitution of 1919 meant that the Finnish State became religiously uncommitted and neutral. The 1922 law of freedom of religion laid down detailed regulations on religious freedom. It also confirmed the different status in relation to the State of the Evangelical Lutheran Church and the Orthodox Church as compared with other religious communities.[60]

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assembly was restricted.

The new Period of Oppression began in 1908 when the Czar subordinated Finnish affairs to the Russian Council of Ministers. In 1910 the Russian Duma approved a law whereby Finnish affairs came under its jurisdiction. Some of the most important controversial issues were those of the "military millions" with which Finland had to compensate for military service, and the 1912 "law of equality" whereby Russians were guaranteed the same rights in Finland as Finnish citizens. The second Period of Oppression ended with the Russian Revolution in March 1917.

58. By the constitution of the Church is generally meant that proclamation of the Word and the administration of the sacraments is organized, there is a parish community, the Church's ordained ministry, the episcopate, the threefold ministry, and parish administration, etc. The purpose of the Church's constitution is to ensure that the Church can function as a community of faith and love.

59. *Finnish Constitution*, July 17, 1919, 8 §.

60. Because the Finnish State, when accepting the principle of freedom of religion, has chosen to adopt a

When the law of freedom of religion came into effect, a population register system was created,[61] which was kept by the Orthodox Church, by other religious communities, and for others by the district registrar (the so-called civil register). This complex system was reformed in the 1970s, and in 1995 the Central Church Board and the Ministry of the Interior agreed on measures to improve co-operation between Church and State.[62]

Religious freedom for the individual and the acceptance of the non-confessional nature of the State did not, however, according to the constitution, require breaking off the relationship between the State and the Lutheran Church. Although the new constitution, on the one hand, restricted the Lutheran Church to being one religious community among many, the so-called "church paragraph" (§ 83) confirmed, on the other hand, the constitution of the Lutheran Church and its special legal status based upon it.[63] The constitution also indirectly confirmed the special legal status of the Orthodox Church, which was based on the statute of 1918 founding a national church.

The most important change compared with the period of compulsory confession and autonomy was the right granted by the law of freedom of religion to leave the Evangelical Lutheran Church without the obligation to join another religious community. The names of these citizens are entered in the civil register, which was established in 1917. As a matter of curiosity, in Finland until recently Finnish Pentecostal assemblies felt unable to register as a religious community under the prevailing law of freedom of religion. They therefore registered under the law of associations. In 1917 the law was changed to allow civil marriage.

In Finland the law of freedom of religion has been in force and in essential respects has remained unchanged for 75 years (in 1997).

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neutral stance towards the religion of its citizens, the special relationship of the State with two churches demands an explanation. Here I refer to the analysis by Bishop *Paul Verschuren* (The Catholic Church in Finland). *Verschuren* (1992, 45) states that from this state of affairs "one can reach the conclusion that is' often reached abroad, that Finland is a country of two confessions or two churches, which means such a logical 'salto mortale' as is denied to private individuals. Usually it is held that a person cannot have two religious convictions at the same time." *Verschuren* emphasizes that a distinction must be made between the two directions of the State: on the one hand, in the relation of the State to religion, on the other hand in the relation of the State to a particular church. Both relationships affect the other and are close to the other, but they do not express the same reality. Although the State is religiously neutral on the basis of freedom of religion, it can still have special authority and a special relationship with respect to a particular church. This authority is called internal authority if it concerns the Church's teaching and liturgy, and external authority if it concerns appointments to an office, the Church's constitution or its property. *Verschuren* points out that in general a state that has recognized freedom of religion does not demand internal authority in the affairs of a particular church. *Ibid*. This is not always the case by any means. The religious policy of the Bolshevik Soviet State offers a good example of how formally recognized freedom of religion can assume the most destructive forms from the Church's point of view. See also *Rössler & Strickler* 1988, 617–626.

61. Originally the register produced for the needs of the Lutheran Church developed into a national state population register.

62. The agreement means a change of emphasis as compared with previous years, when the objective of the Ministry of the Interior was the transfer of responsibility for the population register to civil servants.

63. Section 83 of the 1919 Constitution Act reads: "Provisions on the Organisation and administration of the Evangelical Lutheran Church shall be prescribed in the Church Code. Other existing religious communities shall be governed by the provisions enacted or to be enacted as to those communities. New religious communities may be established in the manner prescribed by Act of Parliament." Quotation from the Constitution Act is from Constitutional Laws of Finland, Procedure of Parliament, Helsinki 1992; Parliament of Finland, Ministry of Foreign Affairs, Ministry of Justice.

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Religion and the Secular State: Rapport Français

AVERTISSEMENT

Dans le contexte de la polémique politique et juridique qui sévit aux États-Unis depuis les années 1990 autour du sens de la Constitution américaine et de l'esprit qui animait ses Fondateurs, une fraction importante de la communauté académique et judiciaire de ce pays dénie l'interprétation des principes de neutralité et de séparation, tels qu'ils ont été interprétés par la Cour Suprême, notamment depuis l'arrêt *Everson* de 1947. Nous avons donc bien conscience que l'expression de Secular State peut avoir un sens très péjoratif en milieu américain et entraîner une féroce critique contre son libéralisme 'radical', sa faiblesse éthique ou son athéisme contaminant.

Nous partons depuis la compréhension française de l'expression Secular State. Cette expression n'est pas péjorative en contexte français et elle représente pour les juristes de ce pays, la définition exacte de leur État. Un État non confessionel, sans lien organique ou concordataire avec une ou plusieurs religions, dont l'idéal "philosophique" est républicain et démocratique. Toutes ces évidences ne sont plus contestées par aucune frange politique ou académique de ce pays. Un consensus s'est opéré depuis la synthèse de la Vème République.

I. CONTEXTE SOCIAL

La France est un pays de quelque 66 M d'habitants avec trois caractéristiques, une population de vieille implantation possédant de très nombreuses traditions, coutumes et art de vivre locaux et une population fortement urbanisée du fait des différentes révolutions industrielles. Sa population est également le fruit d'un peuplement migratoire intense et constant depuis le XIXème siècle. Pays de forte immigration, la France compte aujourd'hui 4 M d'étrangers en flux annuel constant, plus des citoyens aux racines familiales européennes anciennes (Italie, Belgique, Pologne, Espagne, Portugal) ou récentes (Pologne, Lituanie, Roumanie) maghrébines (Algérie, Maroc, Tunisie), africaines (Mali, Tchad, Sénégal, Niger, Burkina Faso, Côte d'Ivoire, Togo, Bénin, Zaïre, Rwanda, Comores), asiatiques (Vietnam, Chine, Sri Lanka). Cette extrême variété est due à plusieurs facteurs : L'attraction économique forte d'un des pays moteur des Révolutions industrielles en Europe, le déficit démographique dramatique provoqué par les deux guerres mondiales, la croissance économique considérable de l'après seconde guerre mondiale et l'afflux migratoire qui a suivi la fin de l'Empire colonial français. L'existence d'un vaste espace francophone, héritage de cet Empire, favorise toujours la destination française dans le processus de migration économique.

Si désormais l'immigration touche tous les pays d'Europe, pendant longtemps la France et le Royaume-Uni ont été les plus concernés par ce phénomène. Depuis les années 1970, la politique de naturalisation et d'acquisition de la nationalité française par naissance ou par mariage a favorisé en France un élargissement rapide de la citoyenneté française aux migrants économiques et à leur famille. L'esprit de cette politique a été celle de "l'assimilation". Ce terme signifie qu'une fois devenu français, l'étranger récupère avec la citoyenneté française une 'attitude' comportementale coutumière et spécifique, la plus spécifique étant la discrétion de son comportement religieux dans l'espace public et dans ses relations à autrui.

Ce modèle, également un héritage de l'histoire complexe de la France dans sa marche très contrariée vers la modernité politique, a été complètement bousculé dans les années 1980. Deux phénomènes se sont développés qui vaille que vaille, déplacent les certitudes et en matière de rapport de l'État aux religions, changent les habitudes acquises. Le

premier phénomène est la dénonciation de la discrimination forte dont sont victimes les populations issues de l'immigration, discrimination dans le travail, le logement, l'éducation, la rémunération et surtout la considération sociale. Le deuxième phénomène est celui d'une contestation de la "Laïcité" française, comme praxis sociale de discrétion des citoyens dans l'espace public. Cette praxis a commencé à être dénoncée comme une forme bien plus insidieuse de discrimination, puisque, obligeant chacun à réserver sa religion à son espace privé, elle favorisait en fait le mépris de l'appartenance religieuse.

Il est vrai qu'en contexte français, l'avènement de l'État séculier n'a pas été une affaire facile et il correspond à une véritable guerre d'influence entre deux conceptions de l'État et de ses liens avec la religion. Une conception moniste où l'État, lui-même confessionnel favorise une seule religion dont il est également le protecteur, (France d'Ancien Régime) une autre conception moniste où l'État n'étant pas confessionnel, ne favorise aucune religion et même, utilise sa force souveraine pour en contenir l'expression à la sphère privée (France républicaine)

Le modèle dans les deux cas est celui de la préexistence de l'État, préexistence historique et non idéologique, malgré les affirmations d'Edmund Burke sur l'extrême autonomie de la société française d'Ancien Régime (par ailleurs profondément inégalitaire). L'État en France a préexisté à l'organisation de l'ordre légal et citoyen. De sorte que les droits et libertés des citoyens, les libertés de la société civile, sont avant tout soumises à un ordre, qui, tout en refusant de se considérer comme transcendant pour le cas de l'ordre républicain, reste néanmoins souverain et soumet les droits et libertés aux limites des lois, dont la fabrication est également strictement encadrée.

Pour passer alors de l'État moniste - qui a exclu l'influence étatique du catholicisme et réduit méthodiquement la marge d'influence de cette religion sur la société au nom de l'émancipation de la conscience- à un État de droit, qui n'interfère pas sur la religion de ses citoyens, et intègre le pluralisme confessionnel comme une nouvelle valeur constitutionnelle, est une gageure difficile. Il a bien fallu les débats récents sur la discrimination religieuse des musulmans ou d'autres religions très minoritaires ou prosélytes,[1] pour que, sans vraiment toucher à la forme et à la philosophie officielle de l'État séculier en France, une plus grande prise en compte de la diversité comme de la vitalité spirituelle de ses citoyens cherche à être traduite dans le droit.

II. Contexte Théorique et Académique

Nous l'avons dit, la forme séculière de l'État français n'est pas remise en cause aujourd'hui dans les milieux académiques. L'État est neutre (il ne professe aucune religion), il est en état de Séparation d'avec les religions, et il laisse entière liberté de conscience à ses citoyens, qui ont le droit de ne croire en rien, de ne pas pratiquer de religion comme le droit de croire personnellement et collectivement. L'État laisse entière liberté aux groupes religieux de s'organiser dans le cadre du droit privé. Ce consensus théorique et académique connaît néanmoins de fortes variables et des disputes importantes.

Ces variables et disputes concernent l'exacte étendue du principe général qui définit la nature du régime républicain français contemporain et plus précisément de sa Constitution. Ce principe est celui dit de Laïcité. Jusqu'à quel point ce principe est-il ou doit-il être une religion civile qui serve de récit fédérateur pour la population française? Plus simplement la Laïcité constitue-t-elle le cœur de l'identité française ou est-elle l'expression de l'État de droit français et pas davantage ? Selon la réponse apportée par les analyses, l'organisation du pluralisme religieux dans la société française va être considérée comme dangereuse, possible, difficile ou au contraire facilitée.

Pour les tenants orthodoxes de la laïcité-identité, l'État séculier est un État qui doit absolument se tenir à l'écart des religions, facilement dangereuses dans leur goût du

1. Françoise Gaspart and Fahrad Khosrokhavar, *Le foulard et la République*, Paris, La Découverte, 1995. Claire de Galembert (ed), numero special *Le voile en procès*, in revue *Droit et Société*, 2008, 1, no. 68

pouvoir et leur emprise sur la conscience des personnes. Dans cette vision, la religion est avant tout considérée comme un code de pensées et de comportements obligatoires qui empiète sur la liberté des personnes de penser et d'agir à leur guise. L'État séculier n'est alors finalement que l'émanation d'une morale ou d'un ideal méta-juridique, l'idéal laïque, qui est celui d'une société émancipée, progressiste, mais également humaniste et compatissante. Pour paraphraser l'expression du philosophe Eric Voegelin, les tenants de cette laïcité-identité sont des 'gnosticistes' conscients et convaincus.[2]

Les tenants orthodoxes n'ont jamais été majoritaires dans le paysage académique et politique français, lequel se caractérise par sa grande diversité critique. La majorité des intellectuels, historiens, juristes, philosophes, admet que l'État séculier français est advenu à la suite de conflits extraordinaires, qu'il a bien eu une racine anti-cléricale mais que son libéralisme sociétal a été toujours freiné par la force d'un imaginaire universel qui lui a servi d'ordre transcendant de substitution. Dans le même temps, ces intellectuels reconnaissent que les conflits se sont calmés, qu'une synthèse s'est opérée à l'orée des années 1960, et que l'État séculier français a finalement posé les conditions d'une existence sereine de la croyance sur le territoire national.[3] L'État séculier en France garantit la neutralité et l'égale accessibilité aux services publics, la non-discrimination pour motif religieux, l'égalité des citoyens devant la loi. L'État séculier protège la liberté de croyance et de conscience de ses citoyens.

La responsabilité de cet État dans la sécularisation de la société française (indifférence religieuse) est toujours débattue. Les Français sont –ils devenus moins catholiques à cause de l'effondrement collectif de la pratique dans les années 1960, à cause du fort anti-cléricalisme véhiculé par le système éducatif public, à cause du renouvellement de la population française par l'apport migratoire de populations sans culture religieuses particulières ou non-catholiques ? Sur cette question, les avis sont très partagés.[4]

Restent finalement une autre frange de recherches académiques qui tentent de dégager la Laïcité française de son imaginaire messianique d'antan, pour insister sur les implications concrètes des valeurs consolidées par la Constitution. En quelque sorte, ils souhaiteraient rendre plus technique et plus opérationnelle les possibilités offertes par l'État de droit. Ils souhaiteraient que la réflexion sur l'avenir des Français dans une société pluraliste soit davantage encore objet de prospective et de prévision, quitte à proposer également une nouvelle mouture de l'imaginaire national où la diversité soit intégrée comme une valeur positive.[5]

III. CONTEXTE CONSTITUTIONNEL

A. *Sur l'existence d'une "relation" spécifiée entre Etat et Eglise:*

Depuis la Révolution française, l'État français n'est plus un État confessionnel, hormis la période de la Restauration (1815-1830). Par la Déclaration des droits de l'homme et du citoyen, la liberté de pensée et d'opinion y compris religieuse n'a jamais été remise en cause. De même, à partir de la Révolution et plus particulièrement avec la

2. "*La République est une philosophie avant d'être un régime ; elle est une Eglise, une Eglise laïque dont le dogme est la libre pensée et dont le prêtre est l'instituteur*". Emile-Auguste Chartier, dit Alain. L'auteur contemporain le plus représentatif qui défendent la thèse de la Laïcité-identité est Henry Pena-Ruiz : *La Laïcité*, Paris, Flammarion, 2003, 254 *Histoire de la Laïcité, Genèse d'un idéal*, Paris, Gallimard, collection La Découverte, 144 Voir également Claude Nicolet, *l'idée républicaine en France*, Gallimard, 1982

3. René Rémond, (ed) *Histoire de la France religieuse,* Tome 3, *Du Roi très chrétien à la Laïcité républicaine, XVIIIème-XIXème siècles*, Paris, Seuil, 2004, 540 p, Troisième Partie, *Une vitalité religieuse toujours forte*.. Paul Airiau, *Cent ans de laïcité française. 1905-2005,* Paris, Presses de la Renaissance, 2005, 288 ; Yves Tripier, *La laïcité, ses prémices et son évolution depuis 1905 (le cas breton),* Paris, L'Harmattan, 2003, 183

4. J. Battut, C.Join-Lambert, Vand, *1984, la guerre scolaire a bien eu lieu*, Bruxelles, Desclée de Brower, 1995.

5. Jean Baubérot, *Vers un nouveau pacte laïc?* Paris, Seuil, 1990, 266

mise en place du Code Civil au début du XXème siècle, les seules lois reconnues par l'État français sont celles qu'il promulgue et les relations entre les citoyens de ce pays sont régies dans ce cadre légal. Le cadre religieux, la loi religieuse n'a pas de force légale, à défaut d'avoir un poids social et moral très fort. Avec l'Empire Napoléonien, la France entame une période de relation concordataire en reconnaissant 4 cultes (catholique, réformé, luthérien, juif) dont elle assure la protection, le financement et l'influence sur la population. Les autres cultes présents sur le territoire ont un droit "privé" d'existence. Ils ne peuvent être publiquement pratiqués. Ce système va tenir jusqu'en 1905, où il est défait par la loi du 9 décembre. Entre temps, l'État a organisé un système scolaire non confessionnel (1880's) sans contrôle possible de l'Eglise catholique, a établi un système sanitaire et hospitalier non confessionnel, et entamé timidement sa dimension plus proprement sociale, en légiférant le travail salarié. Après 1905, la liberté publique de culte est assurée par deux en 1906 et 1907 et les religions peuvent s'organiser en associations privées simples (1901) ou associations cultuelles (1905).

L'examen actuel des principaux textes constitutionnels français en vigueur met en évidence une République dite "laïque" protégeant les droits et libertés des citoyens, en particulier la liberté d'opinion religieuse. Ainsi, dès la Révolution, l'article 10 de la *Déclaration des droits de l'Homme et du citoyen* (DDHC) du 26 août 1789, texte de valeur constitutionnelle essentiel[6], consacre la liberté de conscience et d'opinion : "*Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi*». L'article 1er de ce même texte, en expliquant que "*Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune*", interdit implicitement la discrimination pour motif religieux. Ainsi, les croyances religieuses doivent être protégées au même titre que les autres opinions[7]. Aussi, le Préambule de la Constitution de la Quatrième République, du 27 octobre 1946, repris par le préambule de la Constitution du 4 octobre 1958[8], précise-t-il que "*(...) Le peuple français (...) réaffirme solennellement les droits et les libertés de l'homme et du citoyen consacrés par la Déclaration des droits de 1789 et les principes fondamentaux reconnus par les lois de la République. (...). Nul ne peut-être lésé, dans son travail ou son emploi, en raison de ses origines, de ses opinions ou de ses croyances*». En outre, le treizième alinéa du Préambule de la Constitution de 1946, confirmé par celui de la Constitution de 1958, envisage "*l'organisation de l'enseignement public gratuit et laïque à tous les degrés*" comme "*devoir de l'État*". Quant à la version actuelle de la Constitution, celle de la Cinquième République, du 4 octobre 1958[9], dont le Préambule reprend l'ensemble des normes de référence susvisées, elle affirme que "*La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances*"[10] après avoir qualifié la France de "*République indivisible, laïque, démocratique et sociale*"[11] qui "*assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances. Son organisation est décentralisée*"[12]. Cette reconnaissance expresse de la laïcité ne fait cependant l'objet d'aucune précision, quant à la portée et au contenu de ce principe, dans le texte constitutionnel. Néanmoins, la loi du 9 décembre 1905 relative à la séparation des Eglises et de l'État[13], considérée parfois[14] comme source

6. Qui sera intégrée au préambule de la Constitution de la Ve République, du 4 octobre 1958, comme élément primordial du bloc de constitutionnalité. Cette notion renvoie à un ensemble de textes fondamentaux auxquels l'actuelle constitution fait référence en raison de leur intérêt fondamental, pour la protection des droits fondamentaux, et auxquels le Conseil constitutionnel a conféré une valeur constitutionnelle depuis sa célèbre décision 71-44 DC, du 16 juillet 1971, *Liberté d'association*, http://www.conseil-constitutionnel.fr.

7. Protégées, elles, par l'article 11 de la DDHC.

8. Il s'agit d'une autre norme constitutionnelle de référence.

9. Récemment révisée par la loi constitutionnelle n° du 23 juillet 2008.

10. Article 2 de la loi fondamentale.

11. Article 1er de la Constitution.

12. *Eod. Loc*.

13. http://www.legifrance.gouv.fr.

subsidiaire du droit constitutionnel des religions du fait qu'elle renferme plusieurs principes fondamentaux reconnus par les lois de la république[15] (PFRLR) (séparation des Eglises et de l'État, liberté de conscience[16], libre exercice des cultes et interdiction des subventions) apporte heureusement une interprétation du concept de laïcité.

Le Conseil constitutionnel s'est prononcé, une première fois, sur le principe de laïcité, dans une décision du 19 novembre 2004 relative au contrôle de constitutionnalité du Traité établissant une Constitution pour l'Europe (TECE) en affirmant que les dispositions de l'article 1er de la constitution de 1958 "*interdisent à quiconque de se prévaloir de ses croyances religieuses pour s'affranchir des règles communes régissant les relations entre collectivités publiques et particuliers*"[17]. Plus récemment, dans une décision du 22 octobre 2009, le Conseil a réaffirmé la valeur constitutionnelle du principe de laïcité[18].

B. *Sur la mention de la liberté religieuse dans la Constitution*

La liberté religieuse ou liberté de religion figure dans le texte constitutionnel. Il s'agit d'un des principes fondamentaux du droit des religions en France, à côté de l'égalité entre les croyances religieuses et la neutralité des autorités publiques à l'égard de ces convictions. La Constitution française reconnaît la liberté religieuse à travers la consécration de la liberté d'opinion et de croyances dans le bloc de constitutionnalité[19]. Elle protège avec la même force les opinions et les croyances. En outre, le Conseil constitutionnel a qualifié la liberté de conscience de "*principe fondamental reconnu par les lois de la République*", dans sa décision *Liberté d'enseignement et de conscience*, de 1977[20], qui inclut implicitement la liberté de croyance religieuse dans son 5e considérant en rappelant les exigences de l'article 10 de la DDHC quant au respect des opinions religieuses, conformément à l'ordre public, et au principe de non discrimination dans le travail sur la base des croyances.

Ainsi, même s'il est vrai que des distinctions doctrinales[21] très pertinentes sont

14. Opinion doctrinale exposée dans *O Cit.*, Messner (F.) (Dir.), *Traité de droit français des religions*, 390.

15. Principes de vleur constitutionnelle dégagés pr le Conseil constitutionnel ou le Conseil d'Etat.

16. Si celui-ci a clairement été dégagé par le Conseil constitutionnel dans sa décision Cons. const., 23 novembre 1977, décision n° 77-87 DC, *Sénat, Yvelines* (*Journal officiel* du 25 novembre 1977, 5531, Recueil, 87, http://www.conseil-constitutionnel.fr.; *Gaz. Pal* 9-10 et 11-13 juin 1978, 293-300, note FLAUSS), dans une réponse ministérielle, du 13 novembre 1995 n° 20155, le Ministre de l'Outre-mer s'arrogeait la compétence de préciser que: "*Les principes posés par la loi du 09 Décembre 1905 doivent être considérés comme " principes fondamentaux reconnus par les lois de la République" en ce qu'ils précisent le principe constitutionnel de la laïcité de la République française rappelé par l'article 1 de la Constitution du 04 Octobre 1958. Tel est le cas des principes de liberté de conscience, de libre exercice des cultes et d'interdiction de subventionnement des cultes par l'Etat, le département et les communes, énoncés par les articles 1er et 2 de la loi du 9 Décembre 1905*", www.questions.assemblee-nationale.fr.

17. Cons. constit., 19 novembre 2004, décision n° 2004-505 DC, *TECE*, (considérant 18), *Journal officiel* du 24 novembre 2004 19885, Recueil, 173, http://www.conseil-constitutionnel.fr.

18. Cons. constit., 22 octobre 2009, décision n° 2009-591 DC, *Loi tendant à garantir la parité de financement entre les écoles élémentaires publiques et privées sous contrat d'association lorsqu'elles accueillent des élèves scolarisés hors de leur commune de résidence*, (considérants 4,5 et 6), *Journal officiel* du 29 octobre 2009 18307, http://www.conseil-constitutionnel.fr.

19. Composé comme nous l'avons vu de l'ensemble des éléments auxquels renvoie le Préambule de la Constitution de 1958.

20. *O Cit.*, Cons. const., 23 novembre 1977, décision n° 77-87 DC, *Sénat, Yvelines*, (considérant 5).

21. Les auteurs s'accordent pour reconnaître que la liberté de conscience correspond à la liberté de se définir au regard des actes traduisant les convictions de l'homme, y compris ses convictions religieuses, que la liberté du culte renvoie au droit de manifester ses convictions sans avoir à subir de contraintes extérieures. Mais la doctrine juridique française distingue, d'une part la liberté de religion, droit individuel et, d'autre part la liberté des religions, droit collectif, pour chaque confession religieuse, de régler son organisation interne (principe d'autodétermination), mais aussi de s'exprimer et d'agir dans l'Etat. Certains considèrent que la conviction religieuse n'est qu'un type d'opinion particulier (ISRAËL (J.J.), *Droit des libertés fondamentales*, Paris, LGDJ, 1998, 426), d'autres estiment que "*la liberté de conscience comporte le droit de croire ce qu'on veut et de se rattacher à la religion que l'on préfère. Mais elle n'implique pas la libre pratique des cultes : la liberté de conscience et la liberté des cultes sont deux choses distinctes*» (Barthelemy (H.), *Traité élémentaire de droit administratif*, Paris, Rousseau, 1933, 273 ; Morange (J.), *Droits de l'homme et libertés publiques*, Paris, PUF,

établies entre liberté d'opinion, liberté de conscience, liberté de culte et liberté de religion, cette dernière ne saurait s'exercer sans les premières. Par conséquent, il est possible de conclure à la garantie constitutionnelle de la liberté religieuse qui se distingue par trois traits[22]: la dimension collective, le caractère englobant[23] et l'extériorisation de la conviction par l'exercice du culte.

Cette consécration constitutionnelle comprend, en effet, la dimension individuelle- correspondant à la liberté de conscience et d'opinion religieuse- et collective- intégrant le droit à l'exercice du culte- de la liberté religieuse, ce qui comprend l'organisation des Eglises ou des communautés religieuses et de toutes les formes d'expression religieuses organisées. Sont donc pris en compte, d'une part la liberté du for interne c'est-à-dire la liberté d'adhérer à une religion, de ne pas en adopter ou d'en changer par la conversion et, d'autre part la liberté externe d'exprimer sa conviction religieuse y compris par des manifestations collectives du fait religieux dans la sphère publique. Ceci ne pouvant excéder les limites des droits d'autrui, comme le prescrit l'article 4 de la DDHC, de valeur constitutionnelle, en vertu duquel "*La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui : ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres Membres de la Société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la Loi*". Ainsi, par exemple, la liberté de porter des signes religieux doit se concilier avec la neutralité de l'espace éducatif. Aussi, le prosélytisme agressif est-il prohibé en ce qu'il est susceptible de remettre en cause la liberté individuelle de chacun de croire ou de ne pas croire.

Enfin, d'autres libertés, constitutionnellement reconnues, donnent son effectivité à la liberté religieuse. Il s'agit de la liberté d'expression[24] sans laquelle il demeurerait impossible d'exprimer ses opinions religieuses, la liberté de réunion[25] qui permet de se retrouver en public ou en privé sur des questions à caractère religieux, la liberté d'association[26] indispensable à la constitution d'associations religieuses, la liberté de manifestation qui rend possibles, par exemple, les processions religieuses. Ces libertés fondamentales connexes permettent à chacun d'exprimer ses opinions, y compris religieuses sur tout ce qui intéresse le débat public.

C. *Sur l'existence d'une référence religieuse dans les fondements ?*

Depuis la Révolution française, les références à Dieu ou à la Divine providence se sont plus que raréfiées. Subsiste, dans le préambule de la DDHC de 1789, l'évocation de "*l'Etre Suprême*" sous les auspices duquel l'Assemblée nationale, auteur du texte, s'est placée. Cette référence est reprise dans la *Déclaration des droits de l'homme et du citoyen* de la Constitution inappliquée du 24 juin 1793. La Déclaration fait partie du bloc de constitutionnalité de la Vème République aujourd'hui, mais ladite référence à l'Etre Suprême n'a jamais été utilisée ou évoquée dans le moindre débat constitutionnel sur une éventuelle implication de sa présence dans le texte.

D. *Sur l'existence d'une mention spéciale des principes de neutralité de l'Etat, d'égalité*

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coll. "Droit fondamental", 5e édition, 2000). Flauss (J.-F.) distingue trois approches de la notion de liberté de conscience : "*La première, la plus restrictive, appréhende la liberté de conscience en tant que composante de la liberté religieuse, c'est-à-dire comme un droit pour l'individu de croire ou de ne pas croire en matière religieuse. Dans une seconde optique, la liberté de conscience est entendue de manière "extensive". Elle serait une liberté d'adhésion aux opinions quelles qu'elles soient (…). Enfin, une troisième approche, très analytique, a été parfois défendue : la liberté de conscience présenterait un caractère autonome aussi bien par rapport à la liberté d'opinion qu'à la liberté religieuse, elle serait la liberté de croyance*".

22. Voir Messner (F.), Prelot (-H.), Woehrling (J.- M.), *Traité de droit français des religions*, Paris, LITEC, 43.

23. Qui influe sur les choix fondamentaux de la vie.

24. Article 11 de la DDHC.

25. CE, 19 mai 1933, *Benjamin*. Liberté garantie par les lois des 30 juin 1881 et 28 mars 1907.

26. Constitutionnalisée, à travers la loi du 1er juillet 1901 sur le contrat d'association, dans la décision de 1971 précitée.

entre les religions, de coopération et de pluralisme religieux?

Si la Constitution de 1958 ne fixe pas le régime constitutionnel des Eglises, elle proclame l'égalité[27] des citoyens quelle que soit leur religion, et le respect de toutes les croyances comme en témoignent ses deux premiers articles. L'article 2 pose les principes essentiels de l'égalité de tous les citoyens devant la loi quelle que soit leur religion et le respect par l'État de toutes les religions, garantissant ainsi le pluralisme religieux au moins de forme supposant une diversité des religions. Cette conception peut fonder une doctrine de laïcité-neutralité, ouverte ou positive[28], portée par le président Nicolas Sarkozy lors de sa visite au Latran, en 2007[29]. Elle se révèle très favorable à la possibilité pour l'État et les confessions religieuses de collaborer en vue de la promotion du bien commun de la société, dès lors que cette collaboration respecte l'autonomie et la sphère d'action des religions[30], sans que ce principe de coopération ne figure expressément dans les textes de valeur constitutionnelle. Le régime "concordataire"[31] qui subsiste en Alsace-Moselle illustre, en pratique et à l'extrême, cette collaboration.

Le principe d'égalité implique qu'aucune religion n'a un statut public particulier. Elles représentent en principe des affaires privées, soumises en tant que telles au droit privé. L'égalité impose, d'après le Conseil constitutionnel, *"qu'à situations semblables, il soit fait application de solutions semblables, il n'en résulte pas que des situations différentes ne puissent faire l'objet de solutions différentes*"[32], le pluralisme ne pouvant se concevoir que si chaque croyance et chaque groupe religieux est soumis à un régime juridique non discriminatoire. Ce principe d'égalité ne signifie donc pas que le même traitement doit être appliqué à toutes les religions. En effet, certaines atteintes à l'égalité peuvent être justifiées par des nécessités d'intérêt général ou en vue de rétablir une égalité réelle là où de l'application uniforme de la même règle résulterait une discrimination de fait ou encore pour tenir compte de certains contextes particuliers. Ce dernier cas est illustré par l'inégalité juridique qui prévaut entre le régime concordataire de l'Alsace-Moselle, la situation dans le reste de la Métropole et le droit local des DOM-TOM[33].

Le principe de neutralité des autorités publiques à l'égard des convictions religieuses signifie lui qu'il n'existe en France ni religion d'État ni religion reconnue ou qualifiée officiellement de dominante. Ce principe découle de l'article 1[er] de la Constitution et

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27. Ce principe, fondamental dans une société démocratique, revêt une importance particulière en France. En ce sens, voir PRELOT (V. -H.), "Les religions et l'égalité en droit français", *RDP*, 2001, 738.

28. MORANGE (J.), "Le régime constitutionnel des cultes en France", in *Le statut constitutionnel des cultes dans les pays de l'Union européenne*, Paris, Litec, 1995, 119-138 ; SEGUR (Ph.), "Le principe constitutionnel de laïcité", in *Annales de l'Université des sciences sociales de Toulouse*, 1996, 117-134 ; BAUBEROT (J.), *Vers un nouveau pacte laïque*, 1990; BARBIER (M.), "Pour une définition de la laïcité française", *Revue des débats*, n°134, mars-avril 2005; "Face au nouveau millenium : la liberté religieuse dans une société pluraliste", in *Conscience et Liberté*, 1997, n° 54, Berne, notamment les articles de ROBERT (J.) et de GBAUBEROT (J.) ; COQ (G.), *Laïcité et République*, 1995, 334 ; "La Laïcité", Revue *Pouvoirs*, 1995, n° 75.

29. Le Président a rappelé qu' "*il n'est plus contesté par personne que le régime français de la laïcité est aujourd'hui une liberté : la liberté de croire ou de ne pas croire, la liberté de pratiquer une religion et la liberté d'en changer, de religion, la liberté de ne pas être heurté dans sa conscience par des pratiques ostentatoires, la liberté pour les parents de faire donner à leurs enfants une éducation conforme à leurs convictions, la liberté de ne pas être discriminé par l'administration en fonction de sa croyance*" avant d'ajouter qu'il fallait "*assumer les racines chrétiennes de la France, et même les valoriser, tout en défendant la laïcité, enfin parvenue à maturité*" et d'appeler de ses vœux "*l'avènement d'une laïcité positive, c'est-à-dire d'une laïcité qui, tout en veillant à la liberté de penser, à celle de croire et de ne pas croire, ne considère pas que les religions sont un danger, mais plutôt un atout*". Pour lui, "*il s'agit de rechercher le dialogue avec les grandes religions de France et d'avoir pour principe de faciliter la vie quotidienne des grands courants spirituels plutôt que de chercher à le leur compliquer*". Voir Discours de Nicolas Sarkozy au Palais du Latran, 20 décembre 2007, disponible sur http://www.elysee.fr/documents/index.php?mode=cview&cat_id=7&press_id=819.

30. Il s'agirait d'une "*laïcité de cohabitation*" selon l'expression de POULAT (E.), *Liberté laïcité. La guerre des deux France et le principe de modernité*, Paris, Cerf-Cujas, 1988.

31. Voir infra.

32. Cons. Const., 12 juillet 1979, décision n° 79-107 DC, *Loi relative à certains ouvrages reliant les voies nationales ou départementales*, (considérant 4), *Journal officiel* du 13 juillet 1979, Recueil, 31, http://www.conseil-constitutionnel.fr.

33. Départements et Territoires d'Outre-mer.

implique la non-confessionnalité de l'État, incompétent pour définir le contenu des croyances ou s'immiscer dans l'organisation interne des cultes mais parfaitement habilité, dans l'intérêt de l'organisation sociale, à réglementer l'activité religieuse dans la mesure où l'ordre public le requiert, à travers par exemple la police des cultes. Cette neutralité s'applique aux services publics, à leurs agents, ainsi qu'à l'enseignement public. En effet, le Conseil constitutionnel a dégagé le principe de neutralité du service public[34] qui interdit que ce dernier soit assuré de façon différenciée en tenant compte des convictions politiques ou religieuses, tant du personnel de l'administration que des usagers.

IV. CONTEXTE LÉGAL

Comme pour toutes les libertés fondamentales, le législateur intervient pour préciser le contenu et la portée des principes constitutionnels en matière de religion, fixer le cadre de l'exercice de la liberté du culte et déterminer les limites à la liberté de religion nécessaires dans une société démocratique. Ces lois sont adoptées dans le respect des traités internationaux pertinents[35] en vertu de leur supra-légalité prescrite par l'article 55 de la Constitution du 4 octobre 1958[36]. En outre le législateur français, conscient des implications de l'adhésion de la France au Conseil de l'Europe et, dans une moindre mesure à l'Union européenne, tirera les conséquences d'une décision de condamnation prise par la Cour européenne des droits de l'homme (CEDH)- sur le fondement de l'article 9 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales[37] (CESDH) relatif aux libertés de pensée, de conscience et de religion- ou, à la marge, par la Cour de Justice de l'Union européenne (UE), sur le fondement de l'article 10 de la Charte des droits fondamentaux de l'UE[38] devenue contraignante depuis l'entrée en vigueur du traité de Lisbonne[39].

D'ailleurs, examinant la question de la conformité du principe de laïcité tel qu'il prévaut en France à la liberté de religion telle que consacrée à l'article 9 de la Convention. La Cour a estimé que la liberté de religion n'était pas absolue et qu'elle pouvait être limitée. L'alinéa 2 de l'article 9 dispose, en effet : "*la liberté de manifester sa religion ou ses convictions ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, constituent des mesures nécessaires, dans une société démocratique, à la sécurité publique, à la protection de l'ordre, de la santé ou de la morale publiques, ou à la protection des droits et libertés d'autrui*"[40].

A. *S'agissant des lois spécifiques encadrant les principes constitutionnels et des jurisprudences importantes qui en donnent une interprétation particulière:*

La loi du 9 décembre 1905, relative à la séparation des Eglises et de l'État[41] représente le fondement législatif le plus important. Connue sous le nom de loi sur la laïcité, elle illustre à la fois les principes de liberté, d'égalité et de neutralité. En effet, l'article 1er de ce texte dispose que "*La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public*", reconnaissant le principe de liberté religieuse dans toutes ses dimensions. Quant à l'article 2 alinéa 1, qui prévoit que "*la République ne reconnaît, ne*

34. Cons. const., 86-217 DC, 18 septembre 1986, *Loi relative à la liberté de communication*, http://www.conseil-constitutionnel.fr.

35. Notamment le Pacte international des droits civils et politiques, de 1966, qui consacre son article 18 à notre problématique.

36. Aux termes de cette disposition, "*les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie*".

37. Adoptée, par le Conseil de l'Europe, le 4 novembre 1950.

38. Adoptée, en marge du Conseil européen de Nice, le 7 décembre 2000.

39. Le 1er décembre 2009.

40. L'arrêt CEDH, 4 décembre 2008, *Dogru contre France*, constitue une illustration récente.

41. *JO* du 11 décembre 1905, 7205, disponible sur le site

salarie ni ne subventionne aucun culte. En conséquence, à partir du 1er janvier qui suivra la promulgation de la présente loi, seront supprimées des budgets de l'Etat, des départements et des communes, toutes dépenses relatives à l'exercice des cultes", il porte application du principe de neutralité des autorités publiques à l'égard des croyances religieuses, sans distinction ce qui correspond au principe d'égalité des religions. Néanmoins, cette loi fixe les modalités pratiques de mise en œuvre de ces principes en organisant le transfert des établissements publics du culte des représentants légaux aux associations cultuelles, créées par la loi et qui en jouiront gratuitement[42], en réglant les questions de la propriété (publique) des édifices du culte[43] et les principes présidant à la police des cultes[44]… etc. Une loi complétant celle de 1905 sera votée le 13 avril 1908 autorisant l'État, les départements et les communes à engager les dépenses nécessaires à l'entretien et à la conservation des édifices du culte dont la propriété leur est reconnue par la loi.

En outre cette loi prévoit la constitution d'associations cultuelles destinées à l'exercice du culte. En effet, l'article 4 traduit juridiquement la mise en place de mécanismes garantissant la liberté religieuse en substituant les associations cultuelles de droit privé aux anciens établissements publics du culte[45], dans la mesure où le principe du libre exercice des cultes, prolongement de la liberté de conscience, met à la charge de l'État un certain nombre d'obligations positives. Même s'il ne subventionne pas les cultes, l'État doit fournir à chacun la possibilité de pratiquer sa religion (d'assister aux cérémonies de son culte, de s'instruire dans les croyances propres à la religion de son choix… etc). Le statut de ces nouvelles associations est défini par la loi du 1er juillet 1901, relative au contrat d'association. La jurisprudence du Conseil d'État s'inscrira dans une logique favorable à la tendance législative, en annulant la plupart des arrêtés municipaux d'interdiction d'exercice des manifestations religieuses extérieures au culte[46].

Enfin, l'article 31 de la loi de 1905 protège les individus, contre toute contrainte à l'exercice ou pas d'un culte alors que l'article 32 protège l'exercice du culte contre toute perturbation.

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42. Les articles 3 à 12 de la loi organisent la dévolution des biens mobiliers et immobiliers des anciens établissements publics cultuels : 1°/ aux associations cultuelles nouvelles, fondées selon les préconisations de la loi, pour les biens grevés de charges pieuses ; 2°/ à des services ou des établissements publics ou d'utilité publique, pour les biens grevés d'une affectation charitable. Quant aux biens provenant de l'État, des départements ou des communes, ils leur font retour. La loi décide la rédaction d'inventaires pour répartir les biens. Elle prévoit encore de laisser "gratuitement à la disposition des associations" nouvelles "les édifices [affectés par le Domaine public et] servant à l'exercice public du culte" (art. 13). Les autres édifices affectés (archevêchés, évêchés, séminaires, facultés de théologie protestante, presbytères) sont laissés transitoirement - durant 2 à 5 ans - à disposition gratuite des associations avant d'être repris par l'État, les départements ou les communes (art. 14). Pour l'Eglise catholique, ce transfert était déjà prévu par le concordat du 15 juillet 1801.

43. Articles 14 à 17.

44. Articles 25 à 36. Par exemple, l'article 27 indique que "*les cérémonies, processions et autres manifestations extérieures du culte sont réglées en conformité de l'article 97 du Code de l'administration communale. Les sonneries de cloches seront réglées par arrêté municipal, et en cas de désaccord entre le maire et l'association cultuelle, par arrêté préfectoral*» et l'article 28 interdit "*d'élever ou d'apposer aucun signe ou emblème religieux sur les monuments publics ou en quelque emplacement public que ce soit, à l'exception des édifices du culte, des terrains de sépulture dans les cimetières, des monuments funéraires, ainsi que des musées ou expositions. (...)*".

45. Pie X ayant refusé les associations cultuelles prévues par la loi de 1905, l'article 2 de la loi votée le 2 janvier 1907, concernant l'exercice public des cultes, prévoyait qu'à défaut d'associations cultuelles, les édifices affectés à l'exercice du culte continueront à être laissés à la disposition des fidèles et des ministres du culte pour la pratique de leur religion. Suite à des négociations ont été créées des associations diocésaines, tenant lieu d'associations cultuelles pour les catholiques, par les accords Briand-Cerretti de 1923-1924. Le Conseil d'Etat reconnut la conformité de ce statut avec les dispositions du droit français, notamment avec les lois de 1901 et de 1905 (avis du CE, 13 décembre 1923), et Pie XI autorisa leur constitution dans l'Encyclique *Magnan Gravissimamque*, du 18 janvier 1924. Voir FOYER (J.), "De la séparation aux associations diocésaines", in Imbert (J.) (Dir.), *Etats et religions, Revue des sciences morales et politiques*, 2, 1994, 147-166.

46. Pour une jurisprudence de principe, voir l'arrêt *Abbé Didier*, du 1er mai 1914, protégeant les manifestations traditionnelles du culte, qui confirme que le domaine public peut être mis à la disposition d'une Eglise pour la célébration d'un culte. CE, 1er mai 1914, n° 49842, publié au recueil Lebon, disponible sur le site www.legifrance.gouv.fr.

La loi sur la séparation des Églises et de l'État, votée le 9 décembre 1905 est étendue aux trois départements d'Outre-mer par la loi du 11 février 1911 dont l'article 2 précise que "*la République ne reconnaît, ne salarie, ne subventionne aucun culte*" et, qu'en conséquence, "*les établissements publics du culte sont supprimés*".

D'autres lois prennent en compte les implications du principe de neutralité sur le fonctionnement des services publics français, qui demeurent régis par le principe d'égalité, de valeur constitutionnelle. Ainsi, de manière générale, la fonction publique devant concilier liberté d'opinion et neutralité du service public, l'article 6 de la loi n° 83-634 du 13 juillet 1983, portant droits et obligations des fonctionnaires, admet la liberté d'opinion de ces derniers et exclut toute distinction entre eux selon leurs croyances religieuses. En pratique, le port de signes religieux par des agents publics a donné lieu à de récentes décisions des différentes juridictions administratives qui réaffirment une jurisprudence ancienne. Parce que le principe d'égalité des usagers[47] impose la neutralité du service public, afin de respecter les opinions et les croyances de ceux-ci, les administrations ne doivent ni heurter leurs convictions ni opérer des discriminations entre eux sur ce fondement. Le juge en infère une obligation de tout agent collaborant à un service public de se soumettre à un strict devoir de neutralité[48]. Concrètement, un agent public, en contact ou non avec le public, ne peut manifester ses convictions et opinions dans le cadre du service public, par exemple, par le port de signes religieux[49]. En dehors du service, les agents publics restent soumis à un devoir de réserve qui leur interdit de tenir des propos qui se peuvent avoir des répercussions sur leur service.

Ce devoir de neutralité des agents est susceptible de sanction comme l'explique le Conseil d'État: "*le fait pour un agent du service de l'enseignement public de manifester dans l'exercice de ses fonctions ses croyances religieuses, notamment en portant un signe destiné à marquer son appartenance à une religion, constitue un manquement à ses obligations*"[50]. Le non-renouvellement du contrat de travail d'un agent public, au motif implicite du port d'un vêtement manifestant de manière ostentatoire l'appartenance à une religion est justifié, et ce, quand bien même le comportement en cause ne serait pas délibérément provocant ou prosélyte[51]. Aussi, "*le fait pour un fonctionnaire de refuser d'obéir aux injonctions réitérées de sa hiérarchie et de transgresser délibérément, par le port d'un vêtement exprimant de manière ostentatoire dans le service sa dévotion à un culte particulier, le principe de laïcité de l'Etat, constitue une faute d'une particulière gravité*"[52].

Au-delà des agents publics, les mêmes principes s'imposent aux services publics en général. Ainsi, le principe de neutralité des services publics s'oppose à ce que soient apposés sur les édifices publics, et notamment sur les mairies, des signes symbolisant la revendication d'opinions politiques, religieuses ou philosophiques[53].

En ce qui concerne les usagers, l'expression de l'opinion religieuse est autorisée mais a été encadrée par le juge. Le Conseil d'État a adopté une position libérale, dans le domaine de l'enseignement, dont les grandes lignes semblent s'appliquer progressivement aux autres services publics. Dans un avis du 27 novembre 1989, relatif à la laïcité et

47. CE, 1951, *Société des Concerts du Conservatoire* ; DC 1973 décision du Conseil constitutionnel ; CE, 1984, *Commissaire de la République de l'Arriège*; CE, 1997, *Commune de Gennevilliers*, CE, 20 octobre 1995 *Kouchnir* (égalité accès à l'enseignement public : inscription en classe préparatoire) ; CE, 10 juillet 1995 *Contremoulin* (égalité de traitement : critère pour accorder une dérogation).

48. CE, 8 décembre 1948, *Demoiselle Pasteau*, Rec. 464 ; CE section, 3 mai 1950, *Demoiselle Jamet*, Rec. 247.

49. CE, 3 mai 2000, *Mademoiselle Marteaux*, n° 217017; TA Paris, 17 octobre 2002, *Ebrahimian*, n° 01-740/5; CAA Lyon, 27 novembre 2003, Nadjet Ben Abdallah, n° 03LY01392.

50. CE, 3 mai 2000, *Mademoiselle Marteaux*.

51. TA Paris, 17 octobre 2002, *Ebrahimian*.

52. TA Lyon, 8 juillet 2003, *Melle Nadjet Ben Abdallah*, n° 0201383-0 203 480; CE, sect., 15 octobre 2003, n° 244428 : l'utilisation par un agent public de la messagerie du service public au profit d'une association confessionnelle constitue un manquement au principe de laïcité et à l'obligation de neutralité, et justifie la sanction d'exclusion temporaire des fonctions pour une durée de six mois, dont trois mois avec sursis.

53. CE, 27 juillet 2005, *Commune de Sainte-Anne*, n°259806.

l'enseignement[54], le Conseil d'État a reconnu aux usagers du service public d'enseignement un droit d'exprimer et de manifester leurs croyances religieuses à l'intérieur des établissements scolaires, dans la limite d'autres impératifs, qu'il faut concilier. Par exemple, concernant les absences, le droit à bénéficier, individuellement mais systématiquement (pour toute la durée de l'année), d'une autorisation d'absence est reconnu aux élèves lorsque cette exception est nécessaire à l'exercice d'un culte mais demeure également compatible avec l'organisation des études et le respect de l'ordre public de l'établissement[55].La liberté d'exprimer ses convictions religieuses cède devant des actes de pression, provocations, prosélytisme[56] ou propagande des élèves, des comportements qui portent atteinte à la dignité, au pluralisme, à la liberté de l'élève ou des membres de la communauté éducative, à la santé[57] ou à la sécurité ; la perturbation du déroulement des activités d'enseignement[58], troubles apportés au fonctionnement normal du service[59].

Cet équilibre est appliqué avec pragmatisme, au-delà de la seule sphère de l'enseignement et la haute juridiction invite l'administration à porter une appréciation au cas par cas sur l'équilibre entre ces impératifs et la liberté de conscience des usagers en rejetant toutefois l'interdiction de principe de l'expression de croyances religieuses par les usagers[60]. La Charte de la laïcité dans les services publics[61], de Dominique de Villepin, signée le 13 avril 2007, reprend ces principes relatifs aux usagers et aux agents des services publics en prévoyant, en outre, que "*les usagers des services publics doivent s'abstenir de toute forme de prosélytisme*".

B. *Le contrôle de l'Etat sur les activités prosélytes (liberté de culte, liberté de diffusion et de distribution, etc.)*

Ce contrôle s'exerce par la voie de la "police des cultes", qui constitue un ensemble important dont les principales dispositions figurent dans la loi du 9 décembre 1905 sur la séparation des Eglises et de l'État (Loi de séparation). Il s'agit des articles 26 à 35 qui régissent, dans le cadre du principe de libre exercice des cultes, les réunions (l'article 26, par exemple, interdit les réunions politiques dans les lieux de culte), processions, cérémonies ou autres manifestations extérieures (alignement sur le droit commun des manifestations sur la voie publique), sonneries de cloches (article 27) et signes religieux dans l'espace public (article 28).

Ces dispositions, révélant l'absence de régime de police spéciale des cultes, restent parfaitement conformes à la liberté de religion, constitutionnellement consacrée. Afin de mettre en œuvre ces prescriptions, le ministre du culte dispose d'un pouvoir d'organisation, les pouvoirs de police du maire ont un caractère supplétif[62]. Les mesures de police sont prises par le Premier ministre, le Préfet ou le maire, autorités de police générale, aux niveaux national et local. Dans cette perspective, la finalité de la mesure résidant dans le maintien de l'ordre public, celle-ci devra viser exclusivement cet objet qui recouvre traditionnellement trois éléments : la sécurité, la tranquillité et la salubrité publiques. Par ailleurs, cette mesure, par définition attentatoire à la liberté de culte, impose à son auteur le strict respect du critère de nécessité. Enfin, l'exigence de proportionnalité de la mesure au trouble constaté est requise[63].

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54. Disponible sur le site de l'Assemblée nationale : www.assemblee-nationale.fr.
55. CE Ass. 14 avril 1995, *Koen et Consistoire central des israélites de France*.
56. CE, 27 novembre 1996, *Ligue islamique du Nord*.
57. CE, 20 octobre 1999, *Ministre de l'éducation nationale contre époux Aït Ahmad*.
58. CE, 10 mars 1995, *Epoux Aoukili*.
59. CE, 2 novembre 1992, *Kherouaa*.
60. CE, 14 mars 1994, Yilmaz.
61. Texte disponible sur: http://www.fonction-publique.gouv.fr/IMG/Circulaire_PM_5209_20070413.pdf.
62. L'article L. 2212-2, 3°, du Code général des collectivités territoriales lui confient cependant la responsabilité d'assurer l'ordre dans les Eglises.
63. Voir sur ce thème TAWIL (E.), "La police administrative des cultes en droit français", *Revue de la recherche juridique-Droit prospectif*, 2004, 19-24. Pour la jurisprudence, CE, 5 fév. 1909, *Abbé Olivier*, *Rec.*,

L'article 433-21 du Code pénal[64], aux termes duquel "*Tout ministre d'un culte qui procédera, de manière habituelle, aux cérémonies religieuses de mariage sans que ne lui ait été justifié l'acte de mariage préalablement reçu par les officiers de l'état civil sera puni de six mois d'emprisonnement et de 7500 euros d'amende*", règle la question des mariages. En matière pénale, plusieurs autres délits liés à la pratique des cultes sont réprimés comme l'excision, qualifiée de "*violence volontaire ayant entraîné la mutilation*"[65], le délit d'entrave à l'interruption volontaire de grossesse … etc.

Le problème des inhumations est envisagé par l'article L2213-7 du Code général des collectivités territoriales[66], qui prévoit que "*Le maire ou, à défaut, le représentant de l'Etat dans le département pourvoit d'urgence à ce que toute personne décédée soit ensevelie et inhumée décemment sans distinction de culte ni de croyance*" ; celui de l'abattage rituel relève des articles R214-70 et suivants du Code rural[67], l'article R214-73 explique notamment que "*Il est interdit à toute personne de procéder ou de faire procéder à un abattage rituel en dehors d'un abattoir. La mise à disposition de locaux, terrains, installations, matériel ou équipement en vue de procéder à un abattage rituel en dehors d'un abattoir est interdite*".

Appliqué de manière libérale et pragmatique par le juge administratif, ces textes se révèlent peu contraignants.

La problématique de la prévention contre les activités sectaires se retrouve dans la politique administrative française. Outre la loi n° 2001-504 du 12 juin 2001, relative à la répression des mouvements sectaires, de nombreux textes officiels mais sans valeur juridiques s'intéressent à ce sujet[68].

En ce qui concerne la diffusion des convictions religieuses, la question a été réglée pour le secteur audiovisuel, l'entière liberté de la presse présidant au secteur écrit ne s'opposant depuis la loi du 29 juillet 1881 à l'expression d'aucun courant d'idées et n'excluant aucune Eglise. Il existe, en effet, en France plusieurs journaux confessionnels[69] et ceux qui ne le sont pas gèrent librement l'espace réservé aux questions religieuses, ce qui garantirait un pluralisme effectif des opinions sans les contraintes économiques qui pèsent aujourd'hui sur la presse écrite. La solution pour préserver le pluralisme des courants d'idée et d'expression qui représente un objectif à valeur constitutionnelle[70], dans les médias audiovisuels, tout en sauvegardant l'impérative neutralité du service public[71], réside dans l'article 13 de la loi du 30 septembre 1986 indique que "*Le Conseil supérieur de l'audiovisuel*[72] *assure le respect de l'expression pluraliste des courants de pensée et d'opinion dans les programmes des services de radio et de télévision, en particulier pour les émissions d'information politique et générale*"[73]. L'article 56, plus

186 ; CE 25 janv. 1933, *Abbé Coiffier*, *Rec*., 100 ; CE 2 juil. 1947, *Sieurs Guiller*, *Rec*., 293.

64. Disponible sur le site http://www.legifrance.gouv.fr.

65. Cour d'Assises de Paris, 18 février 1999.

66. *Eod. Loc*.

67. *Eod. Loc*.

68. Voir le rapport interministériel de 1982, le rapport de police nationale de 1984, les deux rapports parlementaires : Rapport Vivien rendu public en 1985 (Vivien (A.), *Les sectes en France, Expressions de la liberté morales ou facteurs de manipulations ? Rapport au Premier ministre*, février 1983, La Documentation française, 1985, http://www.ladocumentationfrançaise.fr et Rapport Gest-Guyard en 1996 (Gest (A.), Guyard (J.), *Les sectes en France*, Assemblée nationale, Rapport n° 2468, rendu public le 10 janvier 1996).

69. *La croix, La Vie, Témoignage Chrétien, Le Monde musulman, Hawa magazine….* Sur ce sujet, voir Riutort (), "L'information en matière de religion. Une spécialisation moralement fondée ?", Lavoisier, *Réseaux*, 2002/1 - n° 111, 132-161,http://www.lccnrs.fr/pdf/Riut-02a.pdf.

70. *O Cit*., Cons. const., 86-217 DC, 18 septembre 1986, *Loi relative à la liberté de communication*, http://www.conseil-constitutionnel.fr.

71. Dans sa décision n° 96-380 DC du 23 juillet 1996, concernant l'entreprise France Telecom, le Conseil constitutionnel a d'ailleurs souligné que la neutralité constituait "*un des principes constitutionnels régissant le service public*".

72. Autorité administrative indépendante chargée d'assurer l'indépendance du service public, d'une part, et la surveillance du secteur privé d'autre part.

73. Loi n°86-1067 du 30 septembre 1986 relative à la liberté de communication (Loi Léotard), http://www.legifrance.gouv.fr.

explicite, enjoint à France Télévision de "*programmer le dimanche matin des émissions à caractère religieux consacrées aux principaux cultes pratiqués en France. Ces émissions sont réalisées sous la responsabilité des représentants de ces cultes et se présentent sous la forme de retransmissions de cérémonies cultuelles ou de commentaires religieux. Les frais de réalisation sont pris en charge par la société dans la limite d'un plafond fixé par les dispositions annuelles du cahier des charges*".Cette obligation de pluralisme interne permet de prendre en compte les opinions religieuses, ce qui correspond à une garantie du pluralisme religieux par le service public. Les modalités pratiques sont précisées dans les cahiers des charges, fixés par décret, des différentes chaînes publiques[74]. L'expression des convictions philosophiques non religieuses - telle la libre pensée - est assurée par Radio France au titre du pluralisme des courants de pensée. Par ailleurs, le décret n°92-280 du 27 mars 1992 modifié fixe les principes de diffusion de la publicité lors des émissions religieuses.

C. *Sur l'existence de lois qui protègent la coexistence pacifique et le respect entre communautés?*

La loi de 1905, par sa vocation à définir la place des activités religieuses dans la société française, dans le respect du principe constitutionnel d'égalité des religions, devrait suffire, dans un État démocratique, à protéger la coexistence pacifique et le respect entre les diverses communautés religieuses. Néanmoins, une réponse peut être déduite de la législation réprimant les incitations à la haine et les crimes inspirés par la haine ou, plus symboliquement, de la loi portant création de la Haute autorité pour la lutte contre les discriminations et pour l'égalité[75].

D. *Sur le paysage qui en résulte par rapport aux principes constitutionnels?*

Le droit français s'efforce désormais de concilier neutralité de l'État dans une société pluraliste et libre exercice effectif des différentes pratiques cultuelles, dans le respect de l'ordre public. Une tâche difficile au vu des problématiques complexes existant et de la diversité du fait religieux. On constate, que le lien intrinsèque entre les principes constitutionnels de liberté, d'égalité et de neutralité se retrouve au niveau législatif et que, dans ce dernier cadre, la jurisprudence a souvent précédé les textes qui, en général, l'ont entérinée.

V. POLITIQUE PUBLIQUE

A. *Sur l'existence de corps administratifs spécifiques chargés des questions religieuses et des communautés religieuses et leur incidence sur la liberté religieuse et l'ambiance sociale*

Au sein du ministère de l'Intérieur, le *bureau central des cultes* (BCC), créé par un décret du 17 août 1911, succède à la *Direction générale des cultes*, dont la séparation des Églises et de l'État en 1905 avait ôté la raison d'être. Un bureau spécifique dépendant du BCC traite de la gestion directe des cultes en Alsace-Moselle. Le BCC contrôle l'observation des principes laïques contenus dans la loi de 1905 (annulation de subventions illégales...) et la police administrative des cultes (ordre public pour les processions, etc.). Il assure les relations entre l'État et les associations cultuelles établies, de même qu'il a contribué à la mise en place des instances du *Conseil français du culte musulman* (CFCM)[76].

74. Articles 18 et 19, *JO* du 1er septembre 1987, 10038 et 10045.
75. Loi n°2004-1486 du 30 décembre 2004 portant création de la HALDE, http//www.legifrance.gouv.fr.
76. Conte (C.), "Qu'est-ce que le Bureau central des cultes ?", *Les idées en mouvement*, no 158, avril 2008.

Ce dernier est une association régie par la loi de 1901 et destinée à représenter les musulmans de France. Créé en 2003[77], il est officiellement créé et soutenue par Nicolas Sarkozy, alors ministre de l'Intérieur. Le CFCM intervient dans les relations avec le pouvoir politique français, dans la construction des mosquées, dans le marché des aliments halal, dans la formation de certains imams et dans le développement de représentations musulmanes dans les prisons et dans l'armée française. Il fixe également les dates du mois du ramadan en France et, à travers le *Conseil européen de la recherche et de la fatwa*, décrète des fatwas ayant pour vocation d'être appliquées en France. Le conseil d'administration est élu pour trois ans par des délégués des mosquées dont le nombre est déterminé par la surface des lieux de culte. Le conseil élit en son sein le bureau exécutif qui élit à son tour le président du CFCM pour la durée du mandat. Les Conseils régionaux du culte musulman (CRCM) sont élus en même temps. Sept tendances composent le conseil :

- Le Comité de coordination des musulmans turcs de France (CCMTF) ;
- La Fédération française des associations islamiques d'Afrique, des Comores et des Antilles (FFAIACA) ;
- La Fédération “Invitation et mission pour la foi et la pratique” ;
- La Fédération nationale des musulmans de France (FNMF) ;
- La Grande Mosquée de Paris (GMP) ;
- Le Rassemblement des musulmans de France (RMF).
- L'Union des organisations islamiques de France (UOIF) ;

L’Union Bouddhiste de France (UBF), fondée en 1986, est une fédération à but non lucratif, apolitique. Elle assure les liens entre les Associations Bouddhistes et l’ensemble des Pouvoirs Publics. A ce titre, elle regroupe des associations et congrégations bouddhistes régies par les lois du 1er juillet 1901 et du 9 décembre 1905, et leurs décrets d’application, elle est un interlocuteur représentatif auprès des pouvoirs publics, des communautés religieuses, des instances humanitaires et universitaires et d’une façon générale, auprès de tout organisme national ou international légalement constitué, elle œuvre à présenter le bouddhisme comme un des grands courants spirituels de l’humanité à travers la diversité de ses traditions, elle développe les échanges entre la pensée bouddhique et la modernité, elle participe à l’intégration du bouddhisme dans la société laïque française, elle renforce les liens entre les associations bouddhiques de France, elle est un centre d’information sur le bouddhisme et elle protège et défend les valeurs du bouddhisme.

A ces institutions, il faut ajouter *la Conférence des évêques de France*, *la Fédération protestante de France*, le *Comité inter-épiscopal orthodoxe en France* et le *Conseil représentatif des institutions juives de France*. L’ensemble de ces autorités religieuses est sollicité pour avis, lorsqu’est envisagée une réforme dans un domaine où est engagée la liberté de conscience ou, plus généralement, une question d’éthique, soit de manière informelle, soit au travers le *Comité national d’éthique*. Malgré l’absence d’institutionnalisation, ces organes acceptés tant par les fidèles intéressés que par l’État demeurent des interlocuteurs privilégiés pour les pouvoirs publics.

Ce qui pose un problème par rapport au principe d’égalité des confessions face à l’émergence de nouveaux mouvements religieux (évangélistes, pentecôtistes… etc). A terme, l’État devra choisir entre renoncer à prévoir une représentation religieuse dans certaines de ses commissions et n’envisager que des auditions ou un système d’*amicus curiae* devant ces commissions pour toutes les croyances religieuses intéressées aux débats.

77. Le CFCM est créé le 28 mai 2003 par publication au *Journal officiel de la République française* le 7 juin 2003.

A. *Liens Officiels: Sur l'existence de relations bilatérales, formelles ou officielles, entre l'Etat et les communautés religieuses et leur niveau de reconnaissance*

Le régime juridique français instaure une réelle séparation entre les confessions religieuses et l'État. Celui-ci ne reconnaît donc aucun culte. Par conséquent, les groupements confessionnels, les communautés religieuses, n'y possèdent pas, en principe, de statut spécifique. La situation de l'Eglise catholique reste pourtant particulière. En effet, malgré le régime de séparation, le concordat de 1801 n'a jamais été abrogé et continue d'être appliqué en Alsace-Moselle. Cette situation pose la question du statut et du régime juridique du concordat en France. La particularité du contenu des accords concordataires, portant d'une manière générale sur toutes les matières intéressant l'Église dans son rapport avec l'État, apparaît comme directement liée au caractère spécifique de la nature du Saint-Siège, entendu ici comme gouvernement central de l'Église catholique. En effet, la qualification juridique d'un accord ne découle pas exclusivement de son contenu, mais surtout de la qualité du sujet qui contracte. Lors de négociations bilatérales avec un État, le Saint-Siège se présente comme l'institution souveraine et suprême de l'Église catholique, avec une personnalité internationale. Ainsi, lors des négociations concordataires, les deux sujets contractants, à savoir le Saint-Siège et l'État, se considèrent chacun comme des sujets autonomes et coordonnés d'un même système : l'ordre juridique international. Sur la base du concordat, véritable contrat synallagmatique, le Saint-Siège et l'État s'obligent l'un vis-à-vis de l'autre à tenir une conduite juridique, qu'elle soit positive ou négative. Cet accord concordataire, dans lequel sont inscrits les engagements réciproques des deux parties, possèdent souvent la forme substantielle d'un traité[78]. Mais la question se pose de savoir si l'institution du concordat est ou non "*régi par le droit international*". Si depuis l'entrée en vigueur en 1980 de la convention de Vienne sur le droit des traités, signée et ratifiée par le Saint-Siège, la situation a été clarifiée, ce n'est pas le cas en France, l'État ne l'ayant pas ratifié. Plusieurs questions restent en suspens. Ainsi en est-il de l'application de l'article 55 de la Constitution française, de la compatibilité du concordat avec ledit article, ou encore les conditions de modification ou de dénonciation du concordat. En toute hypothèse, on peut affirmer, pour les raisons indiquées plus haut, que ces trois départements - *Haut-Rhin, Bas-Rhin et Moselle* - connaissent un régime concordataire (légal et international), avec une dimension légale construite sur la base du concordat et des articles organiques napoléoniens, progressivement modifiée au cours du XIXe siècle, au gré des réformes gouvernementales françaises successives, puis allemandes. Le régime en vigueur en 1918, lors du retour de ces territoires à la France, a été maintenu, tout en subissant depuis quelques modifications. Si dans ces trois départements sont reconnus les confessions catholique, protestantes (Eglise Réformée et Eglise de la Confession d'Augsbourg) et israélite, des particularités existent également dans certains territoires d'Outre-mer[79].

VI. L'ÉTAT ET L'AUTONOMIE DES RELIGIONS

A. *Sur l'intervention de l'État dans la vie des organisations religieuses : la doctrine, la sélection du personnel, les affaires financières de la communauté?*

La liberté de s'organiser au sein des Eglises relève de ce que la doctrine qualifie généralement de principe d'autodétermination. Cette dimension essentielle de la liberté collective de religion signifie, comme le confirme la CESDH, l'interdiction pour les États de dire ce que sont les croyances religieuses légitimes et ce que sont les croyances religieuses illégitimes. Elle implique le droit de constituer une organisation religieuse, celui de définir les règles internes de cette organisation qui semblent les plus appropriées à ses finalités et celui de pouvoir doter cette organisation des moyens financiers et

78. Concernant la forme, ces accords sont soit en forme solennelle soit en forme simplifiée.
79. Ainsi, à Wallis et Futuna, l'enseignement est confié à une mission catholique.

patrimoniaux nécessaires. La France n'impose donc pas de cadre juridique prédéfini au culte et l'État ne saurait y inférer dans le fonctionnement et les orientations internes des institutions religieuses[80], dès lors qu'elles ne portent pas atteinte à l'ordre public.

Par conséquent, les pouvoirs publics ne peuvent pas s'immiscer dans la doctrine des Eglises et sont incompétents pour reconnaître la qualité de ministre d'un culte à un individu. La jurisprudence de la Cour de cassation et du Conseil d'État établit rapidement, après l'adoption de la loi de 1905, que le ministre des cultes légalement en fonction est celui reconnu comme tel par la hiérarchie religieuse ; il jouit d'un statut privé. Cette situation est bien sûre différente pour les régions où le concordat est en vigueur et où l'implication des autorités publiques est plus évidente. Dans le cas des départements du Rhin et de la Moselle (Alsace-Moselle) qui n'ont pas, suite à la désannexion en 1918, intégré la "séparation". La loi du 18 germinal an X (Concordat et articles organiques du culte catholique et des cultes protestants), l'ordonnance du 25 mai 1844 (culte juif) ainsi que les textes s'appliquant aux congrégations ont été maintenus par l'article 7 de la loi du 1er juin 1924. Les quatre cultes reconnus (diocèses catholiques de Strasbourg et de Metz, Eglise de Confession d'Augsbourg d'Alsace et de Lorraine, Eglise Réformée d'Alsace et de Lorraine, consistoires israélites de Strasbourg, de Colmar et de Metz) sont des institutions privées et autonomes exerçant une activité d'intérêt général. Ils sont organisés dans le cadre du droit public et financés par l'État et les communes (Code général des collectivités territoriales, articles L2541-14 et L2543-3). Les pouvoirs publics sont tenus d'organiser un enseignement religieux confessionnel intégré dans les programmes des écoles et des établissements d'enseignement secondaire et professionnel.

Les groupements religieux non reconnus, qualifiés de cultes par l'administration ou le juge, sont organisés dans le cadre du droit privé. Ils disposent d'un cadre juridique spécifique, dont les éléments pivots sont constitués par l'association inscrite de droit local et la possibilité pour les collectivités territoriales de subventionner volontairement les institutions et les activités des cultes non reconnus en l'absence d'interdiction légale.

Les Territoires d'Outre-Mer et un Département d'Outre-Mer relèvent en matière d'organisation cultuelle de droits locaux. Le droit local des cultes du département de la Guyane, découlant d'une ordonnance du 27 août 1828, soutient et organise le seul culte catholique alors que les confessions religieuses des Territoires d'Outre-Mer, de Polynésie française (Tahiti et Iles Marquises), de Wallis-et-Futuna et de Nouvelle-Calédonie s'organisent dans le cadre d'un décret-loi du 16 janvier 1939 (décret Mandel). Ce texte s'applique à des "missions religieuses" implantées dans des "territories" non placés sous le régime de séparation."

B. *Les communautés sont-elles légalement libres de s'organiser et agir librement dans la sphère publique?*

Dans la sphère publique, les religions doivent respecter l'ordre public et les autres libertés fondamentales. Les pouvoirs publics devant rester neutres à l'égard de leurs spécificités sans pour autant se montrer indifférents à ce fait majeur de société, certains mécanismes existent pour permettre une réelle effectivité de la liberté religieuse, que l'État est obligé de garantir. Ceci passe par l'intervention des Eglises notamment dans les prisons ou les hôpitaux publics, à travers l'institution de l'aumônerie des services publics, sur le fondement de l'article 2 de la loi sur la séparation des Eglises et de l'État.

VII. RELIGION ET AUTONOMIE DE L'ETAT

Aucune religion n'a de rôle spécifique dans le gouvernement du pays ni aucun moyen de contrôler d'autres groupes religieux de quelque manière que ce soit. L'Eglise catholique conserve encore un statut de 'religion publique' dans le cas de funérailles

80. Voir, par exemple, CE, 27 mai 1994, *Bourges*, Rec. CE, 263, à propos de l'absence de contrôle public sur la révocation d'un aumônier militaire par les autorités religieuses.

nationales de grands hommes politiques. Dernièrement le Président de la Cour des Comptes, Philippe Seguin, homme politique de premier plan, a reçu l'hommage funéraire de la République, au sein de l'Eglise des Invalides, avec une cérémonie religieuse catholique présidée par l'archevêque de Paris et en présence de tout le gouvernement. De même, encore plus récemment, la tempête qui a poussé l'océan à l'intérieur des terres en Vendée et provoqué une cinquantaine de morts a été suivie d'une célébration catholique "publique" et l'utilisation du toscin dans tout le département de Vendée au moment de la célébration (mars 2010)

Sont également pratiquées des cérémonies publiques œcuméniques ou interreligieuses comme les célébrations religieuses du souvenir du Débarquement Allié en Normandie, par exemple qui sont œcuméniques, ainsi que les cérémonies judéo-chrétiennes qui peuvent suivre les manifestations de commémoration de la Déportation et de l'Extermination des Juifs de France pendant la seconde guerre mondiale. Les célébrations publiques musulmanes restent encore très rares, mais elles sont amenées à se multiplier.

VIII. QUESTIONS FINANCIÈRES ET FISCALES

A. *Le contrôle de l'Etat sur les finances et les biens des communautés religieuse*

Les finances et les biens des communautés religieuses ne suivent pas le même régime juridique selon la forme d'organisation adoptée. En effet, la loi de séparation, instaurant les associations cultuelles, supprime les établissements publics du culte (article 2) et attribue leurs biens aux associations à but cultuel nouvellement créés (article 3). Cette réforme vise les biens mobiliers, immobiliers des menses, fabriques, consistoires et autres établissements publics du culte (article 4). Un décret du 16 mars 1906 visait à mettre en œuvre l'attribution des biens des établissements ecclésiastiques supprimés et à permettre la constitution et le fonctionnement des associations cultuelles. Les biens vacants non réclamés par les associations constituées, conformément à la loi, sont attribués à des établissements communaux d'assistance et de bienfaisance.

L'État, les départements ou les communes demeurent propriétaires des édifices du culte affectés à un culte avant 1801, Ces édifices appartiennent aux collectivités publiques qui en assurent les grosses réparations[81]. Ils sont remis à la disposition des fidèles et des ministres du culte auquel ils sont affectés. C'est le cas des édifices concernant le culte catholique.

L'administration, propriétaire, ne peut entraver l'usage conforme à l'affectation, par exemple en fermant l'église, ou en prescrivant des cérémonies civiles[82]. Elle ne peut pas non plus organiser des visites d'objets mobiliers classés contenus dans l'église sans avoir au préalable recueilli l'accord du desservant "*chargé de régler l'usage du bâtiment de manière à assurer aux fidèles la pratique de leur religion*"[83].

Les ressources des associations cultuelles (celles créées par la loi de 1905 et les associations cultuelles catholiques ou diocésaines) comprennent les cotisations des membres, les quêtes et collectes ainsi que les rétributions pour les services religieux. Aussi, une association cultuelle peut-elle recueillir, sous forme de dons (manuels ou notariés) ou de legs, des biens de toutes sortes : biens mobiliers, immeubles, actions, parts de sociétés civiles… sous réserve du respect du principe de spécialité. Ainsi, une association diocésaine ne peut conserver les biens qui ne sont pas nécessaires au culte. Le cas échéant, elle doit les céder.

Cette faculté pour les associations cultuelles, qui ne bénéficient pas de la reconnaissance d'utilité publique, découle de l'article 1er de la loi du 25 décembre 1942. Toutefois, l'acceptation de ces dons et legs est subordonnée à une autorisation

81. CE, 28 oct. 1945, *Chanoine Vaucanu*, S. 1946, 3, 34.
82. CE, 8 fév. 1908, *Abbé Déliard*, S. 1908, 3, 52. et CE, 9 janv. 1931, *Cadel*, S. 1931, 3, 41.
83. CE, 4 nov. 1994, *Abbé Chalumey*, *J.C.* 1994, IV, 2643.

administrative accordée par arrêté préfectoral. Ces dons et legs sont exemptés de droits de mutation, en vertu de l'article 795-10° du Code général des impôts.

L'article 6 de la loi de 1901, qui fixe le régime juridique de ces associations, limite leurs possibilités d'acquisition à titre onéreux aux locaux destinés à l'administration et à la réunion des membres et aux immeubles strictement nécessaires à l'accomplissement de leur activité religieuse (exercice du culte, enseignement religieux).

Ce patrimoine cultuel, déjà soumis à une tutelle administrative, n'échappe pas à l'imposition. Ainsi en est-il les lieux de cultes, occupés parallèlement à titre privatif, qui sont soumis à la taxe d'habitation[84] ; la vente par une association cultuelle de livres ou tout autre document destiné à propager sa doctrine et dont elle a tiré le plus gros de ses ressources, qui est soumise à la taxe professionnelle[85]… etc.

B. *L'aide de l'Etat (fiscale, sociale, scolaire, caritative-fiscale directe par subventions)*

L'article 2 de la loi de 1905 interdit toute subvention directe des cultes sur les fonds publics. Il n'existe donc en France, aucun financement direct des cultes par l'État, sous peine d'annulation d'une telle décision émanant d'une collectivité publique par le juge administratif[86]. Les subventions, même indirectes sont, par principe, interdites. Ainsi, l'aide accordée par une municipalité à un jeune homme afin de poursuive ses études au séminaire est rejetée[87]. Pourtant, plusieurs procédés impliquent une aide financière pour les religions :

- Les écoles privées sous contrat, qu'elles soient ou non confessionnelles, – en grande majorité catholiques – sont financées par l'État selon des modalités qui les rapprochent de la situation des écoles publiques.
- Les bâtiments affectés à l'exercice d'un culte, construits avant 1905, et qui n'ont pas été réclamés par une association cultuelle demeurent propriété de l'État, des départements ou des communes, qui assurent les grosses réparations.
- Aides indirectes : personnel, ministre d'un culte ou les biens immobiliers, garantie de l'État à des emprunts émis par des associations cultuelles ou diocésaines pour la construction de nouveaux édifices du culte.
- En matière fiscale, outre une législation très avantageuse, la loi du 23 juillet 1987 ajoute un article 238 bis au code général des impôts, créant une déduction fiscale pour les dons consentis à diverses catégories d'associations, parmi lesquelles les associations cultuelles dont les activités sont par définition liées à l'exercice d'un culte ou à l'entretien de ses ministres.

Précisons, sur ce dernier point, que les associations cultuelles et culturelles ne ressortent pas de la même loi et n'obéissent donc pas au même régime financier et fiscal :

- Une loi culturelle (loi de 1901) peut obtenir des subventions sur fonds publics, mais les dons des particuliers ne bénéficient pas d'un régime fiscal particulièrement avantageux, sauf si l'association est déclarée d'utilité publique.

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84. Articles 1407-1414 du CGI.

85. Articles 1447 à 1518 B du CGI.

86. CE, 9 nov. 1992, *Commune de Saint Louis contre Association Siva*, D., 1992, IR, 252. Un problème se pose concernant les religions d'implantation récente comme l'islam eu égard à la conciliation du principe constitutionnel d'égalité des religions et du principe de non financement des cultes. De fait, en refusant de financer la construction de lieux de culte pour ces croyances (au nom de la laïcité de l'Etat) tout en finançant au titre du patrimoine culturel l'entretien de lieux fréquentés par d'autres croyants (catholiques, protestants, juifs), les pouvoirs publics risquent l'accusation de discrimination. Or, à défaut d'aider toute construction de lieux de cultes demandée par des adeptes de n'importe quelle religion ou de vendre purement et simplement les lieux de culte qu'ils entretiennent actuellement au titre du patrimoine culturel, ou de faire acquitter par les catholiques, les protestants ou les juifs une redevance d'utilisation des lieux de culte qui appartiennent à l'Etat, les collectivités locales recourent à des artifices juridiques pour aider au financement de la construction de lieux de culte pour les musulmans.

87. CE, 13 Mars 1953, *Ville de Saumur*, Rec.131.

- Une association cultuelle (loi de 1905) ne peut pas recevoir de subventions sur fonds publics, mais les dons des particuliers bénéficient d'un régime fiscal privilégié.

Mais le droit français offre une double possibilité pour un groupe religieux, très peu usitée: Créer d'une part une association cultuelle gérant le lieu de culte proprement dit et en outre une association de la loi de 1901, administrant les bâtiments annexes et les activités qui s'y déroulent.

Aussi, la loi du 1er août 2003 sur le mécénat, compte parmi les bénéficiaires de la générosité publique, notamment les associations cultuelles et de bienfaisance autorisées à recevoir des dons et legs ainsi que les établissements publics des cultes reconnus d'Alsace-Moselle.

IX. L'Effet Légal des Actes Religieux

En principe, les actes religieux découlant du respect des préceptes, rites et règles de vie prescrits par le culte, ne constituent des obligations contraignantes que d'un point de vue strictement religieux. En droit positif, ils ne représentent que des faits religieux. Ces actes bénéficient d'une "présomption de licéité" puisque les décisions des autorités religieuses échappent au contrôle du juge. Certains de ces actes peuvent produire quelques effets juridiques. Par exemple, le mariage (la polygamie est en France interdite), l'adoption (et la liberté d'éduquer ses enfants dans la religion de son choix), le divorce (son refus pour des motifs de conviction religieuse) entraînent une imprégnation religieuse du droit de la famille. Pour ce qui est du droit des contrats, rien ne s'oppose à l'introduction de clauses religieuses étant donné qu'en la matière c'est l'autonomie de la volonté qui prévaut…certaines prescriptions religieuse imposent des aménagements légaux particulier comme en matière d'inhumations ou d'abattages rituels.

X. Education Religieuse de la Jeunesse

Plus spécifiquement, dans les divers domaines de l'action publique, le législateur est intervenu pour consacrer la dimension laïque du fonctionnement des services publics. Ainsi, en matière d'enseignement, le principe de neutralité met à la charge de ce dernier la protection de la liberté des cultes et la préservation de son libre exercice. C'est pourquoi, l'article 2 de la loi du 28 mars 1882[88], sur l'instruction publique obligatoire[89], prévoit que les écoles primaires vaquent un jour par semaine afin de permettre aux parents qui le souhaitent de donner une instruction religieuse à leurs enfants. Néanmoins, le caractère laïque de l'enseignement est affirmé, notamment par la loi du 30 octobre 1886, sur l'organisation de l'enseignement primaire[90], qui confie l'enseignement primaire public à un personnel exclusivement laïque; les écoles privées confessionnelles reconnues et agréées par l'éducation nationale se voyant exemptées de cette prescription. Pour ces dernières, il faut se reporter à l'article 1er alinéa 3 de la loi du 31 décembre 1959, sur les rapports entre l'État et les établissements d'enseignement privés[91], qui indique que "*Dans les établissements privés (...) [sous contrats] (...), l'enseignement placé sous le régime du contrat est soumis au contrôle de l'État. L'établissement, tout en conservant son caractère propre, doit donner cet enseignement dans le respect total de la liberté de conscience. Tous les enfants, sans distinction d'origine, d'opinions ou de croyances, y ont accès*". Par ailleurs, la loi du 26 janvier 1984, sur l'enseignement supérieur[92] précise que "*Le service public de l'enseignement supérieur est laïc et indépendant de toute emprise politique, économique, religieuse ou idéologique ; il tend à l'objectivité du savoir ; il respecte la*

88. Correspondant à l'article L 141-3 du Code de l'éducation.
89. Loi Jules Ferry.
90. Loi Goblet, articles 2 et 17.
91. Loi Debré.
92. Loi Savary.

diversité des opinions. Il doit garantir à l'enseignement et à la recherche leurs possibilités de libre développement scientifique, créateur et critique".

Aussi existe-t-il de nombreuses circulaires ministérielles en ce domaine. Des circulaires Jean Zay, 1936-1937, qui interdisent toute forme de propagande, politique ou confessionnelle, à l'école, et tout prosélytisme à la circulaire Bayrou, du 20 septembre 1994, recommandant, déjà, l'interdiction à l'école de tous les "*signes ostentatoires, qui constituent en eux-mêmes des éléments de prosélytisme ou de discrimination*". Il s'agit d'instruments dont la force juridique et l'efficacité sont critiquées.

Le législateur est récemment venu renforcer l'application du principe de laïcité dans les écoles, collèges et lycées publics. Suite au rapport de la commission de réflexion sur l'application du principe de laïcité de la République, présidée par Bernard Stasi, rendu public le 11 décembre 2003, a été adoptée la loi n° 2004-228 du 15 mars 2004, encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics[93], qui ajoute au Code de l'éducation un article L. 141-5 "*Dans les écoles, les collèges et les lycées publics, le port de signes religieux ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit. Le règlement intérieur rappelle que la mise en œuvre d'une procédure disciplinaire est précédée d'un dialogue avec l'élève*". La circulaire ministérielle de François Fillon, du 18 mai 2004, précise les modalités de mise en œuvre de cette loi.

XI. Symboles Religieux sur les Places Publiques

L'article 28 de la loi de Séparation des Eglises et de l'État interdit la présence du moindre signe religieux sur et dans les bâtiments publics.[94] En même temps cet article reconnaît le droit à l'existence de tout signe sur des bâtiments de culte, qu'ils soient privés ou publics comme il est le cas pour les églises paroissiales et cathédrales catholiques, qui sont restées propriétés de l'État après la loi de 1905, l'Eglise catholique refusant d'en endosser la propriété. Il ne paraît pas possible par exemple d'interdire la présence de minarets aux abords des mosquées de France, comme cela vient d'être voté en Suisse. Les minarets existent dans le paysage français depuis parfois fort longtemps comme sur l'île de la Réunion ou le département de Mayotte. La grande Mosquée de Marseille, en cours de construction, en comprend un de grande hauteur.

Une tolérance de fait existe face à l'article 28, pour le moment de Noël quand les municipalités organisent des éclairages spécifiques dans les rues et peuvent également exposer des crèches (nativité du christ) dans les espaces publics. Quoique la coutume de la crèche existe jusque dans les écoles primaires publiques, elle tend progressivement à se raréfier dans les zones où se mélangent les populations. Il n'y a à notre connaissance aucune jurisprudence pour violation de laïcité en cas d'exposition publique de crèches en France.

Une autre tolérance très importante est pratiquée à l'égard des milliers de monuments aux morts qui existent sur le territoire français. Erigés après la première et la deuxième guerre mondiales ou les guerres coloniales qui ont suivi, ces monuments mélangent très fréquemment des thèmes religieux à leur statuaire patriotique. Ces monuments se trouvent indifféremment dans les cimetières, ou sur des places des communes, places consacrées à cet effet.

De fait, le culte aux morts et sa représentation semblent échapper à la stricte neutralité imposée à l'espace public. Contenu dans l'article 28, l'interdiction des signes religieux ne s'applique pas aux cimetières qui appartiennent pourtant au domaine public depuis la fin du XIXème siècle. Ils conservent dans toutes leurs décorations, le caractère

93. Voir http://www.legifrance-gouv.fr.

94. Il est interdit, à l'avenir, d'élever ou d'apposer aucun signe ou emblème religieux sur les monuments publics ou en quelque emplacement public que ce soit, à l'exception des édifices servant au culte, des terrains de sépulture dans les cimetières, des monuments funéraires, ainsi que des musées ou expositions.

visible d'espace religieux, dont les emblèmes restent le plus souvent chrétiens. Les tombes familiales elles-mêmes sont marquées par l'appartenance confessionnelle des familles. A ce propos est apparu le problème du regroupement des tombes dans une terre plus particulièrement consacrée pour les religionnaires juifs ou musulmans.

Ce problème a été soulevé par la commission de réflexion juridique sur les relations de culte avec les pouvoirs publics présidée par Jean-Pierre Machelon, professeur à l'université René-Descartes Paris V, doyen de la faculté et directeur d'études à l'Ecole pratique des hautes études, dans un rapport daté du 20 septembre 2006.[95] En effet les musulmans de France sont de plus en plus nombreux à être inhumés sur le sol français, quand les générations précédentes pratiquaient plus massivement le retour des corps dans les pays d'origine. Il a été constaté dans un rapport de la mission d'information sur le bilan et les perspectives de la législation funéraire que l'absence de carrés confessionnels constituerait la cause majeur de l'expatriation d'environ 80% des corps des musulmans en France.

Or, la loi municipale du 5 avril 1884 prévoit dans l'article L2213-9 du code général des collectivités territoriales "qu'il est interdit au maire, dans l'exercice de ses pouvoirs de police des cimetières et des funérailles, de faire des distinctions en raison des croyances du défunt." Dès lors, la loi prohibe la création de carrés confessionnels dans la mesure où le maire serait amené à s'interroger sur l'appartenance religieuse du défunt lors de l'attribution d'une concession. Cependant au regard du respect des volontés du défunt de confession musulmane ou israélite, le ministère de l'intérieur par deux circulaires des 28 décembre 1975[96], a recommandé aux maires "de réserver aux Français de confession islamique, si la demande leur est présentée et à chaque fois que le nombre d'inhumation le justifiera, des carrés spéciaux dans les cimetières existants". Le 14 février 1991[97] le ministère de l'Intérieur a admis la possibilité pour le maire de regrouper les sépultures des défunts souhaitant être inhumés dans un carré propre à leur religion, sous réserve de la préservation de la neutralité du cimetière.[98]

95. *Rapport de la commission de réflexion juridique sur les relations des cultes avec les pouvoirs publics*, 20 septembre 2006, http://les.rapports.ladocumentationfrançaise.fr.

96. Circulaire n°75-603 du 28 novembre 1975.

97. Circulaire n°91-30 du 14 février 1991.

98. Catarina Clemente de Barros, mémoire *Droit pénal et religion*, Faculté de Nice.

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Religion and the Secular State in Germany

I. Social Context

In order to give an outline of the relationship between state and religion in the Federal Republic of Germany in general and its legal fundaments in particular, let us start off with some brief remarks on the social context of this relationship.[1] During the last sixty years these basic sociological conditions have changed dramatically. In 1950, more than 96 percent of the population in the Federal Republic of Germany belonged to one of the major Christian confessions. About 50 percent were Protestants, about 46 percent belonged to the Catholic confession. Until the beginning of the 1960s this situation had hardly changed. Then, however, the decline of the Christian confessions began and the number of persons leaving the churches increased.

Of course, such a process of an increasing secularization and moving away from the churches can be regarded as a fairly typical phenomenon of almost the entire Western world[2] (perhaps with the one so important exception of the United States of America[3]). Yet within the specific German context another crucial aspect has to be taken into account: the division of Germany into two different states belonging to two politically, as well as ideologically, distinct systems from 1949 till 1990. As we will see, the German Basic Law, the *Grundgesetz*,[4] establishes a legal framework that firmly supports religion and religious confessions. In contrast, within the so-called German Democratic Republic the socialist regime practiced deliberately anti-religious politics. Unlike other efforts of the socialist state, this campaigning for atheism was remarkably successful: When the regime finally collapsed and the two German states were re-unified, hardly 30 percent of the population in the GDR still belonged to one of the great Christian confessions.[5]

With these two developments taken together, the current situation is this: about 31 percent of the population belong to the Catholic and about 30 percent to the Protestant confession. Roughly speaking a third of the population does not belong to any religious confession.

Thus, the first remarkable tendency is an ongoing process of moving away from the churches. It is accompanied by a second tendency of religious pluralisation. Whereas the social relevance of Christian faith has declined and continues to decline, the importance of non-Christian religions, in particular that of Islam, is increasing. Though there are hardly reliable data, one supposes that approximately 4 percent of the people in Germany are Muslims. Most of them are immigrants and descendants of former immigrants. As we will see, this appearance of new religious groups causes specific problems for the legal system.[6] The law has to deal with religious phenomena which were irrelevant and thus

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1. See Stefan Korioth, "'Jeder nach seiner Façon': Grundgesetz für die multireligiöse Gesellschaft," *Kritische Justiz, Beiheft 1* (2009), 175.

2. See Charles Taylor, *A Secular Age* (Cambridge [MA]: Harvard University Press, 2007).

3. See, e.g., Marcia Pally, *Die hintergründige Religion. Der Einfluss des Evangelikalismus auf Gewissensfreiheit, Pluralismus und die US-amerikanische Politik* (Berlin: Berlin University Press, 2007).

4. Official translation by Christian Tomuschat & David P. Currie available at https://www.btg-bestellservice.de/pdf/80201000.pdf.

5. See Detlef Pollack, *Säkularisierung – ein moderner Mythos?* (Tübingen: Mohr Siebeck, 2003) 77.

6. For an overview see Stefan Muckel, "Religionsfreiheit für Muslime in Deutschland," *Dem Staat, was des Staates – der Kirche, was der Kirche ist. Festschrift für Joseph Listl zum 70. Geburtstag*, eds. Josef Isensee et al.

unfamiliar at the time when the *Grundgesetz* came into effect in 1949. Against the background of the changed social context the question arises whether or not the old constitutional arrangement is still adequate to meet the current challenges.[7] The possibly anachronistic character of the constitutional regulations becomes even more questionable if one takes into account that some of the relevant constitutional norms are even older than the *Grundgesetz*. The founding fathers and mothers of the *Grundgesetz* simply adopted some statutes concerning the relationship of state and churches from the Weimar constitution from 1919.[8]

II. Theoretical and Scholarly Context

Before we go on to analyze the decisive constitutional framework for the relationship in question, we should take a short look at the history of this relationship and the respective legal regulation. It shall help us to understand the theoretical and scholarly background of the legal constructions and thus the construction itself.[9] In the historical perspective, the current relationship of church and state has to be seen as the product of century-long conflicts between the different confessions. The first major attempt to end the struggle between the confessions was the Peace of Augsburg in 1555. It provided the first legal basis for a peaceful co-existence of Catholicism and Lutheranism. By establishing the principle *cuius regio, eius religio* it guaranteed the aristocratic leaders of the different separate states within the *Reich* a *ius reformandi*, that is to say, a right to freely choose their own confession and thus determine the confession of their citizens. Yet in order to prevent religious civil war, the princes at the same time conceded to their citizens a *ius emigrandi*, i.e., the right to leave the state. We can regard this *ius emigrandi* as a first step towards the acceptance of individual religious freedom. Though the following centuries, and with specific brutality the Thirty Years' War, demonstrate that the menace of religiously motivated (civil) wars was not abandoned, one can detect in this guaranteed choice a certain tendency: The general idea in this context is to establish peace by banning religion from the field of politics. The state starts to withdraw from the religious field, and at the same time religion has to move away from politics.[10] This process of differentiation between politics and religion had important modifying effects on the general idea of religion. Religion became more and more a primarily private and not that much public affair. It thus demands an internalisation by one's own conscience, the *forum internum*, whereas public ceremonial exercises of faith are increasingly limited to non-political aspects.[11]

III. Constitutional Context

The present relationship between state and religion is fundamentally constituted by the legal statutes of the *Grundgesetz*. These norms have a double function: On the one side, they set the stage for the role of religion with respect to the individual and his or her relationship to the state. This individualistic position is further strengthened by rights of

(Berlin: Duncker & Humblot, 1999), 239.

7. See Hans Michael Heinig, "Ordnung der Freiheit – das Staatskirchenrecht vor neuen Herausforderungen," *Zeitschrift für evangelisches Kirchenrecht* 53 (2008): 235–54; Christian Walter, "Religiöse Freiheit als Gefahr? Eine Gegenrede," *Deutsches Verwaltungsblatt* 123 (2008): 1073–80; Martin Heckel, "Zur Zukunftsfähigkeit des deutschen "Staatskirchenrechts" oder "Religionsverfassungsrechts"?, *Archiv des öffentlichen Rechts* 134 (2009): 309–90.

8. See on this historical context Martin Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* (Tübingen: Mohr Siebeck, 2006), 40.

9. See Stefan Korioth, "Die Entwicklung des Staatskirchenrechts in Deutschland seit der Reformation," *Staatskirchenrecht oder Religionsverfassungsrecht?*, eds. Hans Michael Heinig and Christian Walter (Tübingen: Mohr Siebeck, 2007), 39.

10. See Karl-Heinz Ladeur and Ino Augsberg, "The Myth of the Neutral State. The relationship between state and religion in the face of new challenges," *German Law Journal* 8 (2007): 143; Gerd Roellecke, "Die Entkoppelung von Recht und Religion," *JuristenZeitung* (2004): 105.

11. See Ladeur and Augsberg, "The Myth of the Neutral State," 144.

equal treatment forbidding any discrimination with regard to religion. On the other side, the constitutional rules determine the relationship of the state and the diverse religious communities.

The central constitutional norm is the right of individual religious freedom laid down in Article 4 paragraphs 1 and 2 GG. It obliges the state to respect the religious activities of its citizens and to secure their free development. Freedom of religion in this sense includes not only freedom of confession, but also freedom of worshipping. Furthermore, it guarantees to the individual religious person the right to lead a life according to the rules of his or her personal belief.[12] Part of the religious freedom is also its negative dimension, that is to say the freedom not to have any religion. As a human right this freedom of religion is not limited to German citizens only, but belongs to all persons within the German state. Besides, not only individuals, but also the religious communities as such are subjects of religious freedom and hence may invoke this basic right. The same protection as for religious faith applies to *Weltanschauung*, i.e., a philosophical creed. Both types of convictions are equated.

The importance of this basic right is underlined by the specific character of the legal proviso concerning the possibility to interfere in and thus restrict the freedom of religion. Whereas other basic rights, for instance the freedom of assembly according to Article 8 GG, explicitly concede that – in the case of an outdoor assembly – this right may be restricted by or pursuant to a law, the text of Article 4 GG contains no such possibility. However, that does not mean that religious activities are beyond any state control and restriction. Yet if the state decides to restrict religious activities, it has to pursue specific purposes. These purposes must be related to the protection of other constitutional rights as important as religious freedom, e.g., basic rights of other citizens.

This freedom to have (or: not to have) a certain religious or philosophical creed is strengthened by the basic right of equality before the law. According to Article 3 paragraph 3 GG no person shall be favored or disfavored because of his or her personal religious opinions. Article 33 paragraph 3 GG specifies this general rule by stating that neither the enjoyment of civil and political rights, nor eligibility for public offices, nor rights acquired in the public service shall be dependent upon religious affiliations. No one may be advantaged or disadvantaged because of his or her adherence or non-adherence to a particular religious denomination or philosophical creed.

Turning now to the second pillar of the German constitutional law concerning religious issues, we must first mention a certain formal aspect. With respect to the relationship of state and religious communities, the *Grundgesetz* has used a special technique. Article 140 GG refers to and therewith incorporates the relevant norms from the Constitution of the former Weimar Republic (*Weimarer Reichsverfassung*, WRV). According to the German Constitutional Court, the *Bundesverfassungsgericht*, this technique does not imply a minor status of the incorporated norms. Rather, they are a fully effective, integral part of the constitution.[13]

In contrast to the individual approach of Article 4 GG, these incorporated rules constitute the institutional aspect of the German law concerning religion and religious communities. They establish an intricate balance between a separation as well as a cooperation of state and religious communities. The fundamental rule states that there shall be no state church (Article 140 GG and Article 137 paragraph 1 WRV). It determines a basic separation of religion and state. Confirming their autonomy, Article 137 paragraph 3 WRV declares that all religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. In particular, these societies shall confer their offices without the participation of the state or the civil community. However, the fundamental separation of church and state established therewith is not to be seen as a conception of *laïcité* in the strict French sense. As the following legal statutes show, the separation does not exclude certain fields of

12. See BVerfGE 32, 98, 106.
13. See BVerfGE 19, 206, 219.

cooperation between state and religious groups. Only forms of cooperation which integrate religious communities into the state organization are prohibited.

IV. The State and Religious Autonomy

Before we take a closer look on these fields of possible cooperation between state and church, we can name the fundamental idea of the German law concerning religious issues. Both aspects of individual religious freedom and the separation of state and church taken together constitute the basic principle for the relationship of state and religion in Germany. This principle is known as the idea of state neutrality.[14] Accordingly, the state is principally neither allowed to favor nor to discriminate against certain confessions. As a concept of equidistance, the principle of neutrality towards all religious communities commits the state to generally withdraw from religious issues. Though the principle has recently been criticised for being a mere "*chiffre* for indifference"[15], it has also been decidedly defended as the necessary fundament for the legal regulation of religious issues.[16]

This principle of state neutrality has important consequences for the legal concept of religion. The state is obliged not to define what can legitimately be classified as religion and religiously connoted behaviour.[17] There exists no *numerus clausus* of acceptable religious confessions. In contrast, religious freedom allows for the development of totally new forms of confession. Yet if the state is not allowed to determine what religion means, who else is responsible? In order to deal with a comprehensible phenomenon, there has to be some concept of religion that the law can work with. The answer of the German constitutional law, as developed by the *Bundesverfassungsgericht*, is this: the religious groups themselves are responsible. The legal concept of religion is based on the self-conception of the allegedly religious communities.[18]

Nevertheless, there have to be some precautionary measures preventing misuses of religious freedom. Thus it cannot be exclusively the alleged religious community deciding whether and to what extent certain behaviour may be classified as religious and thus shall be granted specific legal protection. There must be some form of state control.[19] Yet with regard to the central role of the self-conception of the religious communities this necessary state control is limited to a form of plausibility check. Only if a certain group evidently misuses the idea of religious freedom in order, e.g., to use it for obviously economic purposes, the state may intervene. This issue has been lively discussed with regard to the so called "Church of Scientology."[20]

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14. See BVerfGE 12, 1, 4; BVerfGE 19, 206, 216; hereunto Stefan Huster, *Die ethische Neutralität des Staates: eine liberale Interpretation der Verfassung* (Tübingen: Mohr Siebeck, 2002); Stefan Huster, "Die religiös-weltanschauliche Neutralität des Staates. Das Kreuz in der Schule aus liberaler Sicht," *Der Streit um das Kreuz in der Schule*, eds. Winfried Brugger and Stefan Huster (Baden-Baden: Nomos, 1998), 69; Rolf Schieder, *Wieviel Religion verträgt Deutschland?* (Frankfurt/M.: Suhrkamp, 2001), 16; for neutrality as a character of the German „Grundgesetz," see, e.g., Rolf Gröschner, "Freiheit und Ordnung in der Republik des Grundgesetzes," *JuristenZeitung* (1996), 637. Contra Gabriele Britz, *Kulturelle Rechte und Verfassung. Über den rechtlichen Umgang mit kultureller Differenz* (Tübingen: Mohr Siebeck, 2000), 233; skeptically Frank Holzke, "Die „Neutralität" des Staates in Fragen der Religion und Weltanschauung," *Neue Zeitschrift für Verwaltungsrecht* (2002): 903.

15. See Ladeur and Augsberg, "The Myth of the Neutral State," 144.

16. See Hans Michael Heinig, "Verschärfung der oder Abschied von der Neutralität?," *JuristenZeitung* (2009), 1136.

17. See BVerfGE 104, 337, 353; furthermore Martin Morlok, *Selbstverständnis als Rechtskriterium* (Tübingen: Mohr Siebeck, 1993), 78; Stefan Muckel, *Religiöse Freiheit und staatliche Letztentscheidung* (Berlin: Duncker & Humblot, 1997), in particular at 1, 27, 121.

18. See BVerfGE 24, 236, 247; 53, 366, 401; 66, 1, 22; 70, 138, 167; 72, 278, 289; BVerwGE 112, 227, 234; Axel Isak, *Das Selbstverständnis der Kirchen und Religionsgemeinschaften und seine Bedeutung für die Auslegung des staatlichen Rechts* (Berlin, Duncker & Humblot 1994).

19. See BVerfGE 83, 341.

20. See *Bundesarbeitsgericht* (Federal Labour Court), *Neue Juristische Wochenschrift* (1996), 143, 146, on the one hand (denying the status as religious community) and *Oberverwaltungsgericht Hamburg* (Higher Administrative Court), *Neue Zeitschrift für Verwaltungsrecht* (1995), 498, 499, on the other (affirming the

This specific importance of religious self-conception is the result of a developing jurisdiction. Indeed, within former decisions of the *Bundesverfassungsgericht* there have been attempts to establish narrower and more concrete definitions. The Court tried to establish a "clause of adequacy of culture" determining religion with regard to "those confessions which have in the course of time been developed by civilized people on the basis of common moral convictions"[21]. As these definitions did not match the constitutional obligation of state neutrality, later jurisdiction has rightfully abandoned them.[22] Consequently nowadays there exist only very open, formal definitions of what can properly be called a religion or religious community. The subject of religion is said to be "an assurance regarding the existence and the content of certain truths being connected to a human being."[23]

Against the background of this conception of state neutrality the most important form of cooperation may come as some surprise: according to Article 140 GG and Article 137 paragraph 5 WRV, "Religious societies shall remain corporations under public law insofar as they have enjoyed that status in the past. Other religious societies shall be granted the same status upon application, if their constitution and the number of their members give assurance of their permanency." The most important consequence of this status as public corporations is stated in the following paragraph: According to Article 137 paragraph 6 WRV religious societies that have achieved this status are entitled to levy taxes on the basis of the civil taxation list.

This possible particular legal status[24] might seem to be at odds with the general idea that there shall be no state church. Apparently by being granted this legal status religious communities can participate in state authority and thus tend to become an integral part of the state. Yet this would be a misunderstanding of the general conception. The idea has to be understood against its historical background. It is the result of a compromise which was achieved in the proceedings for the Weimar Constitution. Its primary purpose was to spare the traditional churches the status of mere private associations. Compared to the churches' outstanding social function and relevance, this status was considered as inadequate and dishonourable.[25]

However, the possibility of a status as public corporations should not contradict the general rule that there is no state church. This description is valid also for the legal situation of the *Grundgesetz*: despite their status as corporations under public law the respective religious communities remain distinct from the state. They do not become an integral part of state organization.[26] The independent regulation and administration of their internal affairs, as guaranteed by Article 140 GG, Article 137 paragraph 3 WRV, applies to those corporations under public law as well as to those under private law. Thus, in contrast to ordinary corporations under public law there exists no state supervision of the internal proceedings within the religious communities.

Consequently, the status as a corporation under public law does not modify the general state-church relationship. According to the judicature of the *Bundesverfassungsgericht*, the status does not alter the churches' fundamental independence from the state; rather, this independence shall be confirmed therewith.[27] Thus, the status is

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status). Stefan Muckel, "The 'Church of Scientology' under German Law on Church and State," *German Yearbook of International Law* 41 (1999): 299.

21. BVerfGE 12, 1, 4; 24, 236, 246.

22. See Bernd Jeand'Heur and Stefan Korioth, *Grundzüge des Staatskirchenrechts* (Stuttgart: Boorberg, 2000), 80.

23. BVerfGE 32, 98, 107.

24. See Klaus G. Meyer-Teschendorf, "Der Körperschaftsstatus der Kirchen," *Archiv des öffentlichen Rechts* 103 (1978): 329; Hans Michael Heinig, *Öffentlich-rechtliche Religionsgesellschaften. Studien zur Rechtsstellung der nach Art. 137 Abs. 5 WRV korporierten Religionsgesellschaften in Deutschland und der Europäischen Union* (Berlin: Duncker & Humblot, 2003); Stefan Magen, *Körperschaftsstatus und Religionsfreiheit. Zur Bedeutung des Art. 137 Abs. 5 WRV im Kontext des Grundgesetzes* (Tübingen: Mohr Siebeck, 2004).

25. See Korioth, "Die Entwicklung des Staatskirchenrechts in Deutschland seit der Reformation," 54.

26. See BVerfGE 18, 385, 386 et sq.; 42, 312, 321; 53, 366, 387; 102, 370, 387.

27. See BVerfGE 30, 415, 428.

misunderstood if it is conceived of as a sort of award for those religions being particularly loyal to the state. The only explicit demand which Article 137 paragraph 5 WRV states – permanency – is not to be supplemented by an unwritten necessity to faithfully participate in state actions. The question was decided in a famous case concerning the possible status as corporation under public law of Jehovah's Witnesses.[28]

This religious community instructs its members not to participate in state elections. The *Bundesverwaltungsgericht* – i.e., the German Federal Administrative Court – regarded this instruction as a sufficient reason to deny the applied status as corporation under public law. It claimed that this status presupposes some kind of loyalty to the state.[29] This decision was overruled by the *Bundesverfassungsgericht*. It explained that it is not an infringement of the constitution if a religious community objects to the state as a secular institution. As long as the religious community does not attempt to overthrow the current legal system in order to install a theocratic regime, i.e., as long as it respects the fundamental rights of the citizens and the principle of religious tolerance, its attitude towards the state is an inner religious phenomenon which the state may not criticise.[30]

Furthermore, the cooperation is realized by numerous contracts between the state and the different religious communities.[31] These contracts concern issues as religious education in state schools, establishment of faculties of theology, and pastoral care in the military services.[32] They constitute a reliable legal framework for both parties.

These possible forms of cooperation between state and religious communities demonstrate the particular character of the constitutional arrangement for the state-church relationship in Germany. The constitution does not strictly oppose state and religious communities, nor does it tend to keep them entirely apart. Rather, it instructs state authorities to assist the different denominations. According to the *Bundesverfassungsgericht*'s jurisdiction, the neutrality imposed on the state "has to be understood as an open and comprehensive attitude which supports religious freedom of all confessions in an equal manner."[33]

V. Religion and the Autonomy of the State

As we have seen, this kind of state neutrality limits only forms of cooperation which tend to make religious communities part of the state organization. Correspondingly, the religious communities have to accept that they may not interfere in state affairs. The autonomy of religion ends where divergent societal functions are at stake.[34] Thus it would, for instance, be unacceptable if a religious community tried to establish a religious law system which attempted to undermine state authority.[35] As Article 137 paragraph 3 WRV states, religious communities are subordinate to the law that applies to all. This does not exclude the possibility of an internal ecclesiastical jurisdiction judging specific affairs within the religious community. But as far as external aspects are concerned, state courts have to have the last word.[36]

VI. Legal Context

If we now turn to the more general legal context, the remarks on this subject can be rather brief. Because of the rather detailed constitutional context, there is not much room

28. See BVerfGE 102, 370; Stefan Korioth, "Loyalität im Staatskirchenrecht?," *Gedächtnisschrift Jeand'Heur*, eds. Wilfried Erbguth et al. (Berlin: Duncker & Humblot, 1999), 221.

29. See BVerwGE 105, 117.

30. See BVerfGE 102, 370, 395.

31. See generally Axel von Campenhausen and Heinrich de Wall, *Staatskirchenrecht* (München: C. H. Beck, 4th ed. 2006), 141.

32. See Jeand'Heur and Korioth, *Grundzüge des Staatskirchenrechts*, 189 et seq.

33. BVerfGE 108, 282, 300.

34. See Ino Augsberg, "Die Entstehung des neutralen Staates als Vorgang der Säkularisation," *Zeitschrift für evangelisches Kirchenrecht* 53 (2008): 445.

35. See Ladeur and Augsberg, "The Myth of the Neutral State," 146.

36. See Jeand'Heur and Korioth, *Grundzüge des Staatskirchenrechts*, 245.

left for legal statutes to alter the basic relationship between state and religion.

Yet one important area of statutory law on the level of the *Bundesländer*, the German Federal lands, has been revealed in the context of a conflict which is well known in other countries, too: the teacher's headscarf case.[37] The *Bundesverfassungsgericht* decided in such a constellation that the *Bundesländer* are not generally obliged to employ teachers unwilling to divest themselves of their headscarves during classes. However, any restriction of religious freedom needs a particular purpose which is itself characterised as a constitutional right. Moreover, this restriction can, for reasons of democratic legitimation, be done only by or pursuant to a law.

Since there was no such legal statute in the respective *Bundesland*, the Court considered the current practice to deny the teacher's employment an unjustifiable infringement of the teacher's religious freedom. In consequence of this decision, several *Bundesländer* enacted laws which forbid teachers to wear religious symbols in class rooms. The *Bundesverwaltungsgericht* has accepted these statutes as long as they remain indifferent towards all kinds of religion and thus respect the principle of state neutrality.[38] Accordingly, certain exemption clauses for Christian or Jewish religious symbols have to be regarded in this context of strict neutrality. Besides the national law and the law of the *Bundesländer*, legislation on the transnational level of the EC (or, according to the new nomenclature of the Treaty of Lisbon: the European Union) has become an increasingly important subject.[39] "Germany's Basic Law and the European treaties can [...] be described as partial constitutions, and only in tandem do they establish the fundamental order of the society."[40]

This applies also for the legal framework concerning religious issues: Though the constituent treaties confer on the Union no immediate legal competence over such issues, legal acts of the EU do have at least indirect implications on the legal position of religious communities and the relationship between state and religion. Based on Article 13 TEC (now, after the Lisbon Treaty's entry into force, Article 19 of the Treaty on the Functioning of the European Union), some European Directives are explicitly directed on banning discrimination on the grounds of race, ethnic origin or religion.[41]

What is more, the EU respects and protects (via the ECJ) religious freedom. Article 6 paragraph 2 TEU obligates the EU to safeguard fundamental rights in line with the European Convention on Human Rights ("ECHR") and the legal traditions common to the member states. Thus, individual religious freedom, as guaranteed by Article 9 ECHR (and protected by the juridiction of the European Court of Human Rights)[42] as well as by the national constitutional fundamental rights, is part of the EU law, too.

Moreover, the European Charter of Fundamental Rights contains an explicit guarantee of religious freedom.[43] Though not legally binding until December 1 2009, the Charter has now become effective with the Treaty of Lisbon.

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37. See BVerfGE 108, 282; Christine Langenfeld and Sarah Mohsen, "Germany: The Teacher Head Scarf Case," *International Journal of Constitutional Law* (2005): 86; Matthias Mahlmann, "Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case," *German Law Journal* 4 (2003): 1009.

38. See BVerwGE 121, 140; Ernst-Wolfgang Böckenförde, *JuristenZeitung* (2004): 1181; Hans Hofmann, "Religiöse Symbole in Schule und Öffentlichkeit – Stand der Entwicklung der Landesgesetzgebung und Rechtsprechung nach der Richtungsentscheidung des BVerfG von 2003," *Neue Zeitschrift für Verwaltungsrecht* (2009): 74, 77.

39. See Stefan Mückl, *Europäisierung des Staatskirchenrechts* (Baden-Baden: Nomos, 2005); Hans Michael Heinig, "Law on Churches and Religion in the European Legal Area – Through German Glasses," *German Law Journal* 8 (2007): 563.

40. Heinig, "Law on Churches and Religion in the European Legal Area," 567.

41. See Council Directive 2000/43/EC of 29 June 2000; Council Directive 2000/78/EC of 27 November 2000; hereunto Mahlmann, "Religious Tolerance, Pluralist Society and the Neutrality of the State," 1113.

42. See Françoise Tulkens, "The European Convention on Human Rights and Church-State-Relations: Pluralism vs. Pluralism," *Cardozo Law Review* 30 (2009): 2575.

43. Charter of Fundamental Rights of the European Union, Article 10, OJ C 364, 18.12.2000, 1.

VII. Legal Regulation of Religion as a Social Phenomenon

The constitutionally guaranteed freedom of religion has certain effects on the legal regulation of specific social phenomena. It forces the state to establish exemption clauses which pay tribute to religious issues. This general commitment of the legislator and the administration can be exemplified with respect to the problem of kosher butchering on the one hand and the general idea of animal protection on the other. Section 4 of the German Law on Animal Protection (*Tierschutzgesetz*, TierSchG) prohibits killing vertebrates without using anaesthesia. According to section 4a paragraph 1 TierSchG the same applies for the kosher butchering of animals. However, with regard to certain religious rules claiming a kosher butchering without anaesthesia, section 4a paragraph 2 no. 2 TierSchG states that there can be exceptions if those are necessary to meet religious demands. If these demands are described by the respective religious community in a comprehensible way, then the general idea of animal protection has to withdraw.[44]

VIII. State Financial Support for Religion

The most important source of income for religious communities in Germany is constituted by tax receipts.[45] As already mentioned above, Article 140 GG in combination with Article 137 paragraph 6 WRV guarantees the possibility to levy taxes to those religious societies being organized as corporations under public law. Moreover, the respective religious communities may use the state and its tax authorities in order to collect these taxes for them.[46] In contrast, those communities having the legal form of private incorporated associations[47] depend on donations and contributions by their members.[48]

Furthermore, there exist numerous public subsidies for religious communities.[49] These subsidies were originally established in order to give compensations for the expropriation of churches during the process of secularization in the nineteenth century. According to Article 140 GG, Article 138 paragraph 1 WRV, these old subsidies on the basis of a law, contract or special grant shall be redeemed by legislation of the *Bundesländer*. However, such a redemption has not yet taken place. Rather, in many cases the old contractual obligations have been replaced by new ones.[50]

IX. Civil Legal Effects of Religious Acts

Generally speaking, the secular law does not recognize legal effects to acts performed by religious group members according to religious law. An interesting aspect of civil legal effects of religious acts could be seen in a recent modification of civil law concerning the wedding ceremony of the state on the one hand and the church on the other.[51] Until 2008 it was illegal to marry in church before the official marriage ceremony at the civil registry office. In 2008 the legislator modified this rule, enabling citizens now to have a previous church wedding. Yet this modification does not change the legal effects of church

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44. See BVerfGE 104, 337; Kyrill-Alexander Schwarz, *Das Spannungsverhältnis von Religionsfreiheit und Tierschutz am Beispiel des „rituellen Schächtens"* (Baden-Baden: Nomos, 2003); Fabian Wittreck, "Religionsfreiheit als Rationalisierungsverbot. Anmerkungen aus Anlaß der Schächtentscheidung des Bundesverfassungsgerichts," *Der Staat* 42 (2003): 519.

45. See von Campenhausen and de Wall, *Staatskirchenrecht*, 226.

46. See von Campenhausen and de Wall, *Staatskirchenrecht*, 234.

47. See generally Josef Jurina, "Die Religionsgemeinschaften mit privatrechtlichem Status," *Handbuch des Staatskirchenrechts der Bundesrepublik Deutschland*, vol. 1, eds. Joseph Listl and Dietrich Pirson (Berlin: Duncker & Humblot, sec. ed. 1994), 689.

48. See Jeand'Heur and Korioth, *Grundzüge des Staatskirchenrechts*, 183.

49. See Michael Droege, *Staatsleistungen an Religionsgemeinschaften im säkularen Kultur- und Sozialstaat* (Berlin: Duncker & Humblot, 2004).

50. See von Campenhausen and de Wall, *Staatskirchenrecht*, 281.

51. See Dieter Schwab, "Kirchliche Trauung ohne Standesamt," *Zeitschrift für das gesamte Familienrecht* (2008): 1121; Richard Puza, "Zum neuen Personenstandsgesetz: Kirchliche Trauung ohne vorhergehende standesamtliche Eheschließung," *Kirche und Recht* (2008): 207.

weddings. Still the only act that produces a legally binding marriage is the ceremony before the civil registry office. From the legal point of view, church weddings remain an unbinding, voluntary act.

However, the respect of internal religious issues can have effects on civil legal affairs. The relevance of this matter can be shown in the field of labour law. State courts have accepted that persons working within church-owned organizations can be expected to share the community's basic convictions.[52]

Further specific legal effects are connected to the status of corporations under public law.[53] Besides the central possibility to levy taxes, this status establishes some other possible courses of action. For instance, it enables the respective communities to dedicate so called "public objects" for special purposes, e.g., church bells. Moreover, the status allows for the establishment of public employments.[54]

X. Religious Education of The Youth

Because of its federal structure, education in schools in Germany is basically a matter that has to be treated on the level of the *Bundesländer*. However, an important article of the *Grundgesetz*, Article 7 paragraph 3, sentence 1 GG, explicitly addresses the issue of religious education. It states that religious instruction is to be taught as a normal school subject. That means that religious education shall form part of the regular curriculum. It is not just an optional possibility. Though the state keeps its right of supervision, the educational program is determined by the different denominational communities. Religious instruction "shall be given in accordance with the tenets of the religious community concerned" (Article 7 paragraph 3 sentence 1 GG). Thus, religious instruction not only takes the form of a neutral explanation of what the different confessions believe, it teaches the respective faith itself. Because of this particular character of religious education on the one hand and the guaranteed religious freedom (particularly in its negative dimension) on the other, no student can be forced to participate in this kind of religious education. For those not willing to join religious classes there exists an alternative educational program in the form of ethics courses. In recent times, there have been two major areas of conflict concerning religious education.

The first is connected with the topic of ethics courses.[55] Some *Bundesländer* have enacted laws which made the participation of ethics courses obligatory for all students, reducing at the same time religious education to a mere optional possibility. In order to avoid the apparent infringement of Article 7 paragraph 3 GG, they referred to an exemption clause established by Article 141 GG. This clause declares that Article 7 paragraph 3 sentence 1 GG shall not apply in any *Bundesland* in which Land law provided otherwise on 1 January 1949. At the time when the *Grundgesetz* was originally enacted, this clause concerned merely the lands Bremen[56] and West Berlin. After the re-unification, the question arose whether or not the clause should apply in the new *Bundesländer* of the former GDR. The land Brandenburg as well as the re-united Berlin claimed that they could invoke this clause.[57]

The second major field of discussion is connected to the specific problems caused by the appearance of new religious groups, as mentioned at the outset. The particular

52. See BVerfGE 70, 138; von Campenhausen and de Wall, *Staatskirchenrecht*, 179.

53. See von Campenhausen and de Wall, *Staatskirchenrecht*, 251.

54. See Jeand'Heur and Korioth, *Grundzüge des Staatskirchenrechts*, 172, 174.

55. See Stefan Korioth and Ino Augsberg, "Ethik - oder Religionsunterricht? Eine Bestandsaufnahme aus verfassungsrechtlicher Sicht," *Zeitschrift für Gesetzgebung* 24 (2009): 222.

56. See hereunto Ralf Poscher, "Religions- oder Religionskundeunterricht? Eine Fallstudie zu einer verfassungsrechtlichen Dichotomie am Beispiel des Bremer Unterrichts in Biblischer Geschichte," *Recht der Jugend und des Bildungswesens* (2006): 460.

57. See Bernhard Schlink, "Religionsunterricht in den neuen Ländern," *Neue Juristische Wochenschrift* (1992): 1008; Stefan Mückl, "Staatskirchenrechtliche Regelungen zum Religionsunterricht," *Archiv des öffentliche Rechts* 122 (1997): 513, 537.

problem here is whether there can be a confessional religious education of Islam.[58] With regard to its content, such religious instructions would have to be organized in accordance with Islamic tenets. However, in Islam there are hardly any central tenets binding for all Muslims. Rather, the state is confronted with numerous different groups with different tenets disputing with one another. Thus, the question is whether instead of organizing religious education in the strict sense of Article 7 paragraph 3 GG, the state shall offer an educational program teaching Islamic confession in a rather objective, scientific manner.

The problem reappears with respect to the question of private schools.[59] Article 7 paragraphs 4 and 5 GG guarantee the establishment of private schools only if the private schools prove to be not inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff. The establishment must not be approved by state authorities if the type of school in question encourages segregation of pupils according to the means of their parents. One might ask whether the danger of segregating pupils with regard to their religious denomination could be seen as another reason for denying state approval.

XI. Religious Symbols in Public Places

One of the most discussed legal cases of the last years has been the question of the crucifix in school rooms.[60] In Bavaria, it was obligatory to have a crucifix at the wall of every classroom. The *Bundesverfassungsgericht* decided that this practice – which was based on legal obligation – infringed the constitutional idea of religious freedom in its negative dimension. According to the judges, it is unacceptable to force students to learn "under the cross," as this cross should properly be understood not only as a cultural, but as a genuinely religious and even "missionary" symbol.[61] In a similar constellation the presence of a crucifix in court room was declared an infringement of the constitution as well.[62] In both cases the *Bundesverfassungsgericht* considered the hanging of the crucifix as an act of state demonstrating an identification with the respective religious symbol. As such, it was regarded as an infringement of the neutrality principle.

XII. Freedom of Expression and Offenses Against Religion

The German Criminal Code, the *Strafgesetzbuch* (StGB),[63] contains a specific chapter dealing with "offences related to religion and ideology." The most important of the respective statutes, section 166 StGB, forbids the defamation of religion and religious, as well as ideological, associations. The subsequent section 167 StGB forbids the disturbance of the exercise of religion, in particular of religious worshipping. The aim of the norms is, however, not primarily the protection of the individual religious believer or religious community. Rather, the aim is to secure the public peace, i.e., the peaceful co-existence of all citizens in the public sphere. With regard to this specific aim, courts have recently been rather reluctant to classify certain statements as such a defamation of religion.[64] As a result to the public discussions on the Danish caricatures of the Prophet

58. See Stefan Korioth, "Islamischer Religionsunterricht und Art. 7 III GG," *Neue Zeitschrift für Verwaltungsrecht* (1997): 1041; Thorsten Anger, *Islam in der Schule Rechtliche Wirkungen der Religionsfreiheit und der Gewissensfreiheit sowie des Staatskirchenrechts im öffentlichen Schulwesen* (Berlin: Duncker & Humblot, 2003); Hans Markus Heimann, "Alternative Organisationsformen islamischen Religionsunterrichts," *Die Öffentliche Verwaltung* (2003): 238; *Islamischer Religionsunterricht? Rechtsfragen, Länderberichte, Hintergründe*, ed. Wolfgang Bock (Tübingen: Mohr Siebeck, sec. ed. 2007).

59. See Karl-Heinz Ladeur and Ino Augsberg, *Toleranz – Religion – Recht* (Tübingen: Mohr Siebeck, 2007), 101.

60. See Jeand'Heur and Korioth, *Grundzüge des Staatskirchenrechts*, 84.

61. See BVerfGE 93, 1, 20.

62. See BVerfGE 35, 366.

63. Official translation by Michael Bohlander available at http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

64. See e.g. *Landgericht München* (district court of Munich), *Zeitschrift für Urheber- und Medienrecht* (2006), 578, concerning the possible banning of the animated sitcom "Popetown."

Mohammed, some German politicians proposed that one should tighten the legal measures in order to augment the prevention of religious denominations.[65] However, these attempts remained as yet unsuccessful.

XIII. OUTLOOK

Let us conclude with a short outlook on our initial question whether the now over sixty-year old German constitution still meets the contemporary challenges. The problem is emblematically reflected in the discussion of whether or not one should substitute the traditional German notion for the legal model of the State-religion-relationship, *Staatskirchenrecht*, with the new concept of *Religionsverfassungsrecht*.[66] The first expression means, literally translated, "law of state church." Against the background of our previous explanations, it should have become clear enough that this literal meaning is mistaking. As there is no state church, there can be no law of it. The expression has to be understood in a wider sense as "ecclesiastical constitutional law."

Yet there remains, then, a reference to the church, *ecclesia*, which one might find inadequate for our present pluralist society. *Religionsverfassungsrecht*, in contrast to this concept, means "constitutional law of religion." On first view, this concept seems to be more adequate in order to describe the deliberately open conception of the *Grundgesetz*. It is designed to stress the importance of the individualistic religious freedom at the costs of the traditional institutional conception. Against the background of the recent sociological changes this might appear as the more promising approach. Yet we should be careful.[67] Within the recent German debates on the relationship of religion and the state one can observe an increasing tendency "to regard the privatization of religion and the principle of the 'neutrality' of the state in religious matters as the central elements of the constitutional status of religion," while at the same time the "public role of religion within the state" is downplayed.[68] This perspective misconceives the productive role that the German model has played in the past. What is more, it also misconceives the future possibilities of this model. Even in the modern pluralist society a merely individualistic conception of religion is insufficient. It underestimates the functional relevance which religious convictions can have not only for the individual citizen, but also for an entire society and its cultural processes.[69] Furthermore, the emphasis on individual forms of religious belief could tend to privilege a certain, Christian tradition, thereby suppressing or at least ignoring other conceptions which rather accentuate collective aspects of religion. Contrarily, the double perspective of the German *Staatskirchenrecht* enforcing individual basic rights and coinstantaneously enabling cooperations with religious communities meets the requirements of religion as both an individual as well as a social phenomenon.

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65. See the proposal for an amendment which the *Bundesland* Bavaria made in the Federal Council of Germany, the *Bundesrat* (BR-Drs. 683/07, available at http://www.bundesrat.de/cln_051/nn_8694/ SharedDocs/ Drucksachen/2007/0601-700/683-07,templateId=raw,property=publicationFile.pdf/683-07.pdf.

66. See the contributions in *Staatskirchenrecht oder Religionsverfassungsrecht?*

67. See Stefan Korioth, "Vom institutionellen Staatskirchenrecht zum grundrechtlichen Religionsverfassungsrecht. Chancen und Gefahren eines Bedeutungswandels des Art. 140 GG," *Der Staat des Grundgesetzes – Kontinuität und Wandel. Festschrift für Peter Badura zum 70. Geburtstag*, eds. Michael Brenner, Peter M. Huber and Markus Möstl (Tübingen: Mohr Siebeck, 2004), 727.

68. Karl-Heinz Ladeur, "The Myth of the Neutral State and the Individualization of Religion: The Relationship of State and Religion in the Face of Fundamentalism," 30 *Cardozo L. Rev.* (2009): 2445, 2451.

69. See Ladeur and Augsberg, "The Myth of the Neutral State," 148.

KOFI QUASHIGAH

Religion and the Secular State in Ghana

I. SOCIAL CONTEXT

Religion was always and is still, to a large extent, an integral part of the lifestyle of the African in the traditional environment. Every activity was a religious exercise, and the individual was left to relate to his or her maker according to how it satisfied the spiritual and material life. Traditional African societies respected religious liberty as a personal choice of the individual.

The fact of the intrusion of Judeo-Christian colonialists into the territories that became Ghana had very far-reaching influence on the impact of Christianity into social and public life as well as governmental activity. The British colonial administrators being predominantly Christian, the activities of the Christian missionaries in a large portion of Ghana have resulted in the development of a dominant influence of Christian perspectives in social and public life. For instance, only Christian religious holidays were accorded national character, while Islamic holidays were limited to only the adherents of the Islamic faith. Eventually, Islamic holidays were legislated into national holidays, though even now the traditional African religions and other minority sects do not have any special occasions accorded the status of even sectarian holidays.

Nevertheless, Ghana is constitutionally a secular state. Religious liberty is guaranteed, and all citizens are free to believe and manifest any religious faith. National census figures place Christianity as the dominant faith at 68.8 percent of the population with Islam at 15.9 percent and traditional religion at 8.5 percent. Only 6.1 percent reported having no religious affiliations. There are other smaller religious denominations, including such groups as Eckankar and Buddhism, make up the remaining 0.7 percent of the population.

In the words of Rev. K. A. Dickson, Professor Emeritus and former President of the All African Conference of Churches, "generally speaking, freedom of religion is a reality in Ghana, as it is elsewhere in Africa, and this has led to unprecedented growth; attempts to restrict the Church's freedom have usually been resisted."[1]

Drawing upon the fundamental fact that religious beliefs and practices permeate all aspects of Ghanaian life, Pobee felt able to argue that "*homo ghaniensis* (a Ghanaian) is a *homo radicaliter religiousus* (a radically religious man – religious at the core of his being).[2]

II. THEORETICAL AND SCHOLARLY CONTEXT

Ghanaian Scholars and men and women of the Church have advocated the churches' participation in the political direction of the country.[3] According to Kudaje and Aboagye–Mensah, "We are clear in our minds, that the church has a valid case to be involved in the affairs of the State in all aspects including national politics."[4]

Research[5] indicates that the church as an established institution has the responsibility to serve as the conscience of the society. This follows from the realization that as a body

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1. Rev. K.A Dickson, Freedom of Religion and the Church, Accra, Ghana Universities Press, 2003, 5.

2. John S. Pobee, Accra, Ghana Universities Press, 1992, 2.

3. See Kwasi Yirenkyi, The role of Christian Churches in National Politics: Reflections from Laity and Clergy in Ghana (Manuscript on file.)

4. J.N. Kudajie, and R.K. Aboagye-Mensah, The Christian and National Politics, Vol. 1, Accra, Assempa Publishers, 1991, 33, quoted in Yirenkyi, id.

5. See Yirenkyi, id.

the church has greater protection and immunity from political aggression than does the individual person. This was particularly so during the periods of unconstitutional rule.

There has existed a complementary developmental relationship between the state and the religious organizations in the provision of education and health care facilities for the citizenry.[6]

III. Constitutional Context

The Constitution depicts Ghana as a secular but not an atheistic state. The very first words of the preamble bear this out: "In the name of the Almighty God, We the people of Ghana in the exercise of our inalienable rights…."

The clear indication is therefore that Ghana is a religious nation, but at the same time secular in the sense that the same Constitution prohibits the elevation of any religious organization into a State religion (see article 56 of the 1992 Constitution).

The Constitution, while still remaining secular in context, nevertheless recognizes the existence of religious organizations as relevant civic society organizations that would need representation in certain matters. The Constitution for instance makes provision for the inclusion of representation of religious groups in specific constitutional bodies. The Constitution for example provides in Article 166(1) for the representation of religious organizations on the National Media Commission.[7]

The obvious observation, however, is that it is only the Muslim and Christian religious organizations that are accorded recognition for membership of the relevant constitutional bodies. The traditional African religious groups and the other smaller religious groups such as Eckankar, Buddhist, and Hare Krishna are not accorded the same

Perhaps the rationale for the recognition of the Muslim and Christian organizations could stem from the fact of their large following in the country and therefore their obvious influence among the general citizenry.

Article 21(1)(c) of the Constitution guarantees the right to religious belief and practice, but while the right to believe is virtually absolute, the practice of the belief is subject to controls in the interest of public health, morality, etc. This is as guaranteed in Article 18 of the International Covenant on Civil and Political Rights (ICCPR). The restraint on the mode of manifestation could be implied from Article 26 of the Constitution which permits the practice of customary practices subject however to the caveat that any customary practice that infringes on the rights of any individual shall be prohibited. It is in that direction that the Trokosi practice, a religious practice that subjects young girls to a form of servitude came to be proscribed by the enactment of various amendments to the Criminal Code.

IV. Legal Context

A. *Legislation*

The main legislative basis for religious liberty is article 21(1)(c) of the 1992 Constitution which, like article 18 of the International Covenant on Civil and Political Rights (ICCPR), guarantees the right of belief and the right to manifest.

Prior to the 1992 Constitution the then military government passed the Religious Bodies (Registration) Law, 1989, PNDCL 221. This piece of legislation failed in its appeal to the generality of the people and was ignored with ignominy by the major religious bodies. No efforts were made by the government to enforce it, and it therefore died a natural death upon the coming into force of the 1992 Constitution.

In the long-standing Trust Bill one finds an invidious attempt at the reintroducing, though in a less audacious manner, the attempted control that was rebuffed in the case of PNDCL 221. Under the draft bill, religious organizations are lumped together with NGO's and civil society organizations to be subjected to the control of the Trust

6. See Asempa, 1990, 6.

7. The National Media Commission is responsible for ensuring the independence of the media in Ghana.

Commissioner responsible for the registration of Trusts.

The functions of the Trust Commission which are to be carried out through its Board are listed as follows (clause 17):

(a) register religious bodies, trusts and non-governmental organizations,
(b) maintain a register of religious bodies, trusts and non-governmental organizations,
(c) oversee the activities of trusts, religious bodies, and non-governmental organizations and investigate the activities of a trust, a religious body, or a non-governmental organization where it is considered expedient in the public interest to do so,
(d) provide procedure for the resolution of disputes among religious bodies, trusts, and non-governmental organizations,
(e) advise the minister on policy matters regarding religious bodies, trusts, and non-governmental organizations and review policy where necessary
(f) issue guidelines for the proper management and organization of the activities of religious bodies, trusts and non-governmental organizations.

These are extensive powers to be conferred on the Commissioner, and these can derogate from religious liberty. In substance this Bill seems to be a rehash of the discredited Religious Bodies (Registration) Law 1989, PNDCL 221. The bill has remained dormant for several years, but of late the NGO community has started to raise it out of its dormancy in their protest against those aspects that relate to the NGOs; the religious organizations are yet to become conscious of the bill's implications, but when they do one can be sure that the same fate that befell PNDC LAW 221 will affect it also.

B. *Case Law*

There is not any case law that directly asserts the right to religious freedom, nevertheless there are some cases that indirectly uphold the right to religious liberty.

In a way, however, the law courts have used the strict interpretation of the criminal law to support religious liberty. In the case of *Nyameneba v. The State*[8] the accused persons belonged to a religious group that cultivates a certain plant that they called "herb of life." The group uses this herb publicly as incense and medicine. Upon chemical analysis, the herb was found to be Indian hemp, from which a narcotic drug could be extracted. The accused were accordingly charged with unlawful possession of narcotic drugs contrary to section 49 of the Pharmacy Act, Act 64. They were found guilty and convicted by the court of first instance, but acquitted and discharged on appeal on the grounds that the prosecution failed to prove knowledge on the part of the applicants that the plants were Indian hemp.

Of course, this holding will not permit subsequent use of the prohibited herb, not even for religious purposes. The sect will thereafter have to practice their religion without the assistance of that herb.

V. THE STATE AND RELIGIOUS AUTONOMY

Religious autonomy is guaranteed in Ghana. The state does not interfere in the internal governance of religious organizations. Where, however, parties to a religious dispute file cases with the court, the latter will exercise its jurisdiction in the resolution of the dispute. And example was the case of *Evangelical Presbyterian Church v. Evangelical Presbyterian Church of Ghana*. In this case the two religious groups that were locked in a dispute over church governance approached the court, which exercised its jurisdiction in the resolution of the dispute.

By the nature of things, religious liberty was an integral aspect of lifestyle in the traditional Africa. Religious belief is not imposed; the individual followed the particular

8. (1966) CC40.

religious belief and mode of worship that satisfied his or her spiritual and material needs and aspirations.

This inherent attribute of the African was exhibited in 1989 when the then military government in Ghana sought to determine religious liberty by the promulgation of the Religious Bodies (Registration) Law 1989 PNDC Law 221. The rationale of the law was stated by some as intended "to check the activities of some religious bodies that in the view of the Government, constitute a nuisance to the general public, and militate against public order, public interest or morality, or acceptable standards of decency."[9]

The Law was in reaction partly to public outcry against the activities of some churches that verged on fraud, debauchery, and corruption of public morals. The Church leaders, while admitting the need to control these depravities within the religious community, nevertheless unwaveringly objected to what they described as "an infringement of the fundamental human rights of the freedom of worship."[10]

The effect of PNDC Law 221 was to force the registration of all religious organizations in Ghana. Section 3 of the PNDCL 221 requires that "Every religious body in Ghana shall be registered under this Law and no religious body in existence in Ghana shall after three months from the commencement of this Law operate as such unless it is registered under this law."

Section 4 of the Law makes the situation even more ominous in the sense that it is not as if any organization can just apply directly for registration; Section 4 requires that "No religious body shall qualify for registration under this Law unless it has been issued with a certificate of approval by the commission upon recommendation of the Religious Affairs Committee."

Moreover Section 9(1) permits the Commission to "where the application is approved, issue a certificate of approval … under such conditions as the Commission may determine." This invidious provision has been rightly described as conferring powers on the Commission to "impose conditions on religious bodies before issuing the certificates of approval to them."[11] Religious liberty guaranteed under international human rights instruments cannot definitely manifest under these conditions.

It was significant that the major religious bodies, acting in their firm belief in religious freedom, even under a military regime, rejected the obvious attempt at the control of religious liberty; the majority of the major religious bodies just simply refused to comply with the Law.

The unwavering attachment to certain religious practices that adversely affect the welfare of individuals often do bring some religious organizations into confrontations with the State. It is, for example, the doctrinal practice of some churches not to accept medication for themselves and their dependents during ailment. Blood transfusion and immunization are particular medical interventions that some of the Christian denominations reject. This rejection is supported by alleged biblical injunctions.

In 2000 for instance, members of the Christ Apostolic Faith Church in five communities in the Ho District were reported to have locked up their children to prevent access to them by medical staff who were engaged in a nationwide immunization exercise against poliomyelitis.[12] Members of the Jehovah Witnesses are also known to have been opposed to blood transfusion.[13]

Article 30 of the 1992 Constitution seeks to strike a balance between adherence to religious beliefs and rejection of medical attention; the said article provides that "a person who for reason of sickness or any other cause is unable to give his consent shall not be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other belief."

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9. A Message from the Christian Council of Ghana and the Ghana Catholic Bishops' Conference to their Faithful and Congregation, 14 November 1989.

10. Id.

11. Id.

12. Daily Graphic, Saturday, 1 January 2000.

13. Id., Tuesday, 18 February 1964.

A careful interpretation of the Constitution indicates that an adult that is conscious and capable of making a decision can refuse to be administered with any medication by the health provider even if that would affect the chances of survival. However, in respect of children and others that are not capable of taking decisions of their own, the Constitution guarantees medical attention to these categories of individuals.

VI. Religion and the Autonomy of the State

Ghana as a secular state maintains a careful balance between cooperation with religious organizations and the separation between it and religious organizations.

VII. Legal Regulation of Religion as a Social Phenomenon

Religious affiliation has virtually no relevance in the scheme of things in Ghana. The individual is at liberty to join and to dissociate from any religious organization at will and without any social or political consequence.

Religious organizations are registered with the Registrar General's office just as any other company. Registration confers legal personality on the organization but not any political advantage.

The dilemma of the government to avoid being perceived as giving undue advantage to one religious organization against others came to the fore during the reign of the National Democratic Congress when the government made known its disapproval of the teaching of Christian Scriptures in second-cycle educational institutions (High Schools).[14] The dominant trend in public first- and second-cycle schools has been the teaching of Christian religious tenets and principles.

This position of the government followed from its intention to provide an equal playing field for all religious organizations and not to be seen to be providing an undue advantage to the Christian churches. Interestingly, the Christian community rather felt "disadvantaged" by this position of the government and applied pressure leading to the government's backing out and allowing the formulation of a syllabus for the teaching of Christian scriptures.[15]

VIII. State Financial Support for Religion

Just as with all other duly registered non-governmental organizations, religious organizations enjoy a status of tax exemption on their income provided that such is not generated out of a commercial activity.

IX. Civil Legal Effects of Religious Acts

The state laws accord legality and therefore sanctity to marriages performed according to religious norms. The law recognizes Christian, Mohammedan, and Customary modes of marriage.

X. Religious Education of the Youth

Although religious organizations can establish educational institutions, the curricula at the primary and secondary levels must conform to the accepted standards as set by the Ghana Education Service. Universities and other tertiary institutions are, however, at liberty to work out curricula that suits their purpose. The issue of the extent to which educational institutions can infuse religious activities into their daily educational programs has come up from time to time. This issue becomes contentious where the educational institution is faith-based. Many schools started as religion based institutions but were subsequently taken over and absorbed by the government into its school system. The schools nevertheless still retained some degree of connection to the religious organization that first established it and the basic tenets of the particular religious group became the guiding principles according to which much of academic work is based.

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14. Dickson, supra n. 1 at 4.
15. Id.

A tragic incident at Adisadel College, an Anglican denominational based Christian educational institution that had been fully taken over by government, threw the issue into clear perspective. By the school's regulations all students were expected to attend the school's church service in the morning. While the church service was in progress a school master who suspected that some students could be hiding in the classrooms went round at about 7 a.m. to lock up the classroom. Upon seeing the school master a number of students that were in some of the classrooms ran helter shelter. In the course of the confusion one of the students who belonged to the Islamic faith fell to his death from the fourth floor of the classroom building.[16] This incident came to be interpreted by some as an attempt by the school authorities to force students to adhere to certain religious beliefs.[17] In reaction, the Director General of the Ghana Education Service (GES) explained that "as far as the GES was concerned, no religion was forced on any student in any educational institution and that even faith-based schools were not allowed to impose their religions on students who did not believe in the teachings or doctrines of those religions."[18] In principle, therefore, no educational institution has the right to impose its teachings and practices on students not belonging to the particular religious faith. Nevertheless, evidence abounds that individuals could become captive adherents because they do not have the immediate capacity to resist acts of religious cohesion.

XI. Religious Symbols in Public Places

The use of religious symbols is a private matter. The state does not encourage or impose their use in public.

XII. Freedom of Expression and Offenses against Religion

In the case of *Alhasuna Muslim Faith vs. Regional Police Commander, Bolgatanga*[19] the petitioners were members of the Alhasuna Muslim Faith who use loudspeakers to call their members to prayer and also for the recital of prayers. The police received a complaint from the members of the Orthodox Muslim Faith that members of the Alhasuna Faith indeed used the opportunity to insult members of the Orthodox Muslim Faith.

The situation was viewed by the police as a possible case of open conflict if allowed to continue. The police therefore asked the members of the Alhasuna Muslim Faith not to disturb the peace. It was against the police order that the Alhasuna Muslim Faith filed petition with the Commission on Human Rights and Administrative Justice alleging infringement on their right to practice their religion.

The Commission found that the petitioners indeed used loudspeakers to disturb people in the vicinity and also insult members of the Orthodox Muslim Faith. The Commission took into account reported incidents of violent clashes between the two groups in which some deaths occurred in another part of the country and therefore held that the order of the police was proper. In order to create a balance between the rights of the petitioners to worship and the need to maintain public order, the Commission held that: "(I) the petitioners have the right to worship given to them under the 1992 Constitution, but the enjoyment of this right should not infringe upon other persons' rights and freedoms, as in this case, freedom from excessive noise(for instance); (ii) the petitioners could use loudspeakers in the propagation of their faith and in their worship, but the Commission seriously cautions that it should not occasion any breach of the peace; (iii) the respondent has been given the constitutional duty equally to take appropriate steps to remedy any breach of the peace."

The laws of Ghana permit any individual or organization to establish an educational institution of any level – primary, second cycle, and tertiary. The Ministry of Education has, however, specified standards that must be met.

16. Daily Graphic, Monday, 17 March 2008, 3.
17. Id., Tuesday, 18 March 2008.
18. Id., Editorial.
19. [1994-2000] CHRAJ 191.

Thus, even though the Constitution of Ghana prohibits the formation of political parties along religious lines, the establishment of educational institutions by religious groups is indeed very much encouraged because government has come to accept the position that it alone cannot satisfy the educational needs of the citizenry.

The constitution nevertheless expects all, including educational institutions owned by religious organizations, to respect the right to religious liberty as is enshrined in Article 21(1)(c). From time to time one comes across insipient attempts by religion based educational institutions to compel adherence to their specific religious tenets by all students including those of different religious beliefs. The All Nations University College, for instance, prescribes a code which includes the following: that "skirts must be long enough to cover knees, including slits, [and]transparent, sleeves, sleeveless, bare-back or tight-fitting blouses and sweaters are not allowed." Also tight-fitting skirts and pants (slacks) are not permitted, and "dresses with low neckline or dresses that do not fully cover the breasts, the belly and armpits are not permitted; jeans and trousers are strictly prohibited, and men are not to wear earrings." Moreove, "gentlemen's hair must be cut flat close to the scalp (as a general rule, hair must not be longer than 1mm)."[20] Non compliance with the dress code carries a penalty of suspension for up to one semester.

Another Christian faith-based tertiary institution, the Valley View University, prohibits the wearing of ornaments by both male and female students. In addition, all students, irrespective of religious inclination, are expected to attend church service on Saturdays; and the food served in the campus restaurant is vegetarian.

The National Accreditation Board which sets and enforces standards in all tertiary educational institutions has on occasion questioned the constitutionality of these standards.

XIII. Respect for the Rights of Others by Other Citizens

Lack of tolerance from fellow citizens is often more visible than official persecution or interference in religious liberty.

The daily newspapers reported the case of an individual who allegedly destroyed two very large community idols that he described as "spiritual nuisance" because he perceived them as "enemies of development." As expected, his action provoked angry reactions from the community whose members arrested and handled him over to the police.[21]

In the case of *Achene v. Raji*,[22] the Commission on Human Rights and Administrative Justice successfully mediated a dispute between husband and wife relating to the liberty of the wife to follow the religious faith of her own conviction. The husband, a Muslim, was insisting that his wife, a Christian, should convert to the Islamic religion.

The accusation of noise pollution has been a persistent complaint against the new generation charismatic churches and some Muslim mosques. The proliferation of places of worship of both churches and mosques within residential areas, and their zeal to evangelize and call their adherents to prayers, has created situations of constant complaints from irate residents, often degenerating into conflicts.

The local authorities do have in place regulations on zoning and level of permitted noise. However, since the zoning regulations are not enforced, places of worship have proliferated in almost all residential communities; even homes are used as places of worship. Due to the propensity of the new-generation churches and some of the Muslim sects to outstrip their rivals, so much noise is generated through the use of powerful public address systems that project the music, preaching and prayers beyond the confines of these prayer houses can engulf the whole community and even far beyond. The activities of these churches and mosques are not limited to particular periods, and they do carry their activities deep into the night, making it impossible for community residents to enjoy peaceful night rests. The local authorities do have regulations prescribing acceptable noise

20. All Nations University College, Student Handbook, 2008 – 2009, 59.
21. Daily Graphic.
22. Casebook on the Rights of Women in Ghana (1959-2005), 289.

levels, and the courts have often come to the aid of distraught residents who are harassed by noisy religious groups. In the case of *Republic v. The Pastor in Charge, Power Miracle Chapel International*,[23] the court ordered the enforcement of a recommendation by Environmental Protection Authority that the respondent church should abate its noise by the installation of noise-proof materials in the building within 14 months. Otherwie, the Metropolitan Authority should close down the church. Upon the failure of the church to take steps to reduce the noise level, the court ordered a closure of the church.

A lack of respect for the rights of others manifested in a 1994 case that went before the Commission on Human Rights Administrative Justice. The petitioners and the respondents, who were Christians and Muslims respectively, reside in the same village in the northern part of Ghana. The village was experiencing an incidence of drought, and in an attempt to appeal to the gods for the rains to come, the respondents requested that each person including the petitioner Christians should pay a fixed amount of money into a fund which was intended to be used for the purchase of sacrificial animals to pacify the gods. The petitioner refused on the ground that the intended use of the funds was against their Christian religious beliefs. Instead they undertook to pray as intercession.The respondents, however, insisted that the petitioners must pay. The matter went before the village chief who upheld the position of the Christians. The respondents refused to abide by the chief's decision and rather ordered the closure of all churches in the village. However, upon the advice of the leadership of another church, the Christians eventually paid. Yet, the respondents not only forced the closure of the churches but also ripped off the roofing from the church and seized the church drums and threatened members with death. Many of the Christians fled the village. When the matter eventually went before the Commission on Human Rights and Administrative Justice, the police were notified of the threat of death and damage to property. However, in order to ensure harmonious co-existence in the village, the Commission together with the police, the village chief, and other opinion leaders initiated a mediation process that resulted in the peaceful resolution of the dispute; the Christians therefore had their right to worship restored.

The issue of religious conflict is not limited only to interreligious conflicts between Christians and Muslims. Islamic religious groups also experience incidents of intra-sectarian conflict. The resolution of a longstanding conflict among the Muslim communities in Koforidua was recently reported.[24] The dispute was alleged to have divided the Muslim community at Koforidua into two factions, and it became impossible for them to pray together at the Central Mosque for the two-year period that the dispute raged.

In all of these instances, the government, being very much conscious of the extensive damage that can be caused in the next elections should it be seen to be favoring any religious group, always endeavours to remain neutral.

XIV. CONCLUSION

Religious liberty is guaranteed in Ghana, and the state recognizes the need for a mutual respect between it and the religious organizations. State interference in religious affairs of citizens is now therefore minimal. It is rather with respect to the relations between various individuals that the issue of religious intolerance is often manifested, and it is in that direction that both the state and civil society organizations, including the churches themselves, must do much to guarantee the respect for religious liberty that is the natural and constitutional right of every individual.

23. Case no. B12/23/08 District Magistrates Court Law, Accra.
24. Daily Graphic, Wednesday, 2 September 2009, 21.

CHARALAMBOS K. PAPASTATHIS

Greece: A Faithful Orthodox Christian State
THE ORTHODOX CHURCH IN THE HELLENIC REPUBLIC

I. THE SYSTEM OF CHURCH-STATE RELATIONS

The 1821 War of Independence of the Hellenes against the Ottoman Empire ended in 1828 when Greece was organized into a State, with Ioannis Kapodistrias (1828-31) as its president. Greece's independence was recognized internationally by the London Protocol on 28 February 1830, which also established a monarchy. Otto, the second-born son of the King of Bavaria, Ludwig I, was chosen as king and came to Greece in January 1833. However, because he was still a minor, a three-member regency made up of Bavarian officials ruled Greece until 1835. Otto was a paradoxical combination of a Greek nationalist and an authoritarian sovereign. After the revolution of 3 September 1843, the Constitution (henceforth C) of 1844 was promulgated.

The kingdom of Greece extended over Central Greece (Roumeli), the Peloponnese, and the islands of the Cyclades. These provinces, as well as the whole Balkan Peninsula and Asia Minor, were under the religious jurisdiction of the Ecumenical Patriarchate of Constantinople, which is first in preeminence in the Eastern Orthodox Church. The Christian Orthodox religion was espoused by the overwhelming majority of the Greek people and was also the traditional religion. The cultural roots of both Byzantine and modern Greece cannot be separated from Orthodoxy. Therefore, it was natural for the Cs adopted during the War of Independence to make special references in favor of the Orthodox Church.[1]

The Cs of the revolutionary period established the Eastern Orthodox Church as the "prevailing" religion or "religion of the State," with a concurrent guarantee of tolerance towards the exercise of their religious duties by the followers of any other cult or religion. The C of the National Conference in Trezene in 1827 also added that "the Clergy according to the Rules of our Holy and Divine Church does not get involved in any public office."[2]

The revolutionary Cs, however, did not address the State's right to legislate in ecclesiastical matters. The provisions referring to religion were characterized by the drafters' self-restraint in not intervening in matters of the Church. The sole exception was a bestowal of special protection to the prevailing religion, but without a concurrent bestowal of such protection to other cults and denominations. The Cs introduced a system of "coordination" of relations between the State and the Orthodox Church. Each handled its own affairs and cooperated only in matters of common interest. The revolutionaries of 1821 had conceived of "coordination;" this system would be further expanded a few decades later in the West between various States and the Catholic Church by means of concordats.

The system of coordination of the democratic Cs of the period from 1822 to 1827, as well as communal self-administration – directly related to parishes – was set aside by the Bavarian regency. The regency introduced a more specific form of State supremacy into church-state relations: the system of "state-law" rule over the Orthodox Church. This system has been in effect in Greece since publication of a decree of 3 April 1833, which stated that "the establishment of Synodal Authorities, the supervision of their acts and the publication of the decisions issued thereof," and "the royal rights in reference to the

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[1] For this period, see Ch. A. Frazee, *The Orthodox Church and Independent Greece, 1821-1852*, Cambridge: Cambridge University Press, 1969.

[2] 1827 Syntagma [SYN] [Constitution] (Greece), art. 24.

appointment to Church offices and to the permission for the ordination of priests and deacons" were under the jurisdiction of the "Secretariat [Ministry] of Ecclesiastical Affairs and Public Education."[1]

In a more distinct manner, the same framework of church-state relations was repeated in the regency's declaration of 23 July/4 August 1833, "[o]n the Independence of the Greek Church," [2] which was planned to cause significant damage to Hellenic national interests in the regions of the Balkans and the Near East. The declaration established the state as the exclusive legislative authority of the Church and made the Church a pawn in the hands of the monarch by declaring that the Orthodox Church of Greece did not recognize "in spirit any other head than the founder of the Christian Faith, our Lord and Savior Jesus Christ, while as regards administrative aspects having the King of Greece as its leader."[3] It was also determined that the "supreme Ecclesiastical power lies in the hands of the Synod, under the sovereignty of the King,"[4] and that the members of the Holy Synod were to be appointed by the government.[5] The sessions of the Holy Synod were to be held in the presence of a royal trustee[6] and any decision made in his absence would be void.[7] Moreover, no synodal decision could be "published or executed" without the government's approval.[8] Synod decisions, including those that had been recognized by the declaration as pertaining to the Church's internal affairs under article 10, could not be executed "unless they were first sanctioned by the government and in compliance with the existing laws."[9]

The Bavarian regency feared that the place of the Orthodox Church in the national culture and the political clout that it had retained throughout the period of Ottoman rule could prove to be a counteracting force to the foreign dynasty. The regency reacted by downgrading the Church to a maidservant of the monarchy by establishing a system of state-law rule, which, despite differentiations over time, is still in force.

During the discussions accompanying the drafting of the current C[10] established tradition was used as a justification for preserving the state-law system. I am afraid that this view (1) does not afford due weight to the vital needs of the Orthodox Church for substantial self-administration; (2) ignores the unfavorable consequences brought about by the existence of a "prevailing church" doctrine in the field of religious freedom; and (3) overlooks, even though it calls upon tradition, the historical fact that during the 1821 struggle for independence, a different framework of church-state relations had been constitutionally established.

By establishing the state-law system, the Bavarian regency bequeathed the Hellenic State with a kind of caesaropapism, which was constitutionally established for the first time in 1844. Here it should be pointed out that articles 1 and 2 of the 1844 C were, with few changes, repeated in all the consecutive constitutions.[11] Neither article, however, refers to state-law rule, but only to the status of the Orthodox Church. From a constitutional point of view, the right of legislators to intervene in Church matters, or state-law rule, was imposed and limited by article 105 of the 1844 C:

> by way of special Laws, and as soon as possible, provisions must be made concerning

1. PD 15/1833 (27). This was the Decree of April 3, 1833.
2. Decree of July 23, 1833.
3. Id. art. 1.
4. Id. art. 2.
5. Id. art. 3.
6. Id. art. 6.
7. Id. art. 7.
8. Id. art. 9.
9. Id. art. 17.
10. This is the current constitution. 1975 Syntagma [SYN] [Constitution] (Greece) art. 24. An English translation of the relevant provisions of the 1975 constitution is reproduced in the appendix to this publication.
11. These 1844 provisions are repeated in art. 1 and 2 of the 1864 C; art.1 and 2 of the 1911 C; article 1 of the 1927 C; articles 1 and 2 of the 1952 C; article 1 of the 1968 constitutional text of the military dictatorship; and art. 3 of the 1975 C; as well as art. 9 of the 1925 and 1926 Cs, which were never enforced

the following issues: a) the number of the Bishops of the State, the provision for all those that are necessary for the maintenance of the clergy, according to the dignity of their character, and the holy offices and those who officiate or lead monastic lives therein; b) Church property.[12]

In subsequent Cs, there has been no stipulation concerning the relevant legislative jurisdiction of the State, with two exceptions: the legislative text of article 1, sections 2 and 5 of the 1968 C[13] and article 72, section 1 of the current C,[14] which have returned the Hellenic Republic to the monarchic models of 1844.

Throughout the period spanning 1864 to 1968, the State's right to control the administrative affairs of the Orthodox Church was maintained by the various charters of the Orthodox Church of Greece, which were and still are laws of the State, as well as by other laws pertaining to the Church. Thus, the system of state-law rule was not based on constitutional command, but on conventional laws, despite the self-governing regime that had been established by all the Cs for the Church, "administered by the Holy Synod of Bishops,"[15] without including in this provision the phrase "as law stipulates," which had previously been assumed to be necessary in similar cases. Therefore, although the 1864, 1911, 1927, and 1952 Cs established the self-governed status of the Church and the autonomous and independent status of the Church and the State, they made no mention of the legislative power of the State regarding the Orthodox Church.

This lack of constitutional prescription was exactly what those agonizing efforts of theory and judicial precedent trying to cover up with their meteoric caesaropapic fabrications, such as "the King as head of the executive power bears the obligation to protect the prevailing religion of the Hellenes, and this same obligation is born by the administration, which is also headed by the King."[16]

These fabrications grounded state-law rule in the constitutional recognition of the Orthodox Church as the prevailing religion, in the King's oath to protect the prevailing religion, or in whatever requirements the principle of the so-called constitutional provision for the holy canons (which, as we will see, is directly aimed at other goals) imposed on legislators. Therefore, from 1864 to 1968, the system of state-law rule was supported by a constitutional fallacy.

The legislation of the dictatorship of 21 April 1967, as well as the C of the Hellenic Republic of 1975, reverted to the monarchic C of 1844. The drafters of the 1975 C, like the drafters of the 1968 constitutional text, omitted those provisions of sections (a) and (b) of article 105 of the 1844 C that restrictively determined on what Church matters Parliament could legislate. They also dropped article 1, section 5 of the legislative text of 1968, which stipulated that without the consultation of the Holy Synod, a draft or a legislative proposal regarding the organization and administration of the Church shall not be discussed in Parliament before the expiration of a twenty-day term.

For these reasons, I cannot subscribe to the prevailing opinion that the 1975 C currently approaches a system of coordination in which church-state relations stand between state-law rule and a regime or inter-mutuality or quasi inter-mutuality.[17] This is because under article 72, section 1 of the C, there is no "tendency for mutual disengagement," but only a unilateral gradual disengagement of the State from the Orthodox Church. From a purely institutional point of view, the present C tries to secularize the State and to politicize the Church.

In summary, according to the 1975 C, the system that regulates relations between the

12. 1844 Syntagma [SYN] [Constitution] (Greece) art. 105.
13. 1968 Syntagma [SYN] [Constitution] (Greece) art. 1, §§ 2, 5.
14. 1975 Syntagma [SYN] [Constitution] (Greece) art. 72, § l.
15. The relevant constitutional provisions are art. 2 of the 1844, 1864, 1911, 1927, and 1952. Constitutions, and art. 1 of the 1968 constitutional text.
16. Judgment n° 1661/1947 of the Council of State [CS], 58 in *Themis* 58 (1947), 510-511.
17. See Ar Manessis- C Vavouscos, *Consultatory Report* (Greece), in *Ecclesia* 52 (1975) 304; Ar. Manessis, *Constitutional Rights* (Greece), fasc. 1, Thessaloniki ^{2}1979, 256.

Greek State and the Orthodox Church is State supremacy *(Staatskirche)*, or state-law rule. The State legislates on religious matters, as the provisions of article 72, section 1 of the C make clear. The plenary session of Parliament is the competent legislative body for debating and voting on bills and law proposals which refer, *inter alia*, to matters falling under article 3 and article 13 of the C Article 3 and article 13 cover matters concerning the Orthodox Church[18] and pertaining to freedom of religious conscience and worship of all religions, as well as of atheism and agnosticism in Greece. We can now consider how the aforementioned provisions led to the establishment of the Orthodox Church.

II. THE STATUS OF THE ORTHODOX CHURCH

A. *The Constitutional Provisions*

Article 3, section 1 of the Constitution of 1975 is the primary reference to the status of the Orthodox Church in the Hellenic Republic. Other relevant provisions are included in article 13 (concerning religious freedom), article 18 section 8 (protecting the property of the Patriarchates in Greece), and article 105 (referring to Mount Athos).[19]

Article 3, section 1 of the C contains the following fundamental principles, which determine the status of the Church of Greece and of the Orthodox Church in general, in Greece: (1) The Orthodox faith constitutes the prevailing religion; (2) the Church of Greece is inseparably united in spirit with the Ecumenical Patriarchate (which has its see is in Istanbul, Turkey) and with all the other Churches of the same denomination; (3) the existing autocephalous regime is maintained; and (4) the Church is self-governed. The provisions of article 3 of the C are not all novel. They are found, with amendments at times, in all Cs which were in force before 1975.

B. *The Prevailing Religion*

The C currently in force differs from the provisions of the 1952 C of the kingdom of Greece concerning some of the specific manifestations of the recognition of the Orthodox religion as prevailing. First, the heir to the throne (and thus indirectly the king as well), the guardian of the minor heir, and the viceroy all had to be Orthodox.[20] No similar provision about the president of the Republic is found in the 1975 C Second, when assuming his duties, the king was required to vow to protect the prevailing religion,[21] a provision which has been removed from the current C[22] Third, the aforementioned oath was supposed to be taken by the king in the presence of the Holy Synod,[23] a provision which has also been left out of the current C[24] Fourth, proselytism and "any other intervention against the prevailing religion" was prohibited by article 1, section 1 of the 1952 C[25] In the current C, section 2 of this provision has been obliterated; proselytism is now only generally prohibited against any known religion.[26] Fifth, the ideological principles of "Graeco-Christian culture,"[27] which the interpretation of the C associated directly with the Orthodox Church, were a mandatory basis for public education. This provision has been replaced by one which includes the development of religious

18. L. 590/1977 "On the Statutory Charter of the Church of Greece," art. 9, § l(c) (recognizing that the Orthodox Church of Greece reserves the right to give consultatory opinions "on any Church law under proposal"; this opinion of the Permanent Holy Synod is not binding on the State).

19. See Ch. Papastathis, Le régime constitutionnel des cultes en Grèce, in *The Constitutional Position of Churches in the European Union Countries*, Paris (European Consortium for Church-State Research), 1995, 153. See also, id., "The Hellenic Republic and the Prevailing Religion," in 1996 *BYU L. Rev.* 821.

20. 1952 Syntagma [SYN] [Constitution] (Greece) arts. 47, 51, 52.

21. Id. art. 43, § 2.

22. 1975 Syntagma [SYN] [Constitution] (Greece) art. 33, § 2.

23. 1975 Syntagma [SYN] [Constitution] (Greece) art. 42, § 2.

24. 1975 Syntagma [SYN] [Constitution] (Greece) art. 33, § 2.

25. 1975 Syntagma [SYN] [Constitution] (Greece) art. 1, § 1.

26. 1975 Syntagma [SYN] [Constitution] (Greece) art. 13, § 2.

27. 1952 Syntagma [SYN] [Constitution] (Greece) art. 16, § 2.

conscience among the goals of education.[28] Sixth, the confiscation of journals and printed matter was permitted in "an offense against the Christian Faith."[29] The existing C permits confiscation on the grounds of "an offense against the Christian and any other known religion."[30]

The invocation to the 1952 C ("In the Name of the Holy and the Consubstantial and Indivisible Trinity") remains unaltered in the 1975 C[31] Moreover, in the oath of the president of the Republic[32] and of the members of Parliament[33] the invocation of the Holy, Consubstantial, and Indivisible Trinity is maintained. But while this nature of the Holy Trinity is taught by almost all Christian churches,[34] the constitution stipulates in article 59, section, 2 that the members of Parliament who are of a different religion or cult are sworn in according to their own religion or cult – a provision which does not appear in the article about the president of the Republic.[35] In other words, it seems that the constitutional drafters considered the invocation of the Holy Trinity as fitting only to the teachings of the Orthodox Church. Therefore, from the identical invocation of article 33, section 2 and the concurrent lack of a provision about a non-Orthodox president, one could argue that the C indirectly authorizes the choice of only an Orthodox president of the Republic. But I hesitate to think this is true. We can attribute the wording of article 59, section 2 of the C to the theological ignorance of the drafters of the C At the same time, the provisions of article 4 (on equality) and article 13, section 1 (on religious freedom) of the C would be grounds for an interpretation that is contrary to the aforementioned hypothesis.

The distancing of the current constitution from only the secondary provisions of the 1952 C regarding the prevailing religion has led to the view that "prevailing" currently means the religion of the majority of the Hellenic people.[36] I cannot embrace this opinion because this whole rationale assumes its conclusion. The prevailing religion is prevalent because it is inextricably connected with the traditions and the majority of Hellenes. The question is discovering the legal content of the provision of the C, not an analysis of statistical data from the population census. At the same time, by not adopting the secondary provisions of the 1952 C, the current constitution demonstrates that the legal weight of the constitutional protection of the prevailing religion is insubstantial in comparison to the 1952 C This is only in reference to the more secondary consequences of the existence of such a religion, whereas the framework of the more general provision of article 3, section 1 of the C remains intact and identical with that of the preexisting constitutional regime.[37]

"Prevailing," therefore, signifies several other things. First, the Orthodox cult constitutes the official religion of Greece. Second, the Church, which expresses this cult, has its own legal existence. It is a legal entity of public law as regards its legal relations, and the same holds for its various organizations.[38] Third, the State approaches it with increased interest, and it enjoys preferential (institutional, moral, and financial) treatment, which does not *ipso jure* extend to other cults and faiths. This, however, does not mean that the prevailing religion is dominant; this preferential treatment is not contradictory to constitutional principles of equality, despite the execution of the decisions of the Church

28. 1952 Syntagma [SYN] [Constitution] (Greece) art. 16, § 2.
29. 1952 Syntagma [SYN] [Constitution] (Greece) art. 14, § 2.
30. 1975 Syntagma [SYN] [Constitution] (Greece) art. 14, § 3, a.
31. It was the same invocation in all the Constitutions of Greece.
32. 1975 Syntagma [SYN] [Constitution] (Greece) art. 33, § 2.
33. 1975 Syntagma [SYN] [Constitution] (Greece)art. 59, § 1.
34. The Holy Trinity is first of all holy, consubstantial and indivisible in the doctrine of both the Orthodox and the Catholic Church as well as the Anglican and the various other Protestant denominations, with the sole exception of the so-called antitrinity sects of the first centuries.
35. 1975 Syntagma [SYN] [Constitution] (Greece) art. 33, § 2.
36. According to Sp. Troianos, *Course on Ecclesiastical Law* [in Greek], Athens-Komotini 1984, 94-95, and An. Marinos, *Church-State Relations* [in Greek], Athens 1984, 22.
37. See *CH. PAPASTATHIS*, *Ecclesiastical Law* [in Greek], fasc. 1, Athens-Thessaloniki ^{2}2007, 56.
38. L. 590/1977 "On the Statutory Charter of the Church of Greece," art. 1 § 4.

authorities of the prevailing religion by state officials,[39] the pure Orthodox character of the religious service of the armed forces,[40] and the assumption on the part of the State of the founding and maintenance of Orthodox ecclesiastical schools.[41]

This preferential treatment concerns the Church, not its believers as individuals, since that would result in a dissimilar treatment of Orthodox and non-Orthodox citizens by the State, which would entail a violation of the principle of equality.

Preferential treatment concerns primarily the Church of Greece and the other bishoprics of the Ecumenical Patriarchate which have their see in Greece, but preferential treatment is also enjoyed by the Greek Orthodox Churches of the East and the Diaspora. Arguably, that preferential treatment should be of general content and should not turn specifically against a particular religion or cult, or against their worship, and should not conflict with any prohibitive or prescriptive provision of the C[42] It should be noted that if we leave out the characterization of the Orthodox cult as the official, or state religion, the other two elements of its recognition[43] do not correspond exclusively and solely to this particular cult. For example, at least a part of the theory has supported the idea that both the Catholic and the Protestant Churches in Greece are also legal entities of public law. Consequently, the exercise of public administration is not restricted only to the principles of the prevailing religion, but also extends to those of known cults, as was the case before Law 1250/1982 "On the Establishment of the Civil Marriage" came into effect, with the issuance of a marriage license by a non-Orthodox bishop to a member of his congregation.[44]

As to the preferential treatment reserved for the prevailing religion by legislators, there are three things that should be remembered: First, the other known religions and cults are also granted many privileges. For example, L. 1763/1988 article 6, section l(c) exempted from military service all priests, monks, postulants, and seminarists, regardless of their religion;[45] and the churches, temples, mosques, synagogues, and monasteries of the Orthodox Church and other cults and religions were exempted from paying income tax on legal entities,[46] as well as property tax.[47] It became accepted that the text of article 21 of Legislative Decree 22.4/1926, stipulating that the rights of the State, the aircraft defense agency, and the holy monasteries on real estate are not subject to usucaption, is also applicable to Catholic monasteries.[48]

Second, there are "privileges" of the prevailing religion that are contrary to the provisions of the holy canons of the Orthodox Church. An indicative example is that the State pays the wages of the Orthodox Church's metropolitans and parish priests (parsons) but did so with exchanges specifically as to the wages of the latter. These exchanges included the devolvement to the State of a large and most profitable portion of ecclesiastical property, and the imposition on Orthodox parish-churches of a special contribution of thirty-five percent of all their gross earnings.[49]

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39. L. 5383/1932 "On Ecclesiastical Courts and the Procedure before them," arts. 53, 54, 62, 107.

40. Legislative Decree 90/1973, art. 2 § 1.

41. See L. 476/1976 "On Ecclesiastical Education."

42. See the pioneering decision 261/1983 of the County Court of Patra which held that such conflict with prohibitive provisions of the C is found in the provision of article 11 of Legislative Decree 3485/1955, which imposed on all consumers of electrical energy in Patra a contribution that was collected with the electrical bills and went towards the erection of the Orthodox Church of Saint Andrew, patron saint of the city. *To Syntagma* 9 (1983), 646.

43. See, supra notes 40-43 and accompanying text.

44. This was according to article 1368 of the Civil Code, which was then in force.

45. L. 1763/1988."On the Recruitment of the Hellenes."

46. Legal Decree 3843/1958.

47. L. 1249/1982.

48. See Judgment nº 1161/1983, of the Court of Appeal of Thessaloniki, in *Christianos* 23 (1984) 33–35.

49. Compulsory L. 536/1945 art. 2, sect. 2 had set a percentage of 25%, which was increased to 35% by Compulsory L. 469/1968, art. 5. See Ch. Papastathis, State Financial Support for the Church in Greece, in *Church and State in Europe: State Financial Support; Religion and the School*, Milano 1992, 9–13. This financial contribution has been abolished by L. 3220/2004, art. 15. See also K. Papageorgiou, *Taxation Status of Religions* [in Greek], Athens-Thessaloniki 2005, 171; Ch. Papastathis, "The Financing of Religions in Greece,"

Third, legislation has established preferential treatment in favor of the adherents of some denominations, even though judicial opinions still debate whether or not they conform to the article 13 concept of "known religion."[50] For example, the provisions of L. 2510/1997 regulate the military service of all those who refuse to bear arms on the basis of their religious convictions.[51] The law does not require that conscientious objectors belong to a "known religion."

C. *The Spiritual Unity of the Orthodox Church*

From an administrative point of view, the Orthodox Church all over the world is distinguished into specific autocephalous and autonomous Churches. The autocephalous Churches are the Ecumenical Patriarchate of Constantinople, the Patriarchates of Alexandria, Antioch, Jerusalem, Russia, Serbia, Romania, Bulgaria, and Georgia, and the Archdioceses of Cyprus, Greece, Poland, Albania, Czech Republic and Slovakia. The Orthodox Churches of Finland and of Estonia are autonomous. The autocephalous Churches are administratively independent from each other. But this independence is circumscribed by a framework of doctrinal and canonical nature, the exit from which leads respectively to heresy and schism. This framework represents the spiritual unity (or simply the unity) of Orthodoxy. The doctrinal unity consists of compliance with the teachings of the Holy Scriptures, of reverence towards sacred traditions, and of the faithful observance of the creeds, as laid down by the ecumenical and local Synods. The canonical unity is expressed by the observance of at least the fundamental institutions of the Church's administration, which were in turn set forth and recognized by the same Synods, as well as through the relations between the various Orthodox Churches.

By 1844, constitutional drafters had already determined that the Church of Greece exists in inseparable spiritual unity with the Great Church of Constantinople (Ecumenical Patriarchate) and with every other Orthodox Church.[52] Constitutional drafters have wished the prevailing religion in Greece to be the Orthodox religion. This is why, being led down theological paths, they have imposed the unity of the Church of Greece with the other Orthodox Churches. But how is unity maintained? The C provides that the Church of Greece is "inseparably united in doctrine" with the other Orthodox Churches by "observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions."[53]

This last phrase, which has remained unchanged since 1844, is intended to maintain the spiritual unity of the Church of Greece with the other Orthodox Churches. However, under the regime of the state-law rule it led both scholars and the judiciary to the conclusion that here the C introduces a new self-existent statute; the constitutional provision for the holy canons. This view has given rise to diametrically opposite interpretations, controversies regarding the constitutionality of various laws, and endless appeals against acts of the public administration and of the Church to the highest administrative court, the Council of State. The debate on the constitutional power of the holy canons is a recurrent one in Greek constitutional law.

The problem of the constitutional guarantee of the holy canons emerged because of trivial reasons. According to the text of article 114, section 2 of the Law of December 27, 1833, regarding the institution of municipalities, parish councils were constituted for the administration of ecclesiastical establishments, composed of the mayor, the parson and two to four citizens registered in the particular municipality and appointed by the mayor.

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in *The Financing of Religious Communities in the European Union*, Leuven-Paris-Dudley, MA (Peeters) 2009, 181.

50. 1975 Syntagma [SYN] [Constitution] (Greece) art. 13.

51. See the relevant judicial decisions in I. Konidaris, *Legal Theory and Practice on Jehovah's Witnesses* [in Greek], Athens-Komotini 1991.

52. The relevant Constitutional provisions are art. 2 of the 1844, 1864 and 1911 Constitutions; art. 1, section 2 of the 1927 Constitution; art. 2 of the 1952 Constitution; art. 1, section 2 of the 1968 constitutional text; and art. 3, section 1 of the 1975 Constitution.

53. 1975 Syntagma [SYN] [Constitution] (Greece) art. 3, § l.

On the basis of this statute, many local politicians started to appoint choristers and sacristans to the parishes of their provinces. But the bishops reacted negatively to this, claiming that both from the aspect of holy canons and from that of the laws of the State, the appointment of these positions came under their jurisdiction. The matter of these appointments ended in a compromise: the Church councils recommended and the bishop appointed the choristers and sacristans. But the purely legal issue of whether the holy canons superseded the laws of the state, or vice versa, remained open in theory.

Two basic views have since been put forth. One view suggests that all the holy canons in general, whether they concern the creed and the worship, or the administration of the Church, are safeguarded by the C Hence, the laws that counter their provisions are unconstitutional. According to the other view, only the so-called doctrinal holy canons – those which deal with the creed of the Church and do not merely concern administration – are enveloped by the constitutional guarantee. Consequently, the legislators should be free to regulate all matters pertaining to the administration and the organization of the Church. For many years, this has been the preferred view of the judicial decisions issued by civil and administrative courts alike.[54]

These views require distinction between the phrases "is inseparably united in doctrine" and "observing unwaveringly, as they do, the holy apostolic and synodal canons and the sacred traditions."[55] According to the two views, the C introduces two distinct principles: the unity of the creed, and the constitutional guarantee (or non-guarantee) of the holy canons and the sacred traditions. I cannot agree with this conclusion. I believe that in the C there is one, and only one principle: the obligation of the State and the Church in Greece to respect and preserve the unity of the Church. Otherwise, how can one interpret "as they do," what is interposed in the self-existing statute on the constitutional force of the holy canons? For this reason, and also because the first view leads to hierocracy and the second one to a severe caesaropapism – regimes which are absolutely contradictory with the principles of all the Cs of the Hellenic State – that here the C does not refer directly to the protection of the holy canons, but to the spiritual unity of the Church of Greece with the other Orthodox Churches. Preservation of the spiritual unity of the Church is achieved by ensuring doctrinal unity[56] and canonical unity.[57]

The letter of the constitutional provision and the historical framework of its first enactment both point towards this conclusion regarding the Church of Greece. When the 1844 C was being drafted, the unity of the Church of Greece with the Ecumenical Patriarchate and with the other Orthodox Churches had already been disrupted because of the declaration (contrary to canonical tradition) of its autocephalous regime in 1833. With the aforementioned constitutional provision, the Third of September National Assembly of Hellenes in Athens aimed at proclaiming the Orthodoxy of the Church of the newly established kingdom. Therefore, that the guideline for legislators interpreting article 72, section 1 of the C in force should be to look into which statutes of the holy canons are differentiated from or are contrary to the law under proposal, and if its provisions can bring about a disruption of the unity of the Church of Greece with other Churches of the same denomination, then the law being proposed is unconstitutional.

In terms of results, the Council of State treated the matter in a somewhat similar fashion in 1967 by abandoning the strict view that the constitution guarantees exclusively the doctrinal holy canons and declaring that "the legislator ... in the spirit of Article 2, § 1 of the Constitution [of 1952] …cannot by the amendments effected by him bring about fundamental changes to basic administrative institutions, which have been deeply

54. For a detailed legal and historical analysis of the particular views, See P. Poulitsas, *The Relations between State and Church, Especially Regarding the Election of Bishops* [in Greek], Athens 1946 ; Ch. Papastathis, *Relations between church and state according to the Constitution of 1975* [in Greek], in *Dikaion kai Politeia*, fasc. 15, 61–84; Ev. Venizelos, *The Relations between State and Church* [in Greek], Thessaloniki 2000.

55. 1975 Syntagma [SYN] [Constitution] (Greece) art. 3, § 1.

56. Id. ("is inseparably united in doctrine").

57. Id. ("observing unwaveringly, as they [= all the other Orthodox Churches] do, the holy apostolic and synodal canons and the sacred traditions").

entrenched and long established within the Orthodox Church."[58] The Council of State, with these decisions and in accordance to the "spirit" of the provisions of article 2, section 1 of the 1952 C, which is analogous to that of article 3, section 1 of the current C, then held that the C fully guaranteed the doctrines and all that is pertinent to Orthodox worship and that the C did not fully guarantee the administrative institutions which were contained in the holy canons in general. These administrative institutions (but not administrative holy canons) were to be classified as basic or non-basic. Legislator could proceed as far as a fundamental change of a non-basic institution, and a non fundamental change of a basic institution.

The problem with the rationale of the Council of State's approach – which no doubt marked a definite progress compared to its prior rigid stance – lies in classifying the administrative institutions of the holy canons as basic or non basic. Making this distinction, although it is "deeply entrenched and long established within the Orthodox Church," is shaky and calls for an intertemporal approach on the part of the legislator – in other words, something that is not always easy.

Nevertheless, the line of judicial decisions issued by the supreme administrative court also went through a third phase, this time under the regime of the current C More specifically, without abandoning article 3, section 1 of the C, the Council of State now confers primary status on article 13, sections 1 and 2 of the C, which safeguard the individual right of religious freedom of, among others, the followers of the prevailing religion. Thus, it foils any action on the part of legislators which would infringe upon the freedom of religious conscience and the freedom of worship. But the protection of articles 3, section 1 and *especially* of article 13, sections 1 and 2 of the C, cannot be regarded as extending to those holy canons and sacred traditions which relate to matters of exclusively administrative nature, because these cannot have the internal meaning of the doctrinal canons. Moreover, these same matters are regulated according to the needs of society and under the influence of more contemporary attitudes. Therefore, according to the Council of State, those holy canons and sacred traditions which refer to administrative issues are by necessity variable, in the common interest of both the Church and the state, and are subject to amendment by legislators. However, legislators cannot make fundamental changes in those primal administrative institutions which have been long established in the Orthodox Church. Thus, the more recent decisions of the supreme administrative court, without abandoning the distinction of ecclesiastical administrative institutions into basic and non-basic, adopt *especially* article 13, sections 1 and 2 of the constitution as a constitutional basis for the protection of the holy canons and the sacred traditions and as a standard for its range.

D. *The Extent of the Autocephalous Regime*

Article 3, section 1 of the constitution stipulates that 'the Orthodox Church of Greece ... is autocephalous." This mention is not merely an observation, but also a directive that the Church of Greece remains autocephalous. For the autocephalous regime to be lifted, a revision of this statute is necessary. The "Orthodox Church of Greece" of article 3, section 1 of the C does not minister to the Orthodoxy of the Hellenic territory as a whole. The limits of its jurisdiction do not coincide with the borders of the State. The Hellenic territory is divided into five separate ecclesiastical districts, which are subject either to a different Orthodox Church or to the same Church but under a different administrative and spiritual regime. These districts are: (1) the autocephalous Church, (2) the New Lands, (3) Crete, (4) the Dodecanese, and (5) Mount Athos. The autocephalous Church encompasses Central Greece (Roumeli), the Peloponnese, the Cyclades Islands (1833), the Ionian Islands (1866), Thessaly, and the province of Arta in Epirus (1882).

The metropolises that today constitute the autocephalous Church of Greece were for centuries under the jurisdiction of the Ecumenical Patriarchate in Constantinople. During

58. Rulings n^{os} 609/1967, 610/1967.

the War of Independence of 1821, there was no contact with the Patriarchate because of the war. From the first year of the Revolution, Adamantios Koraes, a great intellectual figure of Hellenism, proposed the declaration of an autocephalous ecclesiastical regime in the areas under revolt and the undertaking of the Church's administration by a Synod, whose members would be elected by priests and lay persons.[59]

After the founding of the modern Hellenic State, there were many who favored the autocephalous regime for ecclesiastical and political reasons. The attempts of the Patriarchate to bridge the gap and revert to the prerevolutionary regime met with the opposition of President Kapodistrias, who charged Minister of Justice Genatas with drafting a bill on church-state relations.[60] Genatas submitted a memorandum in 1830, leaving the draft law for later, when the relevant views of political and ecclesiastical agents would have been expressed. This memorandum, with a detailed account of all that was happening in the Church and a profound knowledge of its needs and of the national interest, concluded as to the matter of the autocephalous regime, that the relations between the Ecumenical Patriarchate and the ecclesiastical provinces of liberated Greece should be regulated by way of a treaty.[61]

After the inauguration of Otto, and with the renowned lawyer Georg-Ludwig von Maurer as the coordinator of ecclesiastical affairs, the Bavarian regency was right initially in deciding to proclaim the autocephalous regime, but it did not adhere to the prerequisites and the conditions that were required by the institutions of canon law. Thus, with the 23 July / 4 August 1833 proclamation "On the Independence of the Greek Church," the Hellenic state, in an irregular manner, rendered the bishoprics of its territories as autocephalous Church. This coup caused reactions both inside Greece and in Constantinople and the other Orthodox Churches, a disruption of spiritual unity, as well as significant damage to Hellenic national interests in the East and the Balkan Peninsula, regions which were ministered by the Ecumenical Patriarchate, which was the "nation-leading" Church of all the Orthodox people living there. Finally, on 29 June 1850, the Patriarchate issued a "synodal tome" (official Act), by which the Church of Greece was declared autocephalous *ex nunc*.

After the annexation of the Ionian Islands and, later of Thessaly, the province of Arta, and certain villages of Epirus with Greece, the Ecumenical Patriarchate conceded these regions to the autocephalous Church of Greece with its Acts of 9 July 1866, and of May 1882, respectively. With the Patriarchal and Synodal Act of 1882, the extent of the jurisdiction of the autocephalous Church was finalized. Since that time, any territories that were liberated and came under Hellenic State rule were not subject to the jurisdiction of the autocephalous Church.

With the Balkan Wars (1912–13) and the First World War, regions were liberated and incorporated into Greece, including Epirus, Macedonia, the Aegean Islands, and Western Thrace, whose metropolises and dioceses were subject to the Ecumenical Patriarchate. There were many debates and deliberations regarding the ecclesiastical regime of these new territories, which were called "the New Lands." Their subjection to the full jurisdiction of the Ecumenical Patriarchate gave rise to concerns of a political and ecclesiastical nature because of the wars of the 1912 to 1922 period and strained relations between Greece and Turkey.

The metropolitan of Thessaloniki Gennadios (Alexiades) had suggested in 1925 that the spiritual subordination to the Patriarchate be continued and that an autonomous administrative regime be established, with central organizations having their see in Thessaloniki. This solution was the most suitable one since the Ecumenical Patriarchate, which after the exchange of populations between Greece and Turkey was in a difficult

59. See Ad. Koraes, *Extant Excerpts from the Politics of Aristoteles* [in Greek], Paris 1821, 31.

60. See generally Men. Tourtoglou, *Relations between State and Church: An Attempt for their Regulation during the Time of Kapodistrias* [in Greek] in *Peloponnessiaka* 5 (1985–1986) 15.

61. The memorandum was discovered and analyzed by Men. Tourtoglou (above, n. 62).

state, did not lose the provinces of the New Lands, and there were no dangers from a potential lack of communication between Istanbul and Thessaloniki due to the administratively autonomous regime. But another solution was preferred, paradoxical from the nomo-canonical standpoint. The New Lands continued to be spiritually subject to the Ecumenical Patriarchate, but their administration was heretofore carried out "in trust" by the autocephalous Church of Greece. "In trust" means: (1) at the entreating request of the Ecumenical Patriarchate, the autocephalous Church of Greece took on "the direct governance" of the New Lands by extending thereupon "to all the system of administration and the order of its own Provinces;" (2) that "hence the Holy Synod of the Orthodox Autocephalous Church of Greece in Athens is henceforth recognized as the direct central and superior to these Provinces' ecclesiastical authority;"[62] and (3) this regime is temporary.

This solution was reached following deliberations between the Hellenic Republic, the Ecumenical Patriarchate, and the autocephalous Church of Greece. It was enacted in L. 3615 of 10/11 July 1928, and in the Patriarchal and Synodal Act of 4 September 1928, which also determined the general conditions of the operation of this administrative regime. However, the two texts significantly differ regarding the number of these conditions.[63]

Ever since L. 3615/1928 and the Patriarchal and Synodal Act of 1928 were put into effect, the autocephalous Church of Greece and the patriarchal dioceses of the New Lands have constituted the "Church of Greece." Hence, the wording of Article 3, Section 1 of the constitution ("The Orthodox Church of Greece ... is autocephalous"), as well as the identical wording of Article 1, Section 2 of the Statutory Charter of the Church of Greece,[64] are erroneous from a legal technical aspect. The Hellenic Parliament, without due examination, repeated in the current C and in the Statutory Charter the exact same provision of the 1844, 1864, 1911, and 1927 Cs, which contained wording that was correct and congruous with the facts of their time. The 1952 C contains an identical provision as well.

The struggle of the Cretans for independence resulted in the formation of the autonomous Cretan Principality (1898-1912), which signed a treaty with the Ecumenical Patriarchate on 14 October 1900. This treaty regulated the canonical dependence and the organization of the local Church. The local Cretan Church remained under the spiritual jurisdiction of the Patriarchate and administratively came under an autonomous regime. Crete retained this ecclesiastical regime until after its annexation to Greece in 1912. The current Statutory Charter of the Church of Crete is also a law of the Hellenic State.[65] Under this new Charter the Church of Crete became semi-autonomous towards the Ecumenical Patriarchate.

The Dodecanese was annexed to Greece on 7 March 1947. This political change did not cause changes in the ecclesiastical regime. Thus, the four metropolises and the exarchate of Patmos continue to be subject, spiritually and administratively, to the Ecumenical Patriarchate. Finally, the peninsula of Aghion Oros (Mount Athos), which was united with Greece in 1912, preserves unaltered its ancient privileged self-governing regime and is spiritually under the supervision of the Ecumenical Patriarchate.[66]

E. *The Self-Administration of the Church*

The current C is innovative as to the wording of that provision of article 3, section 1

62. See these L. and Act in French translation by Gr. Papathomas, *L'Église de Grèce dans l'Europe Unie*, Katerini 1998, 724–726 and 557–562 respectively.

63. See Ch. Papastathis, The Incorporation of Macedonia into the Greek State, in *Modern and Contemporary Macedonia*, (ed. I. Koliopoulos), vol. II, Thessaloniki 1993, 33–34.

64. L. 590/1977.

65. L. 4149/1961. See K. Papageorgiou, *The Orthodox Church of Crete* [in Greek], Chania 2001 (vol. IX of the review *Talos*,. 543).

66. See An. Vavouscos, *The ecclesiastical Regime of the Dodecanese, (1912-2005)* [in Greek], Athens-Thessaloniki (Sakkoulas) 2005. On Mont Athos see below, Section V.

regarding the self-administration of the Church of Greece. There was technical self-administration under the previous Cs as well, which stipulated that the Church "is administered by a Holy Synod of Bishops"[67] regardless of the practical extent of this self-administration and of the degree of consideration that the state demonstrated towards it. The 1975 C introduces more explicit provisions, especially as to the central administrative organs, as it stipulates that it "is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church."[68] From this provision it follows that the Holy Synod is comprised of those bishops who minister over a province, whereas the preceding Cs referred to a Holy Synod of bishops, a phrase which in practice gave the state the possibility to intervene in Church matters with the appointment of a Synod according to merit.

The provisions of the present C have the following effects: (1) The appointment of a Synod according to merit is thwarted; (2) inactive bishops, associate bishops and assistant bishops are excluded from participating in the Holy Synod, as are representatives of the presbyters, the deacons and lay people; and (3) administration is also exercised by the Permanent Holy Synod, originating from the Holy Synod of the Hierarchy and constituted in a manner determined by the Statutory Charter of the Church[69] (which is a law of the state according to article 72, section 1 of the C). On this point, the constitution once more introduces a pioneering provision in article 3, section 1: "in compliance with the provisions of the Patriarchal Tome of June 29, 1850, and the Synodal Act of September 4, 1928."[70]

With the Patriarchal and Synodal Tome of 1850, the Ecumenical Patriarchate endowed the Church in Greece with an autocephalous regime. With the Patriarchal and Synodal Act of September 4, 1928, the patriarchal dioceses of the so-called New Lands (which since then – together with the autocephalous Church – constitute the Church of Greece, but which continue, from a spiritual point of view, to belong to the Ecumenical Throne) came "in trust" under the administration of the autocephalous Church of Greece. The publication of L. 3615/1928 "On the Ecclesiastical Administration of the Metropolises of the Ecumenical Patriarchate in the New Lands" had already taken place. The Patriarchal and Synodal Act contains more general conditions than those of L. 3615/1928, which gave rise to disagreements regarding the force of all of them.

The C of 1975 is the first one to establish the Patriarchal Tome and the Patriarchal Act as sources of law of increased formal authority. One theory has held that the reference of the C to these two texts does not end with the specific matter of the bearer of the administration of the Church, that is, with the composition of the Permanent Holy Synod, but alludes to the administration of the Church in general. Under this view, the Church of Greece should be "basically" administered as the patriarchal texts specify. And, given that the Patriarchal and Synodal Tome of 1850 provides that the Holy Synod administers "Church matters according to the divine and holy canons freely and without impediment from all temporal interventions," it would follow that the way towards the substantial self-administration of the Church of Greece would be opened. At the same time, the matter of the general conditions of the Patriarchal Act and of L. 3615/1928 would be conclusively resolved in favor of the former.

However, the Council of State ruled that the C imposes the force of the patriarchal texts only as to the composition of the Permanent Holy Synod restrictively, and not in their totality.[71] Using this specific judgment of the Council of State as our standard, we cannot but conclude that the self-administration of the Church is necessarily limited to the regime of the state-law rule or, more emphatically, that "under a regime of State-law rule,

67. The relevant constitutional provisions are art. 2 of the 1844, 1864, and 1911 constitutions; art. 1, section 2 of the 1927 constitution; art. 2 of the 1952 constitution; and art. 1, section 2 of the 1968 constitutional text.

68. 1975 Syntagma [SYN] [Constitution] (Greece) art. 3, § 1.

69. Id.

70. Id.

71. See Rulings n^{os} 545/1978 ; 546/1978 ; 3178/1976.

the autonomy of the Church has solely theoretical significance."[72]

III. State Supervision of Religion

A. *The Supervising Agencies*

1. Ministry of National Education and Cults

General state supervision of all the religions in Greece is entrusted to the General Secretariat of Cults of the Ministry of National Education and Cults, which was instituted pursuant to Presidential Decree 417/1987. Its duties include: (1) The supervision of the implementation of government policy in the area of cults, and (2) the duties of the General Directorate of Cults (Pr. D. 339/1990, art. 1A). It includes three departments (a) Ecclesiastical Administration, (b) Ecclesiastical Education and Religious Instruction, and (c) Persons of Different Cult and of Different Religion, which were already provided for in the Ministry of National Education and Cults.[73]

a. Department of Ecclesiastical Administration

This department is divided into two branches: the Ecclesiastical Administrative Affairs Division; and the Division of Holy Churches (parishes), Holy Monasteries, and Parish Priests. Their duties are limited exclusively to matters of the prevailing religion and only within the Hellenic territory. Thus, the Ecclesiastical Administrative Affairs Division is responsible for recognition of and matters pertaining to the status of the bishops of the Churches of Greece, Crete and the Dodecanese; supervision of the implementation of the C and of the legislation on the organization and the administration of the Churches of Greece and Crete, of the metropolises of the Dodecanese, of the religious associations and foundations, as well as their supervision according to the laws and the sanction of their acts; the founding, the abolishment and the merger of metropolises; the exercise of supervision of the management of the property of the Churches of Greece and Crete, as well as of the-ecclesiastical legal entities of public law.[74] The Division of Holy Churches, Holy Monasteries, and Parish Priests concerns itself with the implementation of legislation on monasteries and hermitages (but not those of the peninsula of Mount Athos), churches, vicarages and their personnel; the expropriation of land for the purposes of erecting or enlarging churches; and the constitution of collection committees for collections in favor of churches when these collections are carried out beyond the boundaries of a single prefecture.

b. Department of Ecclesiastical Education and Religious Instruction

This department is made up of the offices of Personnel and of Administration. The Personnel Office is responsible for the appointment and the official status of the personnel of the schools of ecclesiastical education, of the Apostolic Diaconia of the Church of Greece, and of the preachers. This office also drafts the budget of the General Secretariat of Cults. The Office of Administration is in charge of the foundation and the supervision the schools of ecclesiastical education; the suspension of the operation, the conversion of form, the transfer of seat, the integration and the abolishment of these schools; the programs of their operations; affairs of registration, of transfer and examination of their students; affairs of administration and supervision of the Rizareios Ecclesiastical School (Athens) and the Athonias Ecclesiastical Academy (Karyes in Mount Athos); matters

72. See N. Rotis, Constitutional Order and Holy Canons, Council of State Ruling no. 2336/80) [in Greek], in "*To Syntagma*" 7 (1981) 428-429.

73. PD 147/1976 "Organization of the Central Agency of the Ministry," arts. 5–7.

74. Exempted from this division is the "Apostoliki Diakonia." See, infra Section IIIA.l.b. The Apostoliki Diakonia is a legal entity which belongs to the Church of Greece and takes care of the programming, the organization, and the realization of its educational and missionary work.

pertaining to the Apostolic Diaconia of the Church of Greece; the equivalence of the schools of ecclesiastical education to those of other public schools and to their diplomas; and affairs of religious instruction and of religious associations and foundations.

c. Department of Persons of a Different Cult and a Different Religion

This department (named in a fashion that is paradoxical for a modern State) is comprised of the Office of Persons of a Different Cult and the Office of Persons of a Different Religion. The tasks of the Office of Persons of a Different Cult include dealing with proselytism, the procedures for entry into the country of foreign heterodox clergy and religious ministers, the procedures for the foundation and the operation of the places of worship of the non-Orthodox Christians, of divinity schools, seminaries, foundations and other legal entities, as well as the supervision of all of the above. The same duties regarding the followers of religions other than the Christian one belong to the Office of Persons of a Different Religion. This office is also in charge of the appointment, the discharge, and matters of official status of the general chief rabbi, the chief rabbis and the Muslim muftis.

B. *Ministry of Foreign Affairs*

The Ministry of Foreign Affairs is also charged with responsibilities concerning the various cults. To my knowledge, it is internationally the only Ministry of Foreign Affairs to be institutionally assigned to religious affairs. More specifically, its E2 Department of Religious and Ecclesiastical Affairs[75] has jurisdiction over the supervision of the communal educational and ecclesiastical affairs of Hellenes living abroad; the relation of the Greek State with the Ecumenical Patriarchate of Constantinople, the other Patriarchates the Autocephalous Orthodox Churches, as well as affairs that concern the other Christian creeds, cults and international ecclesiastical organizations abroad, and the civil administration of Mount Athos.[76]

The Department of Ecclesiastical Affairs includes three offices. The first is the Office of Patriarchates-Autocephalous Churches. This Office is responsible for: (1) overseeing relations of Greece with the Patriarchates and the other autocephalous Churches, the World Council of Churches ("WCC"), the various cults and non-Orthodox Churches, as well as the resolution of any relevant matter that arises; (2) supervising the relations among the Orthodox Churches; (3) supervising the relations of the Orthodox Churches with the other Churches, the WCC and religious organizations; (4) providing every possible assistance to the senior Patriarchates and the Monastery of Mount Sinai; and (5) supervising the relations of the Ecumenical Patriarchate with the metropolises of the Dodecanese, the semi-autonomous Church of Crete, and the patriarchal monasteries and foundations in Greece.

The second office deals with Mount Athos and with the "Foreign Cults and Religions in Greece." This office's duties include the regulation of any matter that refers to the exercise of state supervision on Mount Athos, and the supervision of cases that regard matters "of heterodox Churches, foreign Religions and foreign Ecclesiastical Educational Establishments, Foundations and Associations in Greece."[77] The third office of the department is the Office of Ecclesiastical Affairs of Greeks Living Abroad, Orthodox Divinity Schools and Ecclesiastical Centers. This Office is responsible for: (a) protecting all ecclesiastical matters of Hellenes living abroad; (b) providing assistance to Hellenic clergy and lay persons for the study of Orthodox theology; (c) developing the activities of clergy, schools, foundations, and associations situated abroad; and (d) promoting cooperation between the Church of Greece and the Hellenic divinity schools with the Greek Orthodox Churches abroad.

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75. P. D. 230/1948, art. 38, §§ 1–3.
76. For the civil administration of Mount Athos. See infra, Section V.
77. Id.

C. *State Supervision of the Self-Administration of the Prevailing Religion*

The acts of self-administration of the Orthodox Church are subject to State control. Under the regime of article 26, section 1 of L. 590/1977, this is a review of legitimacy and is exercised in three situations. The first situation is when for the completion of an act of the ecclesiastical authority, the law demands the cooperation of the state either: (1) with the participation of state agencies in the final form of the act and within the boundaries of the joint administrative action (for example, in the election of a bishop as archbishop or metropolite, which is completed only with the issuance of a presidential decree);[78] or (2) in the form of the provision of sanction, so that the act of an ecclesiastical administrative organ is rendered executable. For example, for the erection of a place of worship of any religion, Mandatory Law 1369/1938 "On Holy Churches and Vicarages," article 41, section 1 demanded a license issued by the local Orthodox metropolite and final sanction by the Ministry of Education and Cults.[79]

Second, the review of legitimacy can be exercised with the participation of State officials in Church collective administrative organs. Two examples of this would be the participation of a judge and a tax official (an employee of the Public Revenue Services) in the metropolitan councils, and the presence of a government delegate, appointed by a State presidential decree[80]in the Holy Synod of the Church of Crete.

The third situation of State control occurs with the appellate procedures of the administrative courts (the Council of State and the administrative Courts of Appeal) on executory administrative acts of Church agencies, which have been issued in compliance with established legislation and pertain to administrative matters.

1. Appellate Review of the Council of State

The Orthodox Church in Greece is a spiritual and religious foundation, but, at the same time, it exercises a granted administrative power, implementing, as a public legal entity, the provisions of state legislation. Since the first years following its institution, the Council of State has subjected to its review all acts that pertain to administrative matters of agencies to which the State grants the administration of the Orthodox Church, to the extent these agencies are called upon to implement provisions of legislation. The Council of State uses three relevant criteria: First, the act should originate from those agencies to which the State has entrusted the administration of the Church (for example, the Holy Synod, the metropolises, the parish councils). Second, the contested act should be issued in compliance with State legislation. Third, the contested act should be both an exercise of administration – that is, it should regulate an administrative matter, not doctrines, worship, or general matters of a spiritual nature – and be executory.These acts may pertain to either the internal or the external affairs of the Church. Reviewable acts relating to the internal affairs of the Church consist of two types.

One type includes those acts that refer to the general position, formation, operation, exercise of administration, etc., of the central and peripheral organs charged with Church administration, as well as the official status of its employees. This is so because all these are subject to a legislative regime which is established by the state.

Examples of acts which have been reviewed include:

(1) A decision of the Holy Synod concerning the appointment of members of the Permanent Holy Synod and the synodal committees.[81]

(2) Acts by a metropolitan concerning the transfer,[82] discharge,[83] and dismissal of a

78. L. 590/1977, art. 15 § 6 ; Ib., art. 26 § 1.
79. Council of State, Ruling n° 721/1969.
80. L. 4149/1961, "The Statutory Charter of the Church of Crete," art. 8.
81. Ruling n°.1175/1975.
82. Ruling n° 5761/1974; Ruling n° 628/1951.
83. Ruling n° 824/1949, Ruling n° 1930/1946.

parish priest for relinquishing his duties,[84] and dismissal of a temporary parish priest from his position.[85]

(3) An act of a metropolitan council refusing to grant credit for the payment of wages to a parish priest.[86]

(4) A decision of the Permanent Holy Synod to file a document issued by the Ecumenical Patriarchate that constituted a retrial of the judicial case of a metropolitan – who had already been sentenced by an ecclesiastical court – and had been issued by the Patriarchate after the exercise of appeal, according to the old privileges of the Ecumenical Throne.[87]

(5) A metropolitan's decision concerning an objection, submitted against the validity of the election of members of a superior parish delegacy[88] or concerning the appointment of an abbot and the regulation of the administration of a monastery.[89]

(6) A decision of the Permanent Holy Synod rejecting an appeal against the election of an abbot.[90]

(7) Acts surrounding the election of a metropolitan.[91]

(8) The decision of a metropolitan concerning an appointment of a member of a monastery board.[92]

(9) Decisions of a monastic brotherhood on the election of an abbot.[93]

(10) An act of the Organization for the Administration of Ecclesiastical Property which granted a license for the construction of a temporary building made of aluminum and meant to be used as a church.[94]

(11) A decision of the Permanent Holy Synod, transferring a parish priest.[95]

The second type of internal affairs acts subject to review include those dealing with the administrative division of the Church, by which the local jurisdiction of ecclesiastical authorities is influenced. Examples of these acts include decisions of the Holy Synod subjecting a church to the jurisdiction of a specific metropolis[96] or setting of boundaries of metropolises,[97] and acts of a metropolitan council concerning the detachment of the territory of a parish and its subjection to another[98] or concerning the setting of boundaries of a parish.[99]

The reviewable acts of the external affairs of ecclesiastical authorities include those enforceable acts of an administrative nature which are issued in compliance with existing legislation and influence the constitutionally established rights of citizens. Examples of acts which were admissibly contested before the Council of State include the following:

(1) The orders of a metropolitan to a police authority to seal a private church, because the church had been unlawfully offered for public worship[100] or had been put into operation without legal license.[101]

(2) The orders of a metropolitan to a police authority to demolish a private church because the church had been erected without observing the legal formalities.[102]

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84. Ruling nº 507/1983; Ruling nº 1665/1949.
85. Ruling nº 4625/1985.
86. Ruling nº 669/1942.
87. Ruling nº 1983/1979.
88. Ruling nº 250/1954.
89. Ruling nº 2403/1965.
90. Ruling nº 688/1967.
91. Ruling nº 3856/1980; Ruling nº 545/1978.
92. Ruling nº 511/1983.
93. Ruling nº 2714/1984.
94. Ruling nº 1382/1984.
95. Ruling nº 1416/1989; Ruling nº 708/1983.
96. Ruling nº 2063/1947.
97. Ruling nº 1588/1959.
98. Ruling nº 1162/1967, Ruling nº 1/1945.
99. Ruling nº 981/1959.
100. Ruling nº 2915/1983; Ruling nº. 1626/1972; Ruling nº 2688/1970; Ruling nº 219/1944.
101. Ruling nº 1731/1971.
102. Ruling nº 1414/1963.

(3) An omission on the part of the metropolitan to issue an order to seal a private church which had been unlawfully offered for public worship.[103]

(4) The refusal of a metropolitan to grant a marriage license[104] or to spiritually dissolve a marriage pursuant to a judicial decision of divorce.[105]

These categories of acts are subject to the review of the Council of State whether they are of an individual or of normative nature. Especially for the latter, it has become accepted that a regulation of the Church of Greece is admissibly contested by a plea in abatement.[106] Therefore, if the time period set to contest it expires, its legitimacy is admissibly reviewed secondarily by contesting an act issued pursuant to this regulation of the ecclesiastical authority.[107]

Those acts of ecclesiastical authorities which have "spiritual and purely religious content"[108] are not subject to the review of the Council of State. In this broad category one finds those acts which, based on the statutes of the holy canons, regulate matter relating to the creeds, worship, and teachings of the Church. Therefore, the Council of State has excluded from its jurisdiction acts such as a refusal of a metropolitan to ordain one elected to the position of parish priest because of spiritual faults[109] and the election of a bishop as a merely religious minister, which took place with the exclusive invocation of the holy canons and without assigning administrative duties.[110] However, if an act is of double-natured content – both spiritual and administrative in nature – then it may be contested, but only as to its administrative elements.[111]

The Council of State had for decades excluded from its review the decisions of ecclesiastical courts under the exception of acts with solely spiritual content. In this field, the decisions of the Council of State shifted in focus at different times. It had initially ruled that the decisions of the ecclesiastical courts were not acts of administrative agencies; therefore, they were not subject to review by a plea in abatement.[112] Consequently, the Council of State called upon the very nature of the decisions of ecclesiastical courts,[113] but excluded them from appeal, because the review is permissible only from the decisions of the administrative courts; ecclesiastical courts are courts of a special penal nature and impose special penalties.[114]

More shifts in position in the Council of State's line of decisions followed.[115] The Council of State finally concluded[116] that the ecclesiastical courts have the character of disciplinary councils, which, in order to safeguard the principles of the welfare state and just administration, should follow, at least as to their composition and the disciplinary procedure, the basic principles of disciplinary law.

Moreover, the decisions issued by them are contested by plea in abatement before the Council of State as enforceable acts of administrative authorities.[117] Recently, decision 1534/1992 of the Council of State has come full circle and annulled the decision of a metropolitan issued pursuant to the statutes of article 11 of Law 5383/1932, that is, as a bishop's court.

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103. Ruling nº 219/1944.
104. Ruling nº 390/1971.
105. Ruling nº 2635/1980.
106. Ruling nº 960/1978; Ruling nº 866/1974.
107. Ruling nº 3234/1971.
108. Ruling nº 583/1940; Ruling nº 491/1940.
109. Ruling nº 583/1940; Ruling nº 491/1940.
110. Ruling nº 5856/1980.
111. Ruling nº 545/1978; Ruling nº 546/1978.
112. Ruling nº 830/1940.
113. Ruling nº 2279/1953.
114. Ruling nº 2265/1969, Ruling nº 2298/1965, Ruling nº 2024/1965.
115. Ruling nº 368/1977; Ruling nº 36/1975; Ruling nº 2548/1973, Ruling nº 2800/1972.
116. Ruling nº 825/1988; Ruling nº195/1987.
117. Ruling nº825/1988.

IV. The Administrative Structure of the Church

A. *Organization of the Church*

The Church of Greece is organized according to the synodical system; this is a fundamental administrative institution for every Orthodox Church, and it is found at central and local levels. The supreme authority is the Holy Synod of Hierarchy with the Archbishop of Athens as its President, and all the serving bishops (Metropolitans) are its members. Currently, there are eighty metropolitan sees in the entire Archbishopric: 43 in the autocephalous Church and 36 in the New Lands. The Church of Crete has an archbishopric and eight metropolitan sees, the Dodecanese Islands have six, and the Holy Mountain is under the Episcopal jurisdiction of the Ecumenical Patriarch himself.

The Holy Synod has administrative, legislative and juridical competence. In its legislative competence, it may publish regulations and canonical orders according to authority given in several areas by the Charter of the Church (L. 590/1977). The Synod is summoned *ipso jure* annually on 1 October, and at other times exceptionally according to need. A permanent administrative service is assured by the Permanent Holy Synod; this is formed by twelve metropolitans (six from the autocephalous Church and six from the Churches of the New Lands), with the Archbishop of Athens as President. It has a yearly tenure and prescribed powers. At the same time, there exist several synodical committees, which also assist the Synod. It also has attached to it certain organizations as legal persons: the Apostoliki Diakonia and the Inter-Orthodox Centre.

The Church of Greece is organized locally as follows:

(1) The Archbishopric of Athens and the metropolitan sees, whose boundaries, name and see are defined according to resolutions of the Holy Synod of the Hierarchy. The metropolitan sees are legal persons of public law. The bishop is the principal administrator in every province, and his title is that of metropolitan; questions concerning churches and parishes are in general decided by the metropolitan council consisting of a judge, an official from the Ministry of Finance, two priests, and a parish councilor. The election of the Archbishop of Athens and of the metropolitans is carried out by the Holy Synod of the Hierarchy. All active metropolitans are eligible for the archbishopric, together with those priests who are included in the list of candidates. Priests who are candidates for election as metropolitan must be included in the list of those eligible as archbishops. This list is established by the Holy Synod. New names are added every year, according to criteria stated in the Charter of the Church. The Ecumenical Patriarchate of Constantinople also has the right to add new names to the list, but only for the sees of the New Lands. Also eligible are prelates who are not active metropolitans. Official records on the election of archbishops and metropolitans are submitted to the Minister of Education and Cults, and he orders the publication of a presidential decree; following that, the elected prelate submits his confirmation to the President of the Republic and assumes his duties.

(2) A parish is a legal person of public law. It is founded by a presidential decree and administered by the parish priest and a five-member council of lay persons. The parish priest must be married; non-married priests may be ordained temporarily. Vacancies are filled by decree.

(3) Monasteries are also legal persons of public law, and also founded by presidential decree. Monasteries in the Church of Greece are divided into those which are under the spiritual supervision of the local metropolitan and those which are supervised spiritually by the Holy Synod. There are also monasteries in Greece which are supervised spiritually by the Ecumenical Patriarchate or are dependent ("metochia") upon the Monasteries of Mount Athos, the Holy Sepulcher, or the Mount Sinai Monastery.

B. *Church and Education*

In primary and secondary schools, courses in religious education are taught according to the doctrine and the tradition of the Eastern Orthodox Church. Teaching is carried out

by teachers in primary schools, and graduates of a Theology Faculty in secondary schools. Both are considered as civil servants and receive a salary from the State, while their appointment and syllabus are not controlled by the Church. According to the principle of religious freedom, non-Orthodox pupils are not obliged to follow the courses. Parents raise their children according to their own religious beliefs.

Each religious denomination may have its own schools in Greece. The State is also in charge of schools for the Muslim minority in Western Thrace as well as a training college for future teachers in these schools.

Training for Orthodox ordinands is given in twenty-one schools (secondary schools, higher schools and schools for accelerated training). These establishments also provide board and lodging for the students. All expenses are met by the State, and the teachers are considered civil servants. Both the Universities of Athens and Thessaloniki have Theological Faculties, which non-Orthodox students may also attend.

C. *Criminal Law*

1. Ecclesiastical Courts

The penal jurisdiction of the Church, its offences, sentences, and procedures are governed by State L. 5383/1932. Under the regime of "state-law rule," the jurisdiction of the ecclesiastical courts has been limited to clergy and monks. These courts do not judge lay people. If a lay person has committed a serious violation of faith or ecclesiastical order - such as heresy or schism - the Holy Synod of Hierarchy can impose aphorism (anathema) or excommunication. The ecclesiastical courts are for priests, deacons and monks the Episcopal court; the first instance synodal court and the second instance synodal court; bishops the first and second instance courts; and, solely for the members of the Permanent Holy Synod, a special court. All bishops found guilty by the second instance court have the right of appeal to the Ecumenical Patriarchate. The penalties of the ecclesiastical courts are demotion, suspension, dethronement (only for bishops), fine, internment, and unfrocking.[118]

2. State Penal Code

A number of articles of the Penal Code deal with religion:[119]

(1) Article 175, paragraph 1, stipulates that everyone who intentionally assumes, without justification, the exercise of any public, municipal or community authority shall be punished by imprisonment for not more than one year or by pecuniary penalty. Paragraph 2 of the same article adds that the above provision also applies to the cases of assuming, without justification, the exercise of the functions of the service of a clergyman of the Eastern Orthodox Church or any other religion "known" in Greece.

(2) According to article 176, everyone who publicly and without right wears a decoration or title or a uniform or other distinctive indication of a public, municipal, community or religious official, included under paragraph 2 of article 175 (the paragraph dealing with known religions), shall be punished by imprisonment or by pecuniary penalty. At the same time article 54, paragraph 2–3, of the Charter of the Church of Greece (L. 590/1977) imported the disposition according to which those who are not Orthodox monks [or nuns] do not have the right to wear the frock of the monks, who belong to the Eastern Orthodox Church. Otherwise they can be punished according to article 176 of the Penal Code.

(3) Article 196 on abuse of religions office explains that a religious minister who, in the exercise of his office or publicly and because of his office, causes or incites the citizens to bear animosity against the power of the State or against other citizens, shall be punished by imprisonment for not more than three years.

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118. See also Section IV E, below

119. See An. Christophilopoulos, The new Penal Code and Ecclesiastical Law [in Greek], in *Themis* 63 (1952) 305 ff.

(4) Article 198 refers to malicious blasphemy. It stipulates in paragraph 1 that everyone who publicly and maliciously and by any means blasphemes God shall be punished by imprisonment for not more than two year. According to the disposition of paragraph 2, except for cases under paragraph 1, one who by blasphemy publicly manifests a lack of respect for the divinity shall be punished by imprisonment for not more than three months.

(5) There is one more article of the Penal Code about blasphemy: n^{o} 199 on blasphemy concerning religions. According to this article, one who publicly and maliciously and by any means blasphemes the Eastern Orthodox Church or any other religion tolerable [not only known in the constitutional sense of the term] in Greece, shall be punished by imprisonment for not more than two years.

(6) Article 200 stipulates in paragraph 1 that one who maliciously attempts to obstruct or intentionally disrupts a religious assembly for service or ceremony permitted under the C shall be punished by imprisonment for not more than two years. Paragraph 2: One who commits blasphemous, improper acts in a church building or in a place devoted to a religious assembly - not only for worship - permitted under the C shall be subject to the same punishment of two years in prison.

(7) Article 201 on the desecration of corpses says that one who willfully removes a corpse, parts of a corpse or the ashes of the dead from those who have lawful custody thereof or one who commits an offence against a corpse or acts blasphemously and improperly towards a grave shall be punished by imprisonment of not more than two years.

(8) Article 342 refers to the abuse of minors, punishing abuse by imprisonment for not more than ten years. According to paragraph 2, there is incriminating evidence if the perpetrator of this crime is a clergyman with whom the minor has a spiritual relationship.

(9) Article 371 on the breach of professional confidence, stipulates in paragraph 1 that clergymen . . . because of their profession or capacity, are entrusted with personal matters of a confidential nature shall be punished by pecuniary penalty or imprisonment for not more than one year if they disclose such matters entrusted to them. According to the explanation of paragraph 4, such an act shall be justified and shall not be punished it the perpetrator acted in accordance with a duty or in the interest of the custody of a lawful or otherwise justifiable legal interests, public or private, whether his own or an other's, which could in no other manner be protected or performed.

(10) Article 374 on special cases of theft, stipulates that theft shall be punished by confinement in a penitentiary for not more than ten years "if property used for religious worship has been taken from a place of such worship."

3. Religious Symbols

Article 198 of the Penal Code on malicious blasphemy punishes, as we have seen already, everyone who by blasphemy publicly manifests a lack of respect for the Divinity by imprisonment for not more than three mouths. This disposition includes also offenses against the symbols of any religion and cult. Religious symbols, mainly icons of Jesus Christ, are used in the court halls and behind the judges' chair at all jurisdictions, as well as in the classrooms of elementary and secondary schools, hanging on the wall behind the teacher's desk. Schools that belong to various religious and denominations can use their own symbols. No law deals with the use of religious symbols; it is customary. Also, every person is free to use and wear his or her symbols, such as the Muslim foulard, crosses, and the David star.

D. *Financing of Churches*

In Greece there is no Church tax. Every religion has its own revenues from movable and immovable property and offerings of members. The State has, however, almost entirely assumed the financing of the prevailing religion; this is done under a variety of forms: direct or indirect subventions, such as the yearly subvention to the "Apostoliki Diakonia" (L. 976/1946, art. 24(1)(8)) and another granted to the Cathedral of Athens (L.

2844/1954), together with various grants to churches and monasteries for different reasons. At the same time, the State is charged with all the expenses of Orthodox clerical education.

The State pays the salaries of prelates, priests who serve a parish, deacons (priests and deacons number up to 10,000), preachers, and also laity employed by the Orthodox Church. The same persons also receive pensions from the State when retired. The law which imposed a State levy of 35 % of all parish revenues was abolished in 2004. The monks are also insured (for health and pension) by the "Farmers' Security Organization." Priests serving in cemeteries and hospitals receive their salary from the local municipality or hospital administration. Priests serving in the Army and the Police Force are raised to the rank of officers and receive the salary or pension of their rank. They may also hold posts in the public or private sector -usually as teachers - with the appropriate income.

The Orthodox Church enjoys various tax-exemptions such as those from real-estate tax, real-estate income tax, tax from real-estate transfers, donations, and inheritance tax. More favorable tax-exemptions apply to Mount Athos. According to the jurisprudence, all tax exemptions in favor of the prevailing religion are also in force for all the know religions and Christian denomination in Greece, according to the constitutional principle of equality.[120]

Other financial privileges comprise the inalienability of real property belonging to the Orthodox Patriarchates of the Middle East as well as to the monasteries of the Ecumenical Patriarchate, and the fact that real property belonging to monasteries cannot be taken over by third parties by usucapion. The Court of Appeal in Thessaloniki has accepted that this also holds for Roman-Catholic monasteries.[121] The State does not pay the salaries of precentors and sacristans; these persons, however, are not employees according to general labor laws because, according to the Holy Canons, they are considered as inferior clergy.

Although only a few of these persons have this status, the old financial regime still holds in their case–that is, when they are appointed by the metropolitan, they receive from the church a salary which has been agreed by the parties. Other Church employees are remunerated as civil servants of similar categories.[122]

E. *Ordination and Legal Position of Priests and Monks*

> The qualifications required of candidates for ordination are the following:
> (1) He must be a member of the Orthodox Church, (2) with a correct and sound faith; (3) he must be a male, (4) of the right age (minimum age 25 years for a deacon, 30 for a priest, 34 for a bishop), (5) have the necessary education, (6) be physically and spiritually healthy; (7) if he is married, his marriage must conform to the Holy Canons; ; (8) he should not have extramarital relations, and (9) he must be of irreproachable conduct.

If he is found guilty by an ecclesiastical court, a priest may lose his attributes and may be defrocked. A defrocked priest resumes the status he held before ordination, as a lay person or monk. The Eastern Church accepts that the conferring of orders is reversible: the acts of the defrocked priest are invalid.

Priests must accept the following restrictions: they cannot be appointed guardians of minors or of legally condemned persons. The holy canons prohibit trading by priests; if a priest is found to be practicing trade systematically, he is considered a trader and

120. Article 4 § 1.

121. 1161/1983.

122. On ecclesiastical financial matters See I. Koukiadis-Ch. Papastathis, Droit du travail et religion en Grèce, in Les *Églises et le droit du travail dans les pays de la Communauté Européenne*, Milano-Madrid (Consortium Européen) 1993, 115 ff.; Ch. Papastathis, *The Financing*, supra n. 49 at 180–184; K. PAPAGEORGIOU, *Tax Status of Religions* [in Greek], Athens-Thessaloniki (Sakkoulas) 2005; IDEM, *Taxation of Religions* [in Greek], Trikala-Athens 2005; IDEM, *Usucapion and ecclesiastical Real Estate* [in Greek], Trikala-Athens 2008; G. APOSTOLAKIS, *On the Real Estate of the Orthodox Churches in Greece* [in Greek], Trikala-Athens 2007.

accordingly punished. There exist in the Penal Code certain offences, which can be perpetrated only by a priest. These include the abuse of clerical rank,[123] the abuse of a spiritual child with indecent assault,[124] violation of confidentiality.[125] Another offence is the celebration of betrothal before a marriage or marriage without the bishop's permission, according to the constitutional Charter of the Church.[126] This offence may be punishable by up to a year's imprisonment by a State court and is also punishable by the ecclesiastical courts.[127]

According to penal and civil jurisprudence, when an oath is necessary, priests must only give an affirmation; they are not asked to divulge any information gained through confession. A prelate's testimony is taken at his residence and then read out in court. Bishops enjoy a special penal jurisdiction according to the Code of Criminal Procedure. Petty offences committed by a prelate are judged at the "crown court," not at the police court; while an offence is judged at the court of appeal, not at the "crown court." Although this was standard practice in the past, lay people do not now take part in the administration of ecclesiastical establishments and the election of prelates and parish priests.

Monastic status is acquired by tonsure, which is a ceremony and not a mystery. Tonsure takes place at the monastery where the new monk will live. During the ceremony the monk takes vows of obedience, poverty and chastity. Before tonsure, a future monk has to remain a novice, usually for a period of three years. A novice cannot be less than 16 years old.

As with priesthood, tonsure is an obstacle to marriage; tonsure will not automatically annul a former marriage. It constitutes, however, a reason for a demand of divorce by the other partner. Succession to the property of a monk is subject to particularly complicated legal arrangements in Greece. It will suffice to mention here that a monk's estate is inherited twice: after tonsure and after his death. After tonsure, his estate goes to the monastery and to his wife and children if he was married. After death, his estate is equally divided between the monastery and the Church.

F. *Matrimonial and Family Law*

Marriage is not considered incompatible with priesthood in the Eastern Church. It must have taken place, though, before ordination. Bishops are elected only from among non-married or widowed priests.

Civil marriage was introduced in Greece in 1982. Until that year, religious marriage was the only valid form; a civil marriage could only take place abroad, but it was not recognized in Greece. L. 1250/1982 introduced the equal validity of religious and civil marriage, and at the same time abolished many marriage-impediments in the Civil Code. However, the Church of Greece decided to keep many of these impediments for the religious marriage.

Thus, an Orthodox may not be married to a person of a different religion (not of a Christian denomination); nor when a third marriage has already taken place; nor when there is a close blood-relationship or spiritual affinity after baptism; nor when both parties have been convicted by a criminal court of adultery between them (although adultery is no longer considered a criminal offence). Marriage is not permitted to priests and monks (after their ordination or tonsure respectively) and to a woman before ten months have elapsed after the dissolution of a previous marriage. Marriage in Church requires a license from the metropolitan. In practice, this amounts to the same license required by municipalities or communities for a civil marriage. The officiating Orthodox priest should be "in a regular position," that is entrusted with performing the sacraments of the Church.

123. 1975 Syntagma [SYN] [Constitution] (Greece) art. 196.
124. 1975 Syntagma [SYN] [Constitution] (Greece) art. 342(1).
125. 1975 Syntagma [SYN] [Constitution] (Greece) art. 371(1).
126. 1975 Syntagma [SYN] [Constitution] (Greece) art. 49(2) & (3).
127. See, supra, IV, C

Otherwise, the marriage is not valid. Mixed marriages are celebrated according to both doctrines.[128]

Divorce is granted only by a civil court. The Church may intervene in the proceedings twice: before a divorce suit in an attempt at reconciliation,[129] (; and after the court's decision the Church dissolves the marriage spiritually. This is still in force today for persons who after a first religious marriage wish to proceed to another religious marriage.[130]

V. MOUNT ATHOS

Organized coenobitic monastic life on the Athos Peninsula is considered to date from the year 963, when the Monastery of Great Lavra was built. The Byzantine Emperors were in the habit of granting to Mount Athos privileges of self-administration (relating to the exercise of legislative, judicial, and administrative power), as well as privileges of a religious, personal, and financial nature. Mount Athos became the pan-Orthodox monastic centre, with monks from all the Orthodox nations. Currently, almost 2,800 lead the monastic life there.[131]

According to the C, the Athos Peninsula is a self-governing part of the Greek State, whose sovereignty remains intact.[132] Spiritually, Mount Athos is under the direct jurisdiction of the Ecumenical Patriarchate of Constantinople. All persons leading a monastic life there acquire Greek citizenship *ipso jure* upon admission to a monastery as monks or novices. Mont Athos is governed, according to its privileged regime, by its twenty monasteries, and the entire peninsula is divided among them. The whole territory of the peninsula is exempted from expropriation.

The administration is exercised by representatives of the twenty monasteries constituting the Holy Community, and its executive body the *Holy Epistassia* (Superintendence), which comprises four monks drawn annually from four different monasteries in rotation. The C does not permit any change in the administrative system or in the number of the monasteries or in their hierarchical order or in their relationship to their subordinate dependencies (scetes, cells, hermitages). Non-Orthodox Christian persons or Orthodox schismatic are prohibited from dwelling there. The determination in detail of the regimes of Mount Athos entities and their manner of operation is regulated by the Charter of Mont Athos. This Charter was drawn up regulated by the Charter of Mount Athos. This Charter was drawn up and voted for by the twenty monasteries, and ratified by the Ecumenical Patriarchate and the Hellenic Parliament. The Charter in force came into operation in 1927.

In the spiritual field, proper observance of the Athonic regimes by its entities is under the supreme supervision of the Ecumenical Patriarchate, and in the administrative field under the supervision of the Hellenic Republic, which is also exclusively responsible for safeguarding public order and security. These powers of the State are exercised through a civil governor, whose rights and duties are determined by law, and who is appointed by the Ministry of Foreign Affairs. The law determines also the judicial power exercised by the monastic authorities and the Holy Community as well as customs and taxation privileges.[133]

In addition to the C, the Charter, and the L.D., two other basic legal sources are in force: article 13 of the 16th protocol of the 1923 Treaty of Lausanne, which safeguards the

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128. Civil Code 1371.

129. Code of Civil Procedure, art. 593 & f (this was abolished after the introduction of civil marriage).

130. See J. Deliyannis, *Le mariage religieux et son efficacité civile en droit hellénique*, in «Les effets civils du mariage religieux en Europe," Milano (Consortium Européen Giuffré) 1993, 121 ff.

131. See Ir. Doens-CH. Papastathis-K. Papageorgiou-D. Nikolakakis, *Nomo-canonical bibliography on Mount Athos; 1912-2000* [in Greek], Mount Athos 2003; CH. PAPASTATHIS, The Status of Mount Athos in Hellenic Public Law, in "*Mount Athos and the European Community*," Thessaloniki (Institute for Balkan Studies) 1993, 55–57 ff.

132. 1975 Syntagma [SYN] [Constitution] (Greece) art. 105.

133. Legislative Decree of 10/16-9-1926.

rights and liberties of the monastic communities that are non-Greek in origin; and the Joint Declaration no. 4 of the Final Act of 1979 of the Agreement concerning the accession of Greece to the European Community, which states that the Community must preserve the status of Mount Athos, in particular in relation to customs franchise privileges, tax exemptions, and the right of establishment.

VI. Religious Freedom in Greece

There were references to religious freedom in Modern Greece already before the establishment of the Greek State. In 1768, a renowned prelate and scholar, Evghenios Voulgaris, published in Greek a work entitled "Draft on Religious Tolerance, That Is, on the Tolerance of the Heterodox.[134] In his work, he renders the word "Tolerance" with the coined term *anexithreskeia* (tolerance for other religions), which restricts the former only to religious matters. Almost at the same time, another scholar, Righas Velestinlis, who envisioned the cooperation among the Balkan peoples, asserted in the Declaration, which he issued regarding the basic principles of the regime of the future state in South-Eastern Europe, that "the freedom of religions of any kind, Christianity, Turkism, Judaism and so on is not impeded . . . ," as well as that the state shall be inhabited "with no exceptions on grounds of religion and language . . . ."[135]

The Cs, which were enacted during the War of Independence (1821-1828), established the Christian Orthodox cult as the state religion, - a provision which is contained in the current C (1975), as discussed above. At the same time, they instituted tolerance towards any other religion, as well as the unrestrained rite of its worship. In the monarchic C (1844), as well as in those of 1864 and 1911, the relevant statutes became more rigid. The various cults were treated with tolerance, and their rites of worship uninhibited, as long as they were "known." This is a term that, both by precedent and in theory, was used to determine a religion that has no secret beliefs and clandestine worship. Furthermore, these constitutions prohibited proselytism and all kinds of intervention against the prevailing religion. In the C of the Republic (1927), there was no longer plain tolerance of the various religions, but provisions on religious freedom. Religious conscience was inviolable. The rite of worship of every known religion was also unhindered, as long as its celebration was not counter to the public order and public morals. Moreover, proselytism was prohibited.

In the current C of 1975, article 13 contains the following fundamental provisions on religious freedom: the freedom of religious conscience is inviolable. All known religions are free and their rite of worship is performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the moral standards. Proselytism is prohibited, and no person is exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions.

The C, which guaranteed merely the tolerance towards various religions, empowered the State to grant the right of worship to the followers of religions other than the prevailing one. By contrast, since 1927, under the regime religious freedom, the State is required to guarantee the free formation and worshipping manifestation of religious convictions. Religious freedom is also interrelated with other provisions of the C, besides those of art. 13. Article 2, paragraph 1, on the value and dignity of a person, is also relevant, and so is art. 5, paragraph 1, on the unhindered development of one's personality. Also, in cases of events that pose threats to the State (in a state of emergency), during which art. 48 provides for the suspension of force of certain articles, though the implementation of article 13 is not suspended. Also, article 13 protects all

134. Evgenios Voulgaris published in 1768, a Greek translation of Voltaire's *Essai historique et critique sur les dissentions des Églises de Pologne*.Voulgaris added (pp. 217-284) an appendix under the title *An Outline on Toleration, that is Tolerance towards the Heterodox* [in Greek].

135. 1975 Syntagma [SYN] [Constitution] (Greece) art. 7. See Righas Velestinlis, *All his Extant Works* [in Greek], vol. V, Athens (Parliament of the Hellenes) 2000, p. 37.

those inhabiting the Greek territory, regardless of their nationality, while other articles concerning individual rights protect only Greek citizens (art. 4 on equality; art. 2 on the right to assemble; art. 12 on the right of association).

The C differentiates religious freedom into first, freedom of religious conscience; and second, freedom of worship.[136]

A. *Freedom of Religious Conscience*

The freedom of religious conscience is absolute. The C sets no limitations. Not even common legislation imposes restrictive provisions. However, a problem that often arises is how public administration and the courts are to implement the C and the laws. In this field, there were past decisions, which were not always congruous to these provisions.

Let us take a closer look at certain characteristic acts. One of the consequences of freedom of religious conscience is religious equality. This right has primary significance when getting hired for employment in the public sector. A grave problem came up concerning the occupancy of a teacher's post, although the relevant laws did not stipulate anything to the contrary.[137]

In all the schools of general education in Greece, the course of religion is taught – always in accordance with the creed of the Eastern Orthodox Church – as compulsory for all grade-schoolers who have declared to be Orthodox. In junior high schools and high schools, this course is taught by graduates of a university Faculty of Theology; in elementary schools, by the teacher of each class. In 1949, the Ministry of National Education and Cults fired a teacher because he had joined the religion of Jehovah's Witnesses. He appealed to the Council of State (the highest administrative court), which rejected his appeal on grounds that the qualification of Christian Orthodox constitutes a necessary element for the fulfillment of a teacher's duties, which include, e.g. the teaching of religion, the students' churchgoing, etc. Following this decision, the administration no longer appointed teachers in primary education if they were not Orthodox. In fact, the impediment was extended to include kindergarten teachers, although the latter do not teach courses. This system, with an exception in the case of schools of religious minorities, was in force up to 1988, when it was abolished.[138] Accordingly, the non-Orthodox may now be appointed as teacher (in a school with at least two posts) and religion is taught by the Orthodox colleague. Moreover, today there are state-appointed Catholic theologians who teach the course of religion in the junior high schools and high schools of certain islands in the Cyclades, where Catholics represent a high percentage of the local population.

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136. On the religious freedom in Greece, See An. Marinos, *Religious Freedom* [in Greek], Athens 1972; IDEM, "La liberté religieuse dans la nouvelle Constitution grecque," *Conscience et Liberté* 11/1976, 17-20; K. Kyriazopoulos, *Protection of Cultural Property and Religious Freedom* [in Greek], Thessaloniki 1993; G. Sotirelis, *Religion and Education according to the Constitution and the European Convention* [in Greek], Athens-Komotini 1993; I. Konidaris, "Legal Status of Minority Churches and religious Communities in Greece," in *The Legal Status of religious Minorities in the Countries of the European Union*, Thessaloniki-Milano (European Consortium) 1994, 171-181; Ismini Kriari-Katrani, "Freedom of Religion under the Greek Constitution," *Revue Hellénique de Droit International* 47 (1994) 397-415; C Bees (ed.), *Religious Freedom* [in Greek], Athens (Eunomia) 1995; Emm. Roukounas, *International Protection of Human Rights* [in Greek], Athens 1995; Ch. Papastathis, Le régime constitutionel des cultes en Grèce, in *Le statut constitutionel des cultes dans les Pays de l'Union Européenne*, Paris-Milano (Consortium Européen) 1995, 153-169; K. Kyriazopoulos, *Limitations in the Freedom of Religious Minorities' Instruction* [in Greek], Thessaloniki 1999; Paroula Naskou-Peraki, *The legal Framework of Religious Freedom in Greece*, Athens-Komotini 2000; Ch. Papastathis, (ed.), *Religious Freedom and Prevailing Religion* [in Greek], Athens-Thessaloniki 2000; Ch. Papastathis, The Applications of Religious Laws in the Hellenic Republic, in *La religion en droit comparé à l'aube du XXI^e siècle*, Bruxelles (Académie Intern. Droit Comparé-Bruylant) 2000, 307-321; R. CLOGG (ed.), *Minorities in Greece. Aspects of a plural Society*, London (Hurst & Company) 2002; Ch. Papastathis, La liberté religieuse en Grèce, in *L'Année Canonique* 45 (2003) 295 ff; G. Ktistatkis, *Religious Freedom and the European Convention of Human Rights* [in Greek], Athens-Komotini 2004; K. , *Taxation Status of Religions* [in Greek], supra n. 51.; I. Petrou, *Religious Freedom and Democracy* [in Greek], Thessaloniki 2005.

137. See I. Koukiadis-Ch. Papastathis, Droit du travail, supra n. 124 at 115ff.

138. L. 1771/1988.

The President of the Hellenic Republic, before assuming the exercise of his duties, can take only a Christian oath. C 33 does not contain a stipulation similar to that of C 59, concerning the oath of non-Christian members of Parliament. This is an indirect way of promoting the election of a Christian as President only, although this provision does not conform to the principle of equality.

A Jehovah's Witness has been convicted to imprisonment by court-martial, because he refused to serve in the military. After his release from prison, he attempted to be appointed as chartered accountant. The administration refused to grant him the relevant license because of his previous conviction. The Council of State (3339/1991) nullified the disapproving act. Also, the Municipality of Peristeri in Attica had refused to provide one of its employees, who was a Jehovah's Witness, with the family allowances provided by law, because he had solemnized his wedding in the ceremony of the Jehovah's Witnesses, a religion which the Municipality of Peristeri did not consider "known" under the constitutional mandate.[139] Therefore, the said marriage was non-existent for the municipality. The Council of State nullified this act (2105, 2106/1975). Lastly, the Faculty of Theology of the University of Athens decided on the expulsion of one of its students, because he had asserted to be an atheist. The Council of State voided this act, on grounds that the Faculty of Theology is not confessional; thus, it is also open to non-followers of the prevailing religion.[140]

As concerns the military service of those who refuse to serve on the basis of their beliefs, L. 731/1977 initially had provided for the objectors of exclusively religious conscience. This was the first law of its kind in Greece. Its statutes allowed for the unarmed military service for a time period that was double the regular term of service. The refusal to serve this type of military duty constituted a criminal offence. It was punishable by an imprisonment term of equal duration to that of the unarmed service. After serving the sentence, the duty for military service was terminated.

In the year 1997, the Parliament enacted a new law, 2510/24-27.6.1997, which was a "regulation of military duties . . . ." This law introduced new and modernized statutes concerning conscientious objectors. In the preamble to the bill, it is mentioned that "the treatment of the relevant issue, always with regard to the compulsory and universal character of military service, is required also by the compliance of the Country to obligations it has undertaken by way of international treaties." Apart from that, it is well-known that both the prevailing Orthodox Church and several other nationalistic agents are opposed to the provision of military facilitations to conscientious objectors. They allege that Greece faces security risks. The third chapter of this law (articles 18-24) refers to conscientious objectors. The relevant statutes provide that the reasons of conscience are considered to refer to a general outlook on life based on conscious religious, philosophical or moral convictions, which are applied by the individual unwaveringly and manifest themselves with the observance of an analogous behavior. The conscientious objectors are called upon to render either unarmed military service, or alternative civil social service, equal to that which they would have done if they had served in arms, increased by twelve (12) months for those obliged to serve without arms, and eighteen (18) months for those obliged to render civil service.[141] The current L. 3421/2005, art. 59-65, has decreased the duration of the above services.

B. *Freedom of Worship*

While in the realm of freedom of religious conscience, the problems which came up in the past concerned, as a rule, Jehovah's Witnesses. These problems today seem to have been substantially resolved. However, where freedom of worship is concerned, the

139. See section VI, below.

140. 194/1987.

141. See Ch. Papastathis, in European Journal for Church and State Research 5 (1998) 40–46, where the text of L. 2510/1997 on conscientious objectors in English translation.

relevant legislation has not improved. The unhindered practice of worship (C 13, paragr. 2) occurs under certain conditions, determined by the C itself. What is more, the Council of State (866/1974) has ruled that the common legislator cannot add other to the existing ones. In reality, the relevant laws and, consequently, the administrative and the judicial decisions operate regardless of the constitutional prerequisites.

As we already saw, the first condition for the freedom of worship on the part of the followers of a religion is that the religion happens to be "known." A "known" religion does not signify recognized religion. Besides, there is no administrative agency charged with the acknowledgment of religions. In practice, the characterization of a religion as known is usually accomplished with the approval of its petition for the establishment of a church or a house of prayer. Under this procedure, in each particular case the Administration conducts an ex officio inquiry to determine whether or not the conditions of known religion are met. The same procedure is followed by the courts, when the adherents of a religion appeal to it, requesting the nullification of an unfavorable act of the State administration.

Furthermore, the practice of worship of the known religion should not offend public order and public morals (C 13, paragraph 2). The former includes, in its general scope, the latter. Basically, it is the full spectrum of the fundamental civil, moral, social and economic principles and attitudes that prevail in Greece during a particular period. This constitutional framework of safeguarding worship is in practice conveyed by provisions in laws that were very often in stark contradiction to it particularly during periods of political unrest.

It is well known that during Metaxas' dictatorship (1936–1941) the Greece government issued laws which gave the Orthodox Church a predominant position over the other religions and Christian confessions.

One of these laws, L. 1369/1938, stipulated (art. 41) that for the erection of a place of worship of any religion or confession the interested parties had to submit a petition to the local Orthodox bishop. Only after the latter's approval could the Ministry of National Education and Cults authorize it. According to the same law, for houses of prayer there was no need of such permission from the local Orthodox bishop.

In spite of the fact that this provision was obviously anti-constitutional, as the freedom of worship of any religion and confession of worship of any religion and confession was left within the discretionary power of the Orthodox Church, the Council of State had accepted, in a series of rulings, that this law was congruous both with the former C (1952) and with the current Constitution in force (1975).

The Council of State had moreover extended the prerequisite of the bishop's authorization to the establishment of houses of prayer. On the other hand, the Council of State characterized the permission given by the bishop as a mere consultatory opinion, which is not binding for the Ministry's final decision. At the same time, the Council of State had ruled (721/1969) that if the Ministry happened to approve the establishment of a place of worship in spite of the local bishop's contrary opinion, it should make special justification for such a decision.

In practice, most of the time Orthodox prelates did not grant the required permission, particularly to Christian confessions; consequently, the Ministry was hesitant to approve the establishment. The interested parties had no other means to implement their constitutional rights than petitioning the Council of State and then the European Court of Human Rights.

This frustrating situation came to an end through L. 3467/21.6.2006 on "Matters concerning educational staff." Article 27 enacts that the permission (or opinion) of the local Orthodox authority is not required for the foundation, erection or functioning of a place of worship of any confession or religion; It also establishes that all different or contrary provisions on the same matter are abrogated henceforth. The relevant application should be submitted directly to the Ministry of National Education and Cults, which is the only competent authority.

Furthermore, the Council of State added to the constitutional requisites for the

operation of a church or house of prayer the non-performance of proselytism on the part of the petitioners (995/1970 and thereafter). But what is proselytism?

C. *Proselytism*

Proselytism as a legal term means any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of material assistance, or by fraudulent means or by taking advantage of his or her inexperience, trust, need, low intellect, or naiveté.

Proselytism was a criminal offense under article 198 of the old Criminal Law (1833). The relevant statute was deemed inadequate. It was replaced by that of article 4 of Compulsory Law 1363/1938 (cf. CL. 1672/1939), where the aforementioned definition is cited.[142]

Under the precedent of the Areios Pagos (the highest civil and criminal court), this statute has maintained its force even after the introduction of the new Criminal Code (1.1.1951). It is immaterial if the used means are expedient or if the person to whom the attempt is responsive of proselytism or if the desired result is ultimately achieved. It is likewise immaterial if the persons who are involved with the offense are related (e.g. parents-children, spouses).

Proselytism is punished with a cumulative sentence of incarceration (one month to five years) and imposition of a fine. If the perpetrator is a Greek citizen, police surveillance may also be imposed; if he is a foreigner, he may be punished with deportation.

The same law, when referring to the means for the practice of proselytism, uses the term "in particular." This allowed for judicial precedent finding that the enumeration of the manners and means of proselytism is indicative and alternative. Only one of them suffices or the use of other means, not mentioned explicitly in the law, suffices for the offense to take place. It is characteristic that both theory and precedent dealt with the issue of whether or not the distribution or the mailing of printed matter constitutes the offense. Their opinion is that in every single case this depends on the particular circumstances under which the act was committed.

The generality of the wording of the C, as well as the methods and means of proselytism which are indicatively described in the law, have led to the formulation of the opinion that proselytism is distinguished into fair and unfair. The former constitutes the mere exercise of the right of the free declaration of religious convictions. I believe that this distinction is not grounded on legislative reality. However, the limits between the two are extremely elusive. Undoubtedly, the provision of the current C, which prohibits the practice of proselytism for or against a given religion, constitutes progress when compared to the past, provided that the Greek legal order persists in preserving it as an offense. Precisely for this reason some writers do not include proselytism in the domain of religious freedom, but in that of the protection of religions on the part of the State.[143]

D. *Religious Freedom Cases v. Greece before the European Court of Human Rights*

During the period of 1993–2002, sixteen cases on religious freedom versus Greece have been tried by the European Court of Human Rights (the Court).[144] The first one is the well known as Kokkinakis v. Greece.[145] Discussed below are some of the most characteristic of these cases:

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142. A. Loverdos, *Proselytism* [in Greek], Athens-Komotini 1986; K. Kyriazopoulos, Proselytization in "Greece: Criminal Offence vs. Religious Persuation and Equality," *Journal of Law and Religion* 20 (2004–2005) 149ff.

143. As Sp. Troianos-G. Poulis, *Ecclesiastical law* [in Greek], Athens-Komotini 2003, 119–127.

144. E. Kastanas, The Jurisprudence of the European Court of Human Rights on Religious Freedom [in Greek], *Nomocanonica* 1/2 (Oct. 2002) 17–44.

145. Kokkinakis v. Greece, 17 EHRR 397 (1994) (ECtHR 260–A, 23 June 1993).

1. **Kokkinakis v. Greece**. Minos Kokkinakis, a Greek citizen, became a Jehovah's Witness in 1936. From that time, Kokkinakis was arrested more than sixty times for proselytism. Between 1936 and 1962 he was sentenced to imprisonment for 33 1/2 months and convicted to exile for 31 months in total. On 2 March 2 1986, M. Kokkinakis and his wife visited the home of Mrs. Kyriakaki, in Setia/Crete, and engaged in a discussion with her, also attempting to sell some booklets of their cult. Mrs. Kyriakaki's husband, who was the cantor at the local Orthodox parish, accused the Kokkinakis couple of proselytism to the police, who arrested them. They were convicted by the magistrates' court. The Court of Appeals of Crete acquitted Mrs. Kokkinakis, but upheld the conviction of Mr. Kokkinakis. His further appeal to Areios Pagos (the Supreme Court) in Athens was dismissed. M. Kokkinakis applied to the Commission, claiming that his conviction for proselytism was in breach of the rights secured in articles 7, 9 and 10 of the European Convention on Human Rights.

The Commission adopted Mr. Kokkinakis' account and expressed unanimously the opinion that there had been a violation of article 9. The Court in its judgment, held by six votes to three, ruled that there had been a violation of article 9 (right to freedom of religion). The court reasoned that the Greek courts established the applicant's liability by merely reproducing the wording of article 4 of the CL. 1363/1938 and did not sufficiently specify the way in which the accused had attempted to convince his neighbor by improper means. None of the facts they set out warranted such finding. Thus, it had not been shown that the applicant's conviction was justified under the circumstances of this case by a pressing social need. The contested measure (Mr. Kokkinakis' conviction) therefore did not appear to have been pursued or, consequently, necessary in a democratic society for the protection of the rights and freedom of others.

The court acknowledged a violation of article 9 of the Convention, because the inadequately substantiated decisions of the Greek courts infringed on the liberty of manifestation of religious convictions. Further, the Court held that there had been no violation of article 7 of the Convention, since the applicant was in a position to know the actions for which he may incur criminal liability, pursuant to the wording of the Greek law and the relevant legislation. The Court also deemed unnecessary to inquire into the allegations for violation of articles 10 and 14 of the Convention, since all relevant matters had already been analyzed in the context of article 9.

2. **Holy Monasteries of Ano Xenia and Others v. Greece.** The second complaint against Greece before the European Court, which invoked, among other things, a violation of religious freedom (article 9), was made by certain monasteries of the Church of Greece.

Law 1811/1988 ratified the agreement of the assignment to the State of the forest and agricultural property of 149 monasteries of the Church of Greece which entered into this agreement. Forty-seven monasteries informed the Holy Synod that they were not entering into the agreement because, according to their own statement, they did not possess significant forest and farming property. The administration and the management of the overall civil property of the monasteries that did not enter into the agreement came to the Holy Synod of the Church of Greece. It was provided for that around each monastery there was to be a retention of a specific area from the assigned property for the purposes of environmental protection and self-cultivation. The monastery lands for which the monasteries could prove ownership through title-deeds properly registered or by legal statute or by irreversible decision against the State remained in their ownership.

The reasons that compelled the State to initiate a new regulation of the issues regarding ecclesiastical property through Law 1700/1987 and Law 1811/1988, which ratified the agreement of the assignment of monastery property to the State, are the prevention of illegal and disadvantageous transactions or trespasses on the part of shrewd exploiters and the deterrence of frictions not only between the Church and the State but also between the Church and civilians. Similar compulsory concessions of monastery property to the state have been made right after the liberation from the Ottoman yoke, as well as pursuant to the directive of the Constitution of 1952 (Decree 2185/1952) regarding the restitution of sharecroppers (landless peasants).

The State, in exchange for the concession of the ownership of monastery property of those monasteries which became parties to the agreement took on the payment of the salaries of the preachers who were hitherto paid by the Organization for the Administration of Ecclesiastical Property and also the financial support of the monasteries with an amount equal to 1% of the annual budget allotted by the Ministry of Education towards the reimbursement of the expenses of the

Church (payment of salaries to bishops, priests, preachers, employees of metropolises, ecclesiastical education, etc.).

It was noted that the agreed price for the Church lands that were surrendered to the State towards the restitution of landless peasants on the basis of the agreement ratified by the Decree of 8/10/1952 was equal to 1/3 of their value.

The holy monasteries (Ano Xenia of Thessaly, Aghia Lavra of Kalavryta, Metamorphoses tou Soteros of Meteora, Chrysoleontissa of Aegina, Megalon Spelaion of Kalavryta, Flamourion of Volos, Asomata of Petrake, Osios Loukas of Boeotia) appealed to the European Commission of Human Rights and argued that Law 1700/1987 and Law 1811/1988 violated their rights which stem from articles 6, 9, 11, 13 and 14 of the Treaty of Rome and from article 1 of the First Additional Protocol.

The Commission expressed the unanimous opinion that there had been no violation of the Convention and the Additional Protocol by the Greek State. The European Court did not follow the Commission. It held unanimously that Law 1700/1987 constituted a deprivation of the peaceful enjoyment of the property of some of the applicants. The Court found a violation of article 1 of Protocol n° 1 and rejected all other claims, including violation of article 9.

3. **Manoussakis v. Greece.** The third case is that of T. Manoussakis et al. (1996). In the year 1983, T. Manoussakis rented an 88 m^2 room in a building of the village of Ghazi in Herakleio/Crete so that it could be used by Jehovah's Witnesses for their gatherings of any kind. In compliance with the provisions of the law concerning the operation of houses of prayer, T. Manoussakis addressed himself to the Ministry of National Education and Cults five times, requesting license of operation. The Ministry responded that it was not ready to grant the license because it had not yet received the required information from other services. In 1986, Manoussakis and the others were indicted of violation of art. 1 of Law 1363/1938, as this was amended by CL. 1672/1939. They were accused of using a site as a house of prayer, without having prior received the required license by the competent ecclesiastical authority and by the Ministry. The Magistrates[7] Court acquitted the accused. It held that "the gathering of followers of any faith, as long as there is no proselytism conducted, is unhindered, even when it is carried out in a place without a license." In 1987, the accused were tried by a higher court, and convicted to three-month imprisonment, which could be commuted to a fine of four hundred drachmas per day.

The accused appealed to the Commission and subsequently to the European Court. They pleaded that article 1 of CL. 1363/1938 is contrary to articles 11 (right of assembly) and 13 of the C of Greece, as well as to article 9 of the European Convention.

The Court issued its judgment on 26 September 1996. It held that in Greece Jehovah's Witnesses do not enjoy the guarantees which are in effect in other member-states of the Council of Europe. As a result, pluralism, tolerance, even the spirit of open-mindedness, without which there is no democratic society, were in grave danger in Greece. The whole procedure for the granting of a license of operation of a place of worship has been turned into a weapon against the right of religious freedom. Furthermore, the Court noted that the Greek State tended to utilize the potential of legislative provisions in such a way as to impose rigid – even prohibitive –conditions on the practice of worship of certain non-Orthodox religions, specifically of the Jehovah's Witnesses. Besides, the voluminous precedent of the Greek Council of State illustrates the tendency of administrative and ecclesiastical authorities to use legislation towards restricting the activities of non-Orthodox religions.

4. On the same issue was another case, that of **Pentidis, Kahtarios and Stagopoulos v. Greece**. The European Court of Human Rights resolved the dispute (9 June 1997) by giving a similar ruling.

5. **Larissis and Others v. Greece.** Dim. Larissis, S. Mandalaridis and I. Sarandis were officers of the Greek Air Force and followers of the Pentecostal Church. Between 1986 and 1989 they allegedly approached various airmen serving under them, all of whom were Orthodox Christians, and spoke to them about the teachings of the Pentecostal Church. In addition, two of the above officers attempted to convert a number of civilians. They were charged with offences of proselytism under article 4 of Law 1363/1938, which provides that it is a criminal offence to engage in proselytism, by which is meant "in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those

beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of the other person's inexperience, trust, need, low intellect or naivety."

In 1992, the three officers stood trial before the Permanent Air Force Court of Athens, which dismissed their objection that article 4 was unconstitutional. The court convicted them of various offences of proselytism against airmen and civilians. They were sentenced to 12, 13 and 14 months' imprisonment respectively, convertible into pecuniary penalties; but these penalties were not to be enforced, provided that they did not commit new offences within the next three years.

The officers appealed and the Court-Martial Appeal Court upheld the above judgment and reduced the prison sentences by 2 months. Then they lodged an appeal on points of law with the Court of Cassation. This court held that article 4 did not contravene either the provisions of the Hellenic Constitution, which enshrined the principle of *nullum crimen sine lege certa* and the right to religious freedom, or article 9 of the European Convention of Human Rights.

In their complaint before the European Court of Human Rights, the three convicted men complained principally that the Greek law against proselytism was not sufficiently well defined and that its application to them constituted an unjustified interference with their right to exercise their religious freedom.

The European Court found no violation of articles 7, 10, and 14 of the European Convention of Human Rights, though they did find violation of article 9.

6. **Tsavachidis v. Greece**. Gabriel Tsavachidis was a lay Jehovah's Witness in Kilkis. In 1981, in order to conduct meetings of the Jehovah's Witnesses circle, he rented premises in Kilkis. In 1993, the public prosecutor of this town ordered a preliminary enquiry into complaints that a Jehovah's Witnesses church had been established without the necessary permission from the local bishop and the Ministry of National Education and Cults, as specified in article 1 of the Royal Decree of 20 May/2 June 1939. The public prosecutor pressed charges against G. Tsavachidis and another person for illegally operating a church and summoned them to appear before the first instance single-member criminal court on 9 December 1994. One week before the trial, the defense became aware that a "top secret" information report had been included in the case-file. This report contained detailed information about the activities carried out at the church and identified G. Tsavachidis as on of the leaders. G. Tsavachidis wrote to the Prosecutor's Office and requested to be informed of the following: who delivered the "information report"; who wrote it and in what capacity. Also, he announced that he intended to use this information to bring proceedings in the domestic courts and to appeal to the European Court of Human Rights.

When the hearing began, the applicant objected to the validity of the indictment claiming that the "information report" could not be used as a part of the indictment as it was not signed. The court dismissed his objection because they concluded that he had had ample opportunity to prepare his defense. However, the court decided not to take into account the report as evidence because it was anonymous. On 7 April 1995 the criminal court acquitted G. Tsavachidis of the charges. The assistant prosecutor of Kilkis stated *inter alia* that the "information report" had been sent anonymously to the Prosecutor's Office and that the document had not been drawn up by the Secret Service. In his application to the Commission G. Tsavachidis complained that he had been subjected to surveillance by the National Intelligence Service because of his religious beliefs. He invoked articles 8, 9 and 11 of the European Convention taken alone or in conjunction with article 14. In its report of 28 October 1997, the Commission expressed the opinion that: (1) here had been a violation of article 8 (right to respect for private life);(2) there had been no violation of article 9 (religious freedom); (3) no separate issues arose under article 11 (freedom of assembly and association); (4) it was not necessary to examine whether there had been a violation of article 14 (prohibition of discrimination) taken in conjunction with articles 8, 9 and 11. The spokesperson for the Greek government sent a letter to the European Court whereby a positive assurance was given that Jehovah's Witnesses will not in the future be subjected to surveillance because of their religious beliefs, and the applicant would be awarded a sum of money for the expenses he had incurred. The case was ultimately stricken from the record.

7. **Thlimmenos v. Greece.** On 9 December 1983, the Athens Permanent Army Tribunal convicted Iakovos Thlimmenos, a Jehovah's Witness, of insubordination for having refused to wear the military uniform at a time of general mobilization. The tribunal sentenced I. Thlimmenos to four

years' imprisonment. In 1988, I. Thlimmenos sat a public examination for the appointment of twelve chartered accountants. He came second among sixty candidates. However, the Executive Board of the Greek Institute of Chartered Accountants refused to appoint him on the ground that he had been convicted of a felony. I. Thlimmenos exhausted all the legal remedies against this decision before domestic courts, with an unfavorable outcome. Thus, he appealed to the European Court of Human Rights (appl. n° 34369/1997). He argued that the decision of the Executive Board constituted a violation of articles 9 and 14 of the European Convention, and further that the manner and the time at which the subsequent judicial actions transpired constituted a violation of article 6, § 1. Both the Committee and the European Court granted the appeal of I. Thlimmenos for violation of article 14 in conjunction with article 9, as well as of article 6,§ 1. Also, Greece had to pay the applicant 6,000,000 drachmas (drs.) for non-pecuniary damages and 3,000,000 drs. for non-pecuniary damages and 3,000,000 drs. for costs and expenses.[146]

8. **Serif v. Greece.** Under L. 2345/1920, the religious leaders of the Muslims of particular regions, the *muftis*, were elected by them. After the integration of Western Thrace into Greece (1920), the exchange of populations between Greece and Turkey and the Treaty of Lausanne (1923), Muslims, as a recognized minority, inhabited only Western Thrace, where there are three *muftis*, in Xanthi, Komotini and Didymoteicho respectively. The Treaty of Lausanne does not provide for the election of a *mufti*. Moreover, *muftis* in Greece are not simply religious leaders. They are judges in the disputes of family and inheritance law, adjudicating on the basis of the *sharia*. What is more, they are civil servants. Their status is similar to that of the general director of a ministry, and they receive respective salaries from the Greek state. In other words, they hold a status and have competencies that are not afforded them today in Muslim countries. Because of these special judicial competencies, the Greek state has since the beginning designated the *muftis* in Western Thrace by appointment, and not by election on the part of the faithful.

In December of 1990 a new mufti was appointed in Komotini. The two Muslim Members of the Greek Parliament from Western Thrace requested that the government organize elections for the position of *mufti*. After it turned down their request, they organized their own elections and named Ibrahim Sherif as their own *mufti* of Komotini. The public prosecutor indicted them for usurpation involving the exercise of religious service (article 175 of Penal Code) and usurpation of office and vestments (article 176). I. Sherif was convicted by both the trial court and the appellate court, whereas the highest court rejected his appeal. After exhausting the domestic legal remedies, he appealed to the European Court invoking a violation of article 9 (concerning religious freedom) of the European Convention.

In its decision, the European Court held that the right of worship includes the right of the faithful to elect their religious leader. But in what concerns the judicial and administrative competencies, the Muslim interested parties will turn only to the *mufti* that is recognised by the State, regardless of which person they consider as their natural religious leader.

9. **Canea Catholic Church v. Greece.** On 16 December 1997, the European Court of Human Rights held unanimously that the Greek courts had violated article 6 of the European Convention on Human Rights by refusing to acknowledge that the Canea Catholic Church in Crete had legal personality and, therefore, the standing to act in legal proceedings. The Court awarded the Church $40,000 in court costs and damages. The Greek Government complied with decision No. 146/1996/762/963 of 16-12-1997 of the European Court of Human Rights about the legal entity of the Catholic establishments in Greece. Law 2731/5.7.1999 was amended with the addition of an article no. 33, which stipulates: "the legal entities that have been maintained in effect by virtue of article 13 of the Introductory Law of the Civil Code shall include those establishments of the Catholic Church of Greece that were created or have been in operation prior to 23/2/1946." February 23, 1946, was the date when the Greek Civil Code came into effect. With this new provision, cases like the one that was brought before the European Court (that of the Catholic Church in Canea/Crete) are henceforth regulated. But there is no doubt that the whole matter has been treated half-heartedly. The Hellenic Republic could very well proceed to a legislative solution that would once and for all ensure the establishments of the Catholic Church, as well as those of other religions that were founded even after the coming into effect of the Civil Code.

146. 340,75 drs. is equivelant to 1 Euro.

E. *The Special Legal Status of Various Religions and Cults*

1. **Orthodox Church.** According to the C art. 3, para. 1: (1) the doctrine of the Orthodox Church is the prevailing religion; (2) the Orthodox Church in Greece is inseparably united spiritually with the Ecumenical Patriarchate of Constantinople in Istanbul/Turkey and with all other Orthodox Churches; (3) the Church is self-ruled; and (4) it is autocephalous.

The legal significance of the term prevailing is that (1) the Orthodox faith is the official religion of the Greek State; (2) the Church, which embodies this faith, has its own legal status as a moral person under public law in its juridical relations, as well as its various services; and (3) it is treated by the State with special interest and in a favorable manner, which is not extended to other cults. According to jurisprudence and legal theory, this is not inconsistent with the constitutional principle of equality.

The relations between the State and the Orthodox Church are under the principles of the "State-law rule."According to the C 72, para. 1, bills concerning article 3 (position of the Orthodox religion) and 13 (religious freedom) are discussed by the Parliament; in particular in plenary session only, not in the summer session. The legal sources for the Orthodox Church in Greece are mainly laws of the State.

2. **Christian Cults**. Non-Orthodox Christians, as well as the Orthodox who follow the Julian calendar,[147] are almost always assembled into associations of the type provided for in the Civil Code, since there are no special laws that would recognize the moral personality of public law.

The 3rd London Protocol (1830), dealt in the first place with the position of the Roman Catholic Church in Greece. Under this Protocol, France, which had assumed the protection of the Catholics during the period of the Ottoman rule, abandoned this role in the liberated Greek territories, entrusting this task to the future sovereign of the newly-formed state. In addition, under this protocol it was determined that the Roman Catholic religion would enjoy the free and public exercise of its cult; that its property would be guaranteed; that its bishops would be maintained in the integrity of functions, rights and privileges which they enjoyed under the patronage of the kings of France; that the property which had belonged to the old French missions, or French settlements, would be recognized and respected.

Protocol n° 33 (1830) which followed, stipulated that the privileges which the Catholics had benefited from could not impose, on the Greek government, obligations which would eventually entail prejudice towards the dominant religion. When the Ionian Islands were annexed again to Greece (1864), the 3rd Protocol was also put in effect. After the ratification (1923) of the Treaty of Sèvres dealing with the protection of the minorities in Greece, the prevalent opinion in Greek theory and jurisprudence maintained that the London Protocol ceased to be in effect. This interpretation created various problems within the Catholic Church concerning the creation of new dioceses, the official recognition of prelates, the nature and function of its administrative organs, or even the very application of its Canon Law.[148]

There is no legislative text regarding Protestant cults. Several years ago, the question of the legal personality of the Evangelist Church was raised. The justice of the peace of Katerini (1961) had accepted that this Church constituted a moral person of private law. The tribunal of the first instance of the same city and the Appellate Court of Thessaloniki had ruled, to the contrary, that the Evangelist Church is deprived of any legal personality. The Areios Pagos has however attributed this Church with the moral

147. Christodoulos Paraskevaidis, *Historical and Canonical Study of the Old Calendarist Question* [in Greek], Athens 1982; K. Papageorgiou, Statut constitutionnel des communautés religieuses des Anciens Calendaristes à l'ordre juridique de Grèce, in "*L'Année Canonique*" 45 (2003) 171 ff.

148. S. Laskaris, The Catholic Church in Greece [in Greek], *Ephimeris tis Hellenikis kai Gallikis Nomologias* 43 (Sept. 1923–Aug. 1924) 145–160, 209–232; D. Salachas, *The legal Status of the Catholic Church in the Greek State* [in Greek], Athens 1978; N. Maghioros, L'Église Catholique Romaine et l'État en Grèce: Une approche juridico-canonique, in *L'Année Canonique*"45 (2003) 177 ff.

personality of private law.[149] The same was maintained for the Armenian parishes in Greece.[150] As concerns Jehovah's Witnesses, the Council of State has decreed that it is a "known" religion according to art. 13 of the C, whereas the Areios Pagos and the other civil tribunals always maintain their negative position on this subject.[151]

3. **Muslims.** The Muslim minority installed in Western Thrace is governed by the provisions of the Treaty of Lausanne (1923) and by various more recent laws. At the head of the minority, divided into three districts (Xanthi, Komotini, Didymoteicho), there are three *muftis*, appointed by the Minister of National Education and Cults. The jurisdiction of the *mufti* is exercised over all the ministers of the Muslim religion of his district and he judges suits relevant with family law and inheritance law of his fellow Muslims. Next to each *mufti* there sits a committee which manages the property *(evkaf)* which belongs to the religious collectivities and to the pious establishments of its district. The Greek State looks after the maintenance of schools for the Muslim minority, as well as after the *mendresse*s (seminaries) and the School of Muslim school teachers in Thessaloniki.[152]

4. **Israelites.** In Greece, the legal status of the Israelite religion is secured by several laws.[153] In cities where more than five Israelite families reside, an Israelite Community may be founded by Presidential Decree. These communities are moral persons of public law, administrated by the Assembly and the Council of the Community, with organs elected by their members. All the Israelite Communities of Greece are represented by the "Central Israelite Council of Coordination and Consultation," elected for three years by a general assembly, comprised of their special representatives.

Each Israelite Community is headed by a rabbi, appointed by Presidential Decree on the proposal of the respective community. There is likewise a council of rabbis, which also acts as religious tribunal *(Beth-Din).* The Civil Code (1946) has however abrogated its civil jurisdiction. The *Beth-Din* continues, nevertheless, to exercise its competence over the Israelites that don't have Greek citizenship, as well as for pronouncing the spiritual dissolution of marriages for which the civil court granted the divorce.[154]

VII. CONCLUSIONS

In conclusion, it could be said that the constitutional and common legislative provisions are constructed so as to give to the Orthodox Church in Greece the structure of a State agency. This situation causes a number of handicaps to the Church in the fulfillment of its mission. At the same time, however, State-law rule over the prevailing Church has also turned against the State itself, due to the many and various forms of interdependence that it has created in their relations. The consequences of a state-established church became unpleasant for the social and political institutions in Greece. The system of relations that was instituted in 1833 by the State cannot function smoothly. Instead, whether caesaro-papal or hierocratic views prevail depends on the personalities of State leaders.

In very general lines the above framework constitutes an outline on religious freedom

149. K. Vavouskos, On the legal personality of the Protestant Church in Greece [in Greek], *Annuary of the Faculty of Law of the University of Thessaloniki* vol. 13/1 (1966), 421-499; An. Vavouskos, Le statut juridique des Églises Protestantes en Grèce, in *L'Année Canonique* 45 (2003) 191 ff.

150. See Maria Tatagia, Le statut juridique de l'Église Arménienne en Grèce, in *L'Année Canonique* 45 (2003) 207 ff.

151. I. Konidaris, Legal Theory . . . [in Greek], supra n. 51. K. Kyriazopoulos, Les nouveaux mouvements religieux en Grèce: La reconnaissance des organizations religieuses en Grèce, in *L'Année Canonique* 45 (2003) 249 ff.

152. S. Minaidis, "The Religious Freedom of the Muslims in the Greek Law and Order "[in Greek], Athens-Komotini 1990; K. Tsitselikis, Muslims in Greece, in *Islam and the European Union*, Leuven (European Consortium) 2004, 79–107; Id., Le statut juridique de l'Islam en Grèce, in "*L'Année Canonique*" 45 (2003) 219 ff.

153. L. 2456/1920, CL. 367/1945, L. 1657/1951, R.D. of 25.6.1951, D.L. 01/1969.

154. See Vl. Papagrigoriou, Religious Freedom as Experienced by the Jewish Community in Greece [in Greek], in C Bees (ed.), supra n. 136 at 255–289; Ch. Papastathis, Le statut légal de la religion juive en Grèce contemporaine, in "*L'Année Canonique*" 45 (2003) 243 ff.

in Greece. Until now laws that echo dictatorial conceptions on the subject, such as those enacted during the Metaxas regime, are in force and are considered in conformity with the Constitution. Especially, the provisions of the laws and jurisprudence on proselytism constitute the Achilles heel of the common legislation on the subject. Since the famous Kokkinakis affair in 1993, the European Court of Human Rights has dealt several times with Greece in matters on religious conscience and worship. In fact the Byzantine and Post-Byzantine tradition and the political factor keep religious freedom and the relations between the prevailing religion and the State in Greece in a framework that has long been overcome by the member-states of the European Union. It is not possible to keep the medieval historical past and the present democratic international reality at the same time.

Since the Hellenic Republic hesitates to proceed in the direction of a contemporary constitutional and legislative framework for the safeguarding and enjoyment of religious freedom, as well as for the relations between the Republic and the prevailing religion, the decisions of the Commission and the European Court of Human Rights will continue to provide an immeasurably positive contribution in this field.

APPENDIX

CONSTITUTIONAL PROVISIONS CONCERNING RELIGIONS

CONSTITUTION OF GREECE (1975)

In the Name of the Holy and Consubstantial
And Indivisible Trinity

THE FIRST REVISIONARY PARLIAMENT
OF THE HELLENES RESOLVES

RELATIONS OF CHURCH AND STATE

Article 3

1. The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions. It is autocephalous and is administered by the Holy Synod of serving Bishops and the Permanent Holy Synod originating thereof and assembled as specified by the Statutory Charter of the Church in compliance with the provisions of the Patriarchal Tome of June 29, 1850, and the Synodal Act of September 4, 1928.
2. The ecclesiastical regime existing in certain districts of the State shall not be deemed contrary to the provisions of the preceding paragraph.
3. The text of the Holy Scripture shall be maintained unaltered. Official translation of the text into any other form of language, without prior sanction by the Autocephalous Church of Greece and the Great Church of Christ of Christ in Constantinople, is prohibited.

Article 5

2. All persons living within the Greek territory shall enjoy full protection of their life, honor and freedom, irrespective of nationality, race or language and of religious or political beliefs. Exceptions shall be permitted only in cases provided by international law.

The extradition of aliens prosecuted for their action as freedom fighters shall be prohibited.

Article 13

1. Freedom of religious conscience is inviolable. Enjoyment of individual and civil rights does not depend on the individual's religious beliefs.
2. All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of law. The practice of rites of worship is not allowed to offend public order or moral principles. Proselytism is prohibited.
3. The ministers of all known religions shall be subject to the same supervision by the State and to

the same obligations toward it as those of the prevailing religion.
4. No person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions.
5. No oath shall be administered except by law determining the form thereof.

Article 14

3. Seizure of newspapers and other publications before or after circulation is prohibited.
Seizure by order of the public prosecutor shall be allowed exceptionally after circulation and in case of: a) an offence against the Christian or any other known religion.

Article 16

3. Education constitutes a basic mission for the State and shall aim at the moral, intellectual, professional, and physical training of Greeks, the development of national and religious conscience and at their formation as free and responsible citizens.

Article 18

3. Farmlands belonging to the Patriarchal Monasteries of Aghia Anastassia Pharmacolytria in Chalkidiki, of Vlatadhes in Thessaloniki and St. John the Evangelist –Theologos– in Patmos, but not the dependencies thereof, cannot be subject to expropriation. Likewise the property in Greece of the Patriarchates of Alexandria, Antioch and Jerusalem and that of the Holy Monastery of Mount Sinai cannot be subject to expropriation.

Article 24

6. Monuments and historic areas and elements shall be under the protection of the State. A law shall provide for measures restrictive of private ownership deemed necessary for protection thereof, as well as for the manner and the kind of compensation payable to owners.

Article 33

2. Before entering office, the President of the Republic shall take the following oath before Parliament. “I do swear in the name of the Holy and Consubstantial and Indivisible Trinity to guard the Constitution and the laws, to provide for faithful observance thereof, to defend the national independence and territorial integrity of the Country, to protect the rights and freedoms of the Greeks and to serve the general interests and progress of the Greek People.”

Article 59

1. Before undertaking the discharge of their duties, members of Parliament shall take the following oath in the Chamber and in public setting. “I swear in the name of the Holy and Consubstantial and Indivisible Trinity to guard faith in my Country and in the democratic form of government, obedience to the Constitution and the laws and to discharge conscientiously my duties.”

2. Members of Parliament who are of a different religion or creed shall take the same oath modified to the form of their own religion or creed.
3. Members of Parliament declared elected in the absence of Parliament shall take the oath in the Section, in session.

Article 72

1. Parliament in full session debates and votes on its Standing Orders, on bills and law proposals pertaining … to the subjects of articles 3, 13…

Article 95

1. The jurisdiction of the Council of State pertains mainly to:

a) The annulment upon petition of executive acts of administrative authorities for abuse of power or violation of the law.

b) The reversal upon petition of final rulings of administrative courts, for abuse of power or violation of the law.

c) The trial of substantive administrative disputes submitted thereto as provided by the Constitution and the laws.

d) The elaboration of all decrees of a regulative nature.

……

5. The administration shall be bound to comply with the annulling judgments of the Council of State. A breach of this obligation shall render liable any responsible agent as specified by law.

Article 105

1. The Athos peninsula extending beyond Megali Vigla and constituting the region of Aghion Oros

shall, in accordance with its ancient privileged status, be a self-governed part of the Greek State, whose sovereignty thereon shall remain intact. Spiritually Aghion Oros shall come under the jurisdiction of the Ecumenical Patriarchate. All persons leading a monastic life thereon acquire Greek citizenship without further formalities, upon admission as novices or monks.

2. Aghion Oros shall be governed in accordance with its regime by its twenty Holy Monasteries among which the entire Athos peninsula is divided; the territory of the peninsula shall be exempt from expropriation.

Administration of the Aghion Oros region shall be exercised by representatives of the Holy Monasteries constituting the Holy Community. No change whatsoever shall be permitted in the administrative system or in the number of Monasteries of Aghion Oros, or their hierarchical order or in their position to their subordinate dependencies. Heterodox or schismatic persons shall be prohibited from dwelling thereon.

2. The determination in detail of the regimes of Aghion Oros and the manner of operation thereof is effected by the Charter of Aghion Oros which, with the cooperation of the State representative, shall be drawn up and voted by the twenty Holy Monasteries and ratified by the Ecumenical Patriarchate and the Parliament of the Hellenes.

4. Faithful observance of the regimes of Aghion Oros shall in the spiritual field be under the supreme supervision of the Ecumenical Patriarchate, and, in the administrative, under the supervision of the State, which shall also be exclusively responsible for safeguarding public order and security.

5. The aforementioned powers of the State shall be exercised through a governor whose rights and duties shall be determined by law.

The law shall likewise determine the judicial power exercised by the monastic authorities and the Holy Community, as well as the customs and taxation privileges of Aghion Oros.

Article 110

1. The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of article [].…13, paragraph 1…

BALÁZS SCHANDA

Religion and the Secular State in Hungary

I. INTRODUCTION

Hungary is a secular state where the Constitution provides for the neutrality of the state on matters of religion and ideology. Religious freedom enjoys the protection of the Constitution. This freedom is safeguarded by a complex set of legal norms.

II. SOCIAL CONTEXT

Data concerning religious affiliation is considered sensitive, and no state agency may register religious affiliation in any form. The 2001 census contained an optional and anonymous question regarding religion, which 90 percent of the population elected to answer. 15 percent of the population declared they had no denominational affiliation, 55 percent of the population declared themselves Catholic (3 percent Greek Catholic), 16 percent Calvinist, and 3 percent Lutheran. Traditionally, Jewish and Orthodox religions also play an important role, and other religious communities (evangelical, Eastern, etc.) gained place.

The census found the following data:

Catholic	5,558,961	54.5%
- Roman Catholic	5,289,521	51.9%
- Greek Catholic	268,935	2.6%
Reformed (Calvinist)	1,622,796	15.9%
Lutheran	303,864	3.0%
Jewish	12,871	0.1%
Other	112,121	1.1%
- Orthodox	15,298	0.2%
- Baptist	17,705	0.2%
- Adventist	5,840	0.1%
- Other Christians	24,340	0.2%
No denomination	1,483,369	14.5%
No answer	1,034,767	10.1%
No data	69,566	0.7%
Total population	**10,198,315**	**100%**

The proportion of those having a religious affiliation grows with the age groups, with some differences between denominations. Women confessed a religious identity to a higher degree than men. Presumably Jews and adherents of some "new religious movements," as well as Muslims (about 3,000), are over-represented among those declining to answer (some estimations put the Jewish population ten times higher than the census results).

Altogether, the population stated affiliations to 260 different religious communities and beliefs. It is noteworthy that the census question was open, with no pretyped, possible answers listed. The affiliation with mainstream Christian denominations is stronger in rural areas than in towns. The proportion of people having no denomination or not responding to the question was the highest in Budapest, whereas the percentage decreases with the size of the municipality.

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Calvinists constitute the majority in Eastern Hungary. Greek-Catholics are concentrated in the northeastern part of the country, whereas the western part of Hungary has a Catholic majority, with some traditionally Protestant (Lutheran or Calvinist) settlements. Most Jews surviving the holocaust live in Budapest. While the Calvinist Church is strongly identified with the Hungarian nation, the Lutheran Church in Hungary was traditionally composed of ethnic Hungarians, Germans, and Slovaks. Catholics in the region have a heterogeneous ethnic background. While denomination is and remains a significant factor or personal identity for a large majority of the population, religiosity is not especially high in Hungary. About 13 to 18 percent of the population claims to follow the doctrine of a church; 50 to 55 percent claim to be religious "in their own way"; 20 to 30 percent are not religious and only 3 to 5 percent are declared atheists.[1] Religiosity is higher with elderly rural population and younger urban academics than with middle-aged skilled workers. Cities that underwent a rapid urbanization during the communist period are more secular than other cities, including the capital, Budapest. Society underwent a rapid secularization in the 1960s and 1970s. Since then, religiosity has become slightly stronger or has been stagnant.

III. Theoretical and Scholarly Context

The doctrine on neutrality elaborated by the Hungarian Constitutional Court may be seen as the most important principle governing the State in its relationship with the religious communities as well as with other ideologies. According to this doctrine, the State should remain neutral in matters concerning ideology: there should be no official ideology, be it religious or secular. Neutrality means that the State should not identify with any ideology (or religion); consequently it must not be institutionally attached to churches or to any one single church, nor to any organization based on an ideology. This shows that the doctrine underlying the principle of separation (as explicitly stated in the Constitution) is the neutrality of the State. It is to be noted that neutrality must be distinguished from indifference, which is not what the Constitution implies – as follows from the concept of neutrality elaborated by the Constitutional Court. Neither is neutrality "laicism": the State may have an active role in providing an institutional legal framework as well as funds for the churches to ensure the free exercise of religion in practice. The State should not enter into institutional involvement with any organization that is based on an ideology, either religious or secular. The freedom of religion and the freedom from religion are equally protected. All public institutions, including schools, universities, hospitals, etc., are bound by the principle of neutrality.[2] There are no religious symbols at public institutions.

IV. Constitutional Context

A. Outline of the Political History of the Country with regard to the Relations between State and Religion

Hungary is a country that emerged to statehood by adopting western Christianity in the first millennium. The foundations of the Catholic Church were laid by St. Stephen (997-1038), the first king of Hungary, who founded ten dioceses. The claim of the "patronate," the royal (state) care of spiritual issues, remained firm throughout the twentieth century. Although Hungarian history is determined by adherence to western Christianity, Orthodox minorities have been present in Hungary throughout the country's history. The Reformation reached the country when the central state power was weak and the country was in permanent war with the Ottoman Empire. The Reformation was highly successful in the sixteenth century as the majority of the population turned first to the Lutheran and shortly therafter to the Calvinist Reformation. The Reformed

1. Tomka, Miklós, Egy új társadalmi szereplő, Társadalmi Szemle 1998/8-9.
2. Decision 4/1993. (II. 12.) AB

(Calvinist-Presbyterian) Church became the birthplace of national culture in respect to Bible translation, schools, and so on. The Counter-Reformation, encouraged/bolstered by the royal court (from 1526 the Habsburg dynasty gave the kings of Hungary), also achieved success, but the country has preserved a high level of denominational pluralism. A generally tolerant approach to religious issues is deeply rooted in Hungarian society. The coexistence of Catholics and Protestants (mainly Calvinists who often regard themselves as the "Church of the nation") has not always been free of conflict, but has proven to be a fruitful tension, enriching both national and local culture. After the Turkish wars at the end of the seventeenth century, ethnic Hungarians became a minority in the Kingdom of Hungary. While the Serbs in the south remained Orthodox, large numbers of Romanians in Transylvania and Ruthenians in the Carpathians joined the Catholic Church, favored by the Habsburgs. During the course of the seventeenth century, the Protestant nobility achieved considerable freedom in Hungary. However, due to the re-Catholizing efforts of the Habsburg kings, this freedom was gradually curtailed. The state influence in the affairs of the Catholic Church was also strong, especially in the enlightened absolutist Josephinist (Joseph II 1780-1790) era, when, for example, contemplative religious orders were dissolved. The Reformed and Lutheran religions regained their freedom at the end of the eighteenth century.[3] At that time, although the free exercise of these religions was permitted, their status remained far from equal to that of the Catholic Church. Even though revolutionary legislation in 1848 declared the equality of all accepted religions,[4] the emancipation of Jews did not occur until 1867.[5] By the end of the nineteenth century, the Jewish population had risen to over 5 percent. The liberal era of the late nineteenth century enhanced the rapid assimilation of the Hungarian Jewry. This era produced legislation proclaiming religious freedom for all, but restricting the right of public worship to the acknowledged communities (either incorporated or recognized).[6] After the trauma of the post-World War I secession of Hungary, national conservative forces dominated the political and the cultural landscape, cutting back some of the liberal legislation of the late 1800s. Hungary became a small country surrounded by her former lands – and large ethnic Hungarian minorities. The country became involved in World War II and came under German occupation on the nineteenth of March 1944. In the following few months three-quarters of the Hungarian Jewry – who had suffered massive discrimination, but had enjoyed relative security until then – were deported and killed.

Even after 1895, when the free exercise of religion was officially recognized, differences in the treatment of various religions still remained. A two-tier system was applied with distinctions between "incorporated" and "recognized" religions, allowing representatives from "incorporated" denominations to hold seats in the "Upper House" of the Parliament. The Catholic, Reformed, Lutheran, Orthodox, and Unitarian churches as well as the Jewish Communities were considered "incorporated" religions. In 1947, "incorporated" churches lost their privileges, when all religions were granted equal status, which basically amounted to the status previously enjoyed by "recognized" churches.

After the communist takeover in 1948, religious freedom remained a dead letter of the Constitution. Education was nationalized (1948), religious education fought back (from 1949), theological faculties detached from state universities (1950), religious orders were banned (1950), property of religious communities was mostly confiscated, numerous religious leaders were arrested and sentenced, including the Primate of the Catholic Church in Hungary, Cardinal Mindszenty, who was arrested on December 26, 1948 and,

3. Leopoldi II, Decree, art. 26 (1790).

4. On the Issue of Religion, Act XX (1848). Accepted religions were Latin, Greek, and Armenian Catholic, Reformed, Lutheran, Unitarian, Serbian, and Romanian Orthodox.

5. On the Equality of Israelites in Regard to Civic and Political Rights, Act XVII (1867). József Schweitzer & Gábor Schweitzer, *A magyarországi zsidók és az izraelita felekezet jogállásának alakulása* [*The Development of the Legal Status of Jews in Hungary and that of the Jewish Denomination*], *in* Felekezeti Egyházjog Magyarországon [Denominational Ecclesiastical Law in Hungary] 229 (Lajos Rácz ed., 1994).

6. Act XLIII/1895.

after being tortured, was sentenced to life imprisonment in February 1949. After the arrest of a considerable part of the Hungarian episcopate, the remaining Bishops' Conference signed an agreement with the government in 1950 regulating the fate of members of banned religious orders and consenting to the operation of eight Catholic secondary schools managed by four orders. Other denominations had already signed similar agreements in 1948, basically acknowledging the emerging power. In the Catholic Church the number of vacant or impeded bishopric sees was growing as the government claimed the right to control the nomination of bishops, and even lower ministries. In other denominations often collaborationist churchmen came into office. In the Catholic Church, the state sponsored movement for peace brought a rupture in the clergy. The Churches were generally put under strict state control that was exercised by the State Office of Church Affairs.

Although from the 1960s the state pressure began to relax to some extent, the general rules and practices of the regime did not change until the late 1980s. In 1964, the Holy See and Hungary signed a document on the procedure followed at the appointment of bishops, on the oath of clergy on the constitution, and on the operation of the postgraduate training institution of the Hungarian clergy, the Pontifical Ecclesiastical Institute in Rome. On a much longer list of sensitive issues no agreement was reached, but the competence of the Holy See was acknowledged, which was a unique development in the Soviet Block. From that period, representatives of the regime and the Holy See met twice a year, once in Budapest, once in the Vatican, but the diplomatic relations could not be re-established. In the late eighties, the control over religions became looser, a number of new denominations were acknowledged, and traditional denominations, including members of the Catholic episcopate, began to claim more freedom. The collapse of the communist system (1989/1990) brought a gradual new beginning for religious freedom and church-state relations.

B. Current Constitutional Provisions and Principles Governing the Relations between State and Religion – The Model of State-Religion Relations

The Constitution provides for religious freedom with wording similar to that of the Universal Declaration of Human Rights. In addition to that document, however, the Constitution expressly recognizes the right not to express conviction. Convictions can also be expressed in any way not contrary to the law. The Constitution also states that church and state function separately.[7] The Constitution provides for non-discrimination on the basis of religion[8] and recognizes the rights of parents to determine the education of their children.[9]

Neutrality and a (friendly) separation are characteristic principles of the model of State-religion relations.

No religion or religious community is explicitly mentioned by the Constitution. The Constitution provides for the separation of Church and State, whereas the doctrine of state neutrality in religious issues was elaborated by the Constitutional Court. Statutory law on religious freedom provides for equal rights of religious communities and for the cooperation of state and religious communities.

V. LEGAL CONTEXT

The Act of Freedom of Conscience and Religion and the Churches (1990) provides for details of both individual and collective aspects of the freedom of religion and for an institutionally strict, but benevolent separation.[10] Details are regulated by separate

7. Constitution § 60.
8. Constitution§ 70/A.
9. Constitution§ 67 (2)
10. Act IV/1990.

legislation on the restitution of confiscated church property (1991),[11] the funding of religious communities (1997),[12] laws of public education (1993)[13] and of higher education (1993, 2005).[14]

Since 1990 there is no government agency responsible for the administration of religions – the government maintains only a liaison secretariat to communicate with religious communities. Agreements reached with the Holy See (diplomatic relations – 1990, army chaplaincy – 1994, funding – 1997) and some other religious communities (Reformed Church, Lutheran Church, Alliance of Jewish Communities, Baptist Church, Serb Orthodox Church) significantly contributed to ensuring stability in church-state relations generally.

VI. The State and Religious Autonomy

All church offices are to be filled by the exclusive decision of the church concerned. No state body (including the courts) is entitled to rule over the canonical aspects of church offices. The government is not involved in any kind of nomination and the candidates or appointees are not communicated to the government. No oath of any kind is required by the state from any person taking a church office and there are no citizenship requirements. A unique exemption is the military ordinariate. According to the Government Decree on the Army Chaplaincy the appointment of the army bishops, the rabbi and the pastors to the army is pursued according to agreements reached with the religious communities concerned.[15] The agreement of the Holy See and the Republic of Hungary signed on the tenth of January 1994 requires the Holy See to communicate the candidate designated to become the field bishop (*ordinarius militaris*) and the Government has the right to raise "general objections of political nature."[16] Certainly these "objections" are not legally binding, so in the legal sense it is not a kind of veto. As the Constitutional Court stated, the Chaplaincy did not lead to an unconstitutional entanglement as it did not become an institutional part of the military, but works alongside it.[17]

Church entities do not have to match national borders: e.g. a diocese having its seat in Hungary could have canonical jurisdiction abroad, and church jurisdictions administered from abroad can freely work in Hungary.

There are no legal restrictions on the autonomy of religious communities with regard to self-government and social action. There are no legal or political instruments designed to control the religious life or choices of citizens. The generally tolerant traditions of the country ensure the peaceful coexistence and respect between religious communities. Besides occasional events (festivities, conferences) the state does not apply specific provisions to facilitate peaceful coexistence and respect between religious.

VII. Religion and the Autonomy of the State

Prior to World War II dignitaries of mainstream (incorporated) denominations had seats in the upper house of the legislature. No religion could have any power to control other religious communities under the State law (e.g., intervening in the process to recognize legal personality for religious communities or to grant permission to open places of worship). Today, no religious community plays any role in the secular governance of the country and no religious community has representation in legislative or executive bodies.

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11. Act XXXII/1991.
12. Act CXXIV/1997.
13. Act LXXIX/1993.
14. Act LXXX/1993., Act CXXXIX/2005.
15. Government decree No. 61/1994. (IV. 20) Korm. § 8 (4)
16. International treaty No. 1994/19 from the minister of defence.
17. Decision No. 970/B/1994 AB, ABH 1995, 739.

VIII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

Religion requires/benefits from specific regulation in many respects. Religious entities may be registered as such (not as associations, foundations or else). Ensuring religious freedom may require the accommodation of specific claims, such as conscientious objection, ritual slaughter, etc. In comparison with other social phenomena, this specific regulation is more cooperative with religion.

The State may have no record of the religious affiliation of individuals. Religious affiliation has no legal consequences under State law. Accommodation of religious claims is based on the conscientious conviction of the individual, without regard to his membership in a particular community.

IX. STATE FINANCIAL SUPPORT FOR RELIGION

The Constitutional Court rejected a petition claiming that public funds for religious communities were violating the separation clause of the Constitution.[18] To the contrary, supporting activities of religious communities is mandated by state's responsibility to enable religious freedom. The Constitutional Court stated in the context of the restitution of church property confiscated during the communist regime that the operability of churches was a condition for religious freedom; consequently the state had a responsibility to ensure that churches regain their ability to carry out their mission.

Detailed legislation prescribes titles and calculation of state subsidies to religious communities.[19]

Churches are exempt of various taxes and fees. For example, church legal entities do not have to pay local taxes[20] and fees[21] when purchasing or inheriting real estate or become parties of civil or administrative procedures. The stipend given by private individuals to Church persons for Church services is tax free.[22]

If a church provides public services on demand of the citizens, it is entitled to the same subsidy the state provides for public institutions. Church-run museums, archives, and libraries may receive public funding if they fulfill certain criteria.[23] Renovation of church architectural heritage can be subsidized. None of these subsidies is considered funding of cult or core religious activities. Social and health care are important fields of the public activity of churches, but the most significant is the presence of churches in education.[24] Church-run universities providing courses in secular subjects take part in the same competitive system of allocation of state-funded student places at state universities. Church-run schools undertake duties that would otherwise be completed by the State or the local government. Church-run schools receiving equal funding provide tuition-free education.[25]

Although the principle of equal funding is firmly established and reaffirmed by decisions of the Constitutional Court,[26] as well as by agreements between various denominations, the calculation of the subsidy repeatedly leads to conflicts between center-to-left governments and churches. The state contributes to some church activities to a

18. Decision 381/B/2004.

19. Act CXXIV/1997.

20. Act C/1990 (on local taxes) § 3 (2).

21. Act XCIII/1990 (on fees) § 5 (1) e).

22. Attachment 4.8. to Act CXVII/1995. This covers mass stipends according to can. 945 of the CIC.

23. Act CXXIV/1997 § 7 (1).

24. In the school year 2007/2008 , 3.3 percent of kindergarten-age children attended church-run institutions; at the elementary school level this percentage was 5.5 percent (with beginners this ratio was 6.3 percent, which shows that the share of church-run institutions is growing), in full time secondary schools 17 percent, at the university level 5.9 percent. Statistical Yearbook of Education 2007/2008, *available at* http://www.okm.gov.hu/letolt/ statisztika/okt_evkonyv_2007_2008_080804.pdf (31 July 31 2009).

25. Act LXXIX /1993 (on public education) § 4 (6) and § 81(4).

26. Decision 22/1997 (IV. 25). AB; Decision 99/2008 (VII. 3) AB.

limited extent, like the reconstruction projects of architectural heritage, based on individual decisions of parliament and government. Local authorities may contribute to reconstruction projects, may undertake expenses like the illumination of the church building, and often provide the building plot for new church buildings free of charge.

Clergy, except chaplains serving the army and in penitentiaries, do not directly receive public funds. Since 1998, a major method of public funding is a tax assignment system, where income taxpayers get the right to assign one percent of their tax to a religious community of their choice or to alternative public funds. Funds raised in the tax assignment system are freely administered by the respective churches, without any public control.

X. Civil Legal Effects of Religious Acts

Church autonomy can be seen as the most important difference between entities registered as churches and other registered legal entities,[27] like associations, political parties or trade unions. Autonomy in this stricter legal sense means that the internal actions of organizations registered as "churches" are not subject to any kind of state interference. This means that whereas a resolution of an association can be brought before court (and courts have the power of striking it down if these internal actions are unlawful or violate the charter of the association), a resolution of an internal church entity, like a bishop or a synod, cannot be challenged before state courts. Churches are also not bound by the principle of democratic internal structure, while associations have to be democratic. If a church violates the law, the public prosecutor has the right to sue the church. The court has to call upon the church to restore the lawfulness of its operation, to comply with the law. If the church does not comply with the court order it will be deleted from the register of churches. This means the loss of the status of being a "church," but there is no ban on activities. The unlawful actions themselves cannot be challenged, but they may lead to the deletion of the church from the register.[28]

The "internal law" of the churches is regarded to be law by the state, though lacking the enforcement of state authorities. State law makes a number of references to the internal laws of the churches, even reciting them. That is, the legal character of the "internal law" (like that of the canon law) is acknowledged by the State in certain cases. The most important case of the application of the internal church law by state authorities is the acknowledgment of legal entities by the state. According to the law, if the "charter" of the church provides so, the organizational units of the church with an independent organ of representation (like institutions, parishes) are legal entities.[29] This means that the internal law of the religious communities determines whether legal persons acknowledged by the state come into existence or not – no further state registration of these persons is required (in the case of the Catholic Church the Code of Canon Law and the Code of Canons of the Eastern Churches determine which church entities have legal personality in the Hungarian legal system). If there is any doubt, the representatives of the given church can refer to their charter, and judges may need to study church codes to find out about the status of church entities in state law.

The state law makes several references to the internal law (canon law) of the churches. In some cases this is done out of practical considerations, as the legislator would not be able to set up a neutral frame that would fit all communities. In other cases, the principle of separation (the respect of church autonomy) sets a limit on how deep the state law can go. Consequently, the acknowledgment of the potential of the churches to make internal laws is an important sign of the acknowledgment of their autonomy. Enforcement, however, is not provided to internal church law.

The Constitutional Court, while dismissing the application, stated that the separation of church and state cannot be interpreted in a way that it leaves those entering into a legal

27. Decision 8/1993 (II. 27) AB.
28. Act IV/1990 § 20. (2).
29. Act IV/1990 § 13 (2).

relation with a church without a remedy. The remedies, however, can only consider the aspects regulated by state law. Aspects regulated by internal church law (canon law, or the statute of the religious community) cannot be subject of disputes at public remedies.[30]

The Constitutional Court arrived at this statement at the end of a remarkable dispute between a professor of theology in the service of the Reformed Church and his Church as well as his University. The professor, a pastor of the Reformed Church, was forced into retirement by the Faculty of Theology. He later challenged this decision by initiating an internal church procedure. After losing his case within the Church, he sued the Church and the University in a labor court, seeking restoration of his employment as well as compensation.

Courts in various instances remained uncertain whether they had jurisdiction over a dispute between a church and its pastor, as section 15 (2) of the Act IV/1990 on the Freedom of Conscience and Religion and the Churches states as a consequence of the constitutional separation between church and state that "No state pressure may be applied in the interest of enforcing the internal laws and regulations of a church." The applicant considered this unavailability of the courts as a lack of remedy in his case, which he considered to be a labor law case between an employer and a dismissed employee. After having exhausted his options in the lower courts, he filed a constitutional complaint with the Constitutional Court.

Since 1895, Hungary has an obligatory civil marriage regime.[31] Since 1962, however, the separation of church and state is relevant in this regard: the civil wedding does not have to precede the church wedding, so one can enter a religious marriage without any consequences under the state law (in state law such couples may qualify as non-marital cohabitants). Prior to this development, clergy assisting at weddings where the spouses had not gone through the civil marriage procedure committed a criminal offense, except in the case of danger to life. Due to the strict separation of church and state, canonical or other religious marriage is not a subject of state law in Hungary. The right to enter a religious marriage is undoubtedly part of the right to exercise religion, not family law.

XI. Religious Education of The Youth

Churches have the right to provide religious education in public schools and kindergartens at the request of students and their parents.[32] Nonpublic schools are not obliged to provide religious education, but they may do so. Neutral public schools should not endorse any religion or ideology, but must provide objective information about religions and philosophical convictions. Schools should provide fundamental information on ethics.[33]

The possibility for students to participate in optional religious education and instruction organized by a church legal entity in state and council educational institutions has to be ensured. Church legal entities may organize religious education and instruction on demand of the parents at kindergartens and on demand of the parents and the students at schools and dormitories. Religious education and instruction in kindergartens may be organized separately from kindergarten activities, also taking into account the daily routine at the kindergarten. The religious instruction may be organized at schools in conformity with other compulsory curricular activities. It is the task of church legal entities to define the content of the religious education and instruction, to employ and supervise religious education teachers, and to execute the acts of administration related to the religious education and instruction with special regard to the organization of the application for religious education and instruction, the issuance of progress reports and

30. Decision 32/2003. (VI. 4.) AB
31. Act XXXI/1894 (on marriage law)
32. Act IV/1990, § 17 (2), Act LXXIX/1993 (on education), § 4 (4), § 10 (3) d), § 13 (3)
33. Act LXXIX/1993, § 4 (2)-(3)

certificates, and the supervision of lessons. The school, dormitory, or kindergarten is obliged to provide the necessary conditions for religious education and instruction, using the tools available at the educational institution, with special consideration for the proper use of rooms and the necessary conditions for application and operation. The kindergarten, school, or hall of residence cooperates with the interested church legal entity in the course of the performance of the tasks related to the optional religious education and instruction organized by the church legal entity.[34]

Religious instruction in public schools is provided by religious communities, not by the school. The instruction is not a part of the school curriculum, the teacher of religion is not a member of the school staff, grades are not given in school reports, and the churches decide freely the content of the religion classes as well as their supervision. Teachers of religion are in church employment; however, the State provides funding for the churches to pay the teachers. The school has only to provide an appropriate time for religious classes (this is a difficult issue in many cases) as well as teaching facilities. Churches are free to expound their beliefs during the religious classes: they do not have to restrict themselves to providing neutral education that is merely giving information about religion, as do the public schools.

Religious education is not part of the public school's task; it is a form of introduction into the life and doctrines of a given religious community at the request of students and parents. The reality of religious education at public schools shows great regional differences. At elementary schools in certain rural areas the large majority of children attend religion classes at school, whereas in urban areas, especially at secondary schools, churches do not even offer religious education. Certainly at the secondary level the option of church-run schools is an alternative to public school religious education in most major cities.

XII. Religious Symbols in Public Places

Teachers at public schools should teach on a neutral basis; they have the right to express their opinion or belief, but they should not indoctrinate their students. Headscarves have not yet become an issue in Hungary, but at present there is no dress code that would rule them out. A similar approach would apply to other public employees.

There are no religious symbols at public institutions. Eventually individuals could post religious symbols at public institutions, for example placing a cross over a bed in a social care institution, like a public senior house.

At symbolic events both on the national and on the local level mainstream churches and public authorities may interact in many different ways. Church dignitaries and representatives of public power are mutually expected to attend both public and religious events. The national day of Hungary is Saint Steven's day. Saint Steven (997-1038) was the first, state-founding king of Hungary. Church, state, civil and family celebrations are interlinked in a special way this day. Representatives of state agencies appear in the solemn mass and the procession honoring Saint Steven.

Religious ministers, often Protestant pastors, also play an important role in local festivities and celebrations. Local holidays have often been festivities of the patron saint of the town or village, and local coats of arms often show the influence of religious symbolism, even in cases where symbols are newly designed, not determined by historic traditions.

After the fall of communism, not only were historic names of streets and public institutions, such as hospitals, generally restored, but local municipalities often gave new institutions religiously inspired names for cultural reasons. A large number of pharmacies carry the names of saints.

34. Act LXXIX/1993, § 4 (4)

XIII. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

Free speech enjoys a privileged position in the hierarchy of fundamental rights.[35] The dignity of the person, however, may require the limitation of this right. Blasphemy, when causing public scandal, was a criminal offense under the first criminal code (1878).[36] That provision was abolished in the early years of the Communist regime. At present there is no crime of blasphemy (though certain methods of protecting national symbols may be analogous to blasphemy.)[37] Neither God nor religion enjoys the protection of the criminal law. Criminal law protects the freedom of religion, personal convictions, and religious communities. Freedom of expression is limited by the penalization of hate speech: whoever incites the public to hatred against the Hungarian nation, any national, ethnic, racial group or certain groups of the population is guilty of a misdemeanor, punishable by up to three years imprisonment.[38] Incitement to hatred against a religious community (or a non-religious, anti-religious community) would fall under this provision. The religious sentiments of the population, or certain groups of the population, however, enjoy no protection by criminal law. Since 1992, a mere defamation no longer qualifies as a criminal offense, as the Constitutional Court has found that this would be a disproportionate limitation of the freedom of expression.[39] Since then, Parliament has proposed/enacted several amendments penalizing hate speech, but the Constitutional Court has rejected the amendments, continuing its liberal approach to free speech.

35. Decision 30/1992. (V. 26.) AB
36. Act V/1878. § 190.
37. Act IV/1978 (Criminal Code) § 269/A.
38. Act IV/1978 § 269.
39. Decision 30/1992. (V. 26.) AB

TAHIR MAHMOOD

Religion and the Secular State: Indian Perspective

I. SOCIAL CONTEXT

India is an ancient land of religious pluralism and cultural diversity. This largest democracy on the globe is a federation of 35 constituents – 28 full-fledged States and seven Union Territories, two of which are self-governing and the rest ruled by the central government. The Hindu religion is predominant in as many as 29 of these constituents, its followers having a nearly 80 percent share in a country population of over a billion.[1]

The 160 million Muslims of India – with a predominant Sunni majority – are the country's second largest community.[2] They are an overwhelming majority in Kashmir and Lakshadweep, a third of the population in Assam, about a quarter each in Kerala and West Bengal, and a fifth in the country's most populous state – Uttar Pradesh – while there is a sizable number of Muslim-majority districts, cities and townships situated in various parts of the country.

With a headcount of nearly 24 million, the Christians – with a predominant Catholic majority – are the country's third largest community.[3] They are a majority in three north-eastern states – Meghalaya, Mizoram and Nagaland – and their population is much higher than the national average (2.5 percent) in Andamans, Arunachal Pradesh, Goa, Kerala and Manipur.

The Sikhs, with a total population of 16 million, are the majority in the state of Punjab and a minority everywhere else. Next to them are 8 million Buddhists – having a high percentage of population in Sikkim, Arunachal Pradesh and the Laddakh area of Kasmir – followed by 3.5 million Jains scattered all over the country.[4] Besides these, there are small Zoroastrian, Jewish and Baha'i groups and a number of tribal faiths prevailing in certain parts of the country whose entity as separate religions is specifically recognized by State law and judicial decisions.[5]

II. THEORETICAL AND SCHOLARLY CONTEXT

The majority of Indians have never favored a theocratic State, but there have always been in the country undercurrents of thought suggesting a space for religion in State affairs. Until the beginning of the 20th century, India's war of independence from foreign rule was fought on the plank of equality of all faith traditions and of their followers. The scene changed thereafter and certain sections of the majority community began projecting their religion as an inseparable part of the future political ideology. As a reaction to this, some Muslim leaders began demanding special arrangements for their community in the country's forthcoming political structure.

These competitive aspirations eventually led to the partition of the country accompanying its independence from the British rule. During the thirty months of

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1. There is an official census in India every twenty years. The approximate population figures for all communities given here are based on the Census Report of 2001.

2. Among the minority Muslim groups are the Ithna Ashari Shi'as and the Isma'ilis.

3. The Census Reports mention Catholics and Protestants separately. Among the many other Christian groups are the Presbytarians, dominant in certain parts of north east.

4. Among the Buddhists the Mahamayana group is dominant, while the Jains are divided into Digambar and Swetambar sects.

5. Many of these are separately mentioned in the Census Reports. A leading case on their legal status is *SP Mittal v. Union of India* AIR 1983 SC 1.

Constitution-making since the advent of freedom, demands were made for the protection of certain religious traditions in the national charter under preparation, and some of these had to be accommodated.[6]

A quasi-secular ideology remained dominant in State affairs for about half a century after independence, but throughout these years certain concessions had to be periodically made in favor of particular religions. Towards the fag end of the 20th century, the majority community's protagonists of a different ideology that they called "*Hindutva*" took over the reigns of the nation and their ideology of "cultural nationalism" remained dominant in the country's governance throughout their six-year rule.[7] They remain in political control over certain regions, but, for the time being, not at the federal level. Existence of these two competing political ideologies – one believing, in principle, in equality of all religions and the other in a privileged position of the historically oldest religion of the country – seems to have become a permanent feature of the Indian polity. On the whole, the favored ideology regarding the state-religion relationship in general is of a liberal cooperation – not of a rigid separation.

In a leading case, the Supreme Court of India stated that secularism is "more than a passive attitude of religious tolerance; it is a positive concept of equal treatment of all religions," asserting at the same time that "when the State allows citizens to profess and practise religion it does not either explicitly or impliedly allow them to introduce religion into non-religious and secular activities of the State."[8] The idea that *Hindutva* was much more than merely a religious ideology once got active support from the country's apex court, but, as it evoked public outcry, the court had to issue a supplementary decision that its ruling did not mean to dilute the Indian concept of secularism. [9]

III. CONSTITUTIONAL CONTEXT

Adopted in the third year of independence from foreign rule achieved in 1947, the Constitution of India did not declare any religion to be the State religion or an otherwise privileged faith tradition. It declared "equality of status and opportunity" to be one of the basic ideals of future polity, and non-discrimination on the basis of religion one of the people's Fundamental Rights.[10] Twenty-six years later the Preamble to the Constitution was amended to add the word "secular" to the prefatory description of the character of the country.[11] However, the concept of "secularism" adopted under the Constitution was and remains quite different from its western stereotype – in the Indian Constitution there is no US-type "non-establishment" clause erecting a "wall of separation" between State and religion, and no space for the French doctrine of *lacite*. Religion has no substantive role to play in the affairs of the State, but there is no ban on allowing it a ceremonial role in State functions and official events. Conversely, the State is not at all prevented by law from playing a role in the affairs of religion and has, in fact, always held a pivotal position in this area of social life.

As regards religious freedom, the Preamble to the Constitution speaks of the solemn resolution of the people of India, inter alia, to secure themselves "liberty of thought, expression, belief, faith and worship." The chapter on people's Fundamental Rights guarantees to the individuals freedom of conscience and the right to "profess, practice and propagate" religion – clarifying that this right is not absolute and can be restricted by the

6. The Constitution was adopted by the Constituent Assembly on 26 November 1949 and enforced with effect from 26 January 1950.

7. A derivative from the name of the majority religion (Hindusim), the word *Hindutva* indicates an ideology which insists on the religio-cultural beliefs and practices of the majority community being an essential attribute of patriotism, national culture and social practice.

8. *SR Bommai v. Union of India* (1994) 3 SCC 1.

9. See the multiple so-called "Hindutva judgments" and the clarification ruling, all reported in the 1996 volume of *Supreme Court Cases*.

10. CONSTITUTION OF INDIA 1950, Preamble & art. 15-16.

11. The Preamble now describes India as a "sovereign, democratic, socialist and secular republic" – the words "socialist and secular" added by the 1976 amendment.

State in the interest of public order, morality, health, and other provisions of the Constitution.[12] At the same time, all religious communities and every "denomination thereof" are guaranteed freedom to manage their own affairs in religion, acquire and mange property and establish institutions for religious and charitable purposes.[13] The Constitution, however, makes it specifically clear that these guarantees for religious freedom will not preclude the State from introducing social reforms by law or from "regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice."[14]

In recognition of the nation's religio-cultural diversity the Constitution entitles every section of citizens in all regions of the country to conserve its distinct culture, language and script, imposing at the same time on all citizens a Fundamental Duty "to value and preserve the rich heritage of our composite culture."[15]

Though the Constitution does not specify any "preferred or privileged" religion, there are in it some special religion-based provisions relating to the majority community. Its chapter on people's Fundamental Rights declares that "untouchability"-- an age-old practice associated with Hindu religion according to which high-caste people have to keep a distance from members of the so-called lower castes – is abolished and its practice in any form is prohibited.[16] On the other hand, the chapter on Directive Principles of State Policy under the Constitution directs the State to protect by law the holy cow (without, of course, a reference to the Hindu reverence for it).[17] Moreover, certain denominational Hindu temples in two South Indian states – Kerala and Tamil Nadu – must, by a constitutional dictate, receive prescribed subsidies from public funds.[18]

There is no provision in the Constitution directing the State to remain neutral to religious issues; nor does it specifically ask the State to cooperate with the religious communities in respect to their faith affairs. The mandate is only for non-discrimination between people on religious grounds. The silence of the Constitution on this issue is taken as tacit approval for State intervention in religious affairs of all communities, and all organs of the State – legislature, executive and judiciary – have accordingly been taking active interest in such affairs in a way that may be inconceivable under a rigidly secular political set up. The legislative and administrative measures of this nature are financed by the State exchequer, and their validity is well-established despite the Constitutional ban on collection of taxes meant for promoting particular religions.[19]

Nowhere does the Constitution say or even remotely suggest that religion is to be the foundation or source of state law. Nor is there such a provision for religion in any legislative enactment. Parliament and state legislatures are empowered to make laws in the areas of personal status, family relations and religious endowments, shrine management and organization of inland and overseas pilgrimages, without saying that these are to be drawn on religious sources. But in practice, religious tenets are usually kept in mind while enacting such laws. Legislative enactments and administrative regulations in these areas – both those of the pre-Constitution era since retained and those enacted later – contain provisions based on religious sources.

The judiciary has in several cases interpreted Constitutional provisions relating to religious freedom to lay down its parameters and boundaries. A distinction has been made between "essential" and "non-essential" practices of religion, holding that the Constitution necessarily protects the former and not always the latter. In many cases, the judiciary itself has dwelt on religious beliefs to determine if an allegedly religious practice is "essential" or not. Sometimes the criterion adopted for this purpose has been how a

12. CONSTITUTION OF INDIA 1950, Preamble & art. 25.
13. Id., art. 26.
14. Id., art. 25 (2).
15. Id., art. 29 (1) and 51-A (f).
16. Id., art. 17.
17. CONSTITUTION OF INDIA 1950, art. 48.
18. Id., art. 290-A.
19. Id., art. 27.

community as a whole generally looks at it.

A crucial observation of the Supreme Court of India in this regard is worth quoting here:

> The rights to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right, they are subject to reform on social welfare by appropriate legislation by the State. The court therefore, while interpreting Articles 25 and 26 strike a careful balance between matters which are essential and integral part (of religion) and those which are not and the need for the State to regulate or control in the interest of the community.[20]

In a case relating to a prominent Muslim shrine, the Supreme Court cautioned people against treating "superstition" as religion.[21] The concern of the court was well in accord with a provision of the Constitution which declares it to be a Fundamental Duty of the citizens "to develop scientific temper, humanism and spirit of inquiry and reform."[22]

IV. LEGAL CONTEXT

A. Legislation on Change of Religion

Though the Constitution recognizes people's right to propagate their religion, the policy of the State is to prevent by law forced or induced religious conversions – the connotation of "inducement" for this purpose being quite large. There is no all-India legislation on the subject but penal laws to this effect have been enacted by a number of state legislatures.[23] Legal validity of the first two laws enacted in this regard during 1965-66 had been challenged by the Christians on religious grounds before the Supreme Court of India, but the court had ruled that the constitutional guarantee of the right to "propagate" religion did not mean right to convert others to one's own religion.[24] The decision was faulted by some eminent constitutional-law experts, but it remains in force.

Although all such laws speak of conversion in general terms, the common understanding in the country is that they apply only to cases of conversion by the Hindus to a non-Hindu religion, and not vice versa. Certain staunch Hindu groups keep publicly organizing mass "re-conversion" of non-Hindus to Hinduism (and call it *ghar-wapsi*, i.e., returning home, thereby implying that those re-converted were originally Hindu), but none of the anti-conversion laws have ever been applied to them. In any case, these laws are mainly deterrent – there have hardly been any convictions under these laws in any case of conversion.

B. Cow Protection Legislation

Laws prohibiting killing of cows and their progeny have been enacted in a number of states in accordance with the provision of the Constitution relating to the protection of cow revered by the Hindus referred to above. Validity of some of these laws was challenged in several cases under the provisions of the Constitution relating to religious freedom and freedom of vocation and profession, but the courts have invariably upheld it.[25] In one such case, it was even observed that "ours being a secular State is not relevant" in judging an administrative action taken under such a law.[26] Despite a strict

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20. *AS Narayana Deeshitalyu v. State of Andhra Pradesh* (1996) 9 SCC 548.

21. *Durgah Committee v. Syed Hussain* AIR 1961 SC 1402.

22. CONSTITUTION OF INDIA 1950, art. 51-A (h).

23. Arunachal Pradesh, Chhatisgarh, Gujarat, Himachal Pradesh, Madhya Pradesh, Orissa and Rajasthan. Tamil Nadu state had also enacted a similar law but has since repealed it.

24. *Stainislaus v. State of Madhya Pradesh* (1977) 2 SCR 611.

25. The first leading judgment of the Supreme Court of India on the subject was *Mohd Haneef Qureshi v. State of Bihar* AIR 1958 SC 731.

26. *State of Gujarat Mirzapur Moti Kureshi Kassab Jamaat* (2005) 8 SCC 534.

enforcement of these laws, allegations of their violation sometimes leads to communal tensions.

C. Bodies Dealing with Religious Communities

Established in 1978 and given a statutory status in 1992, the National Commission for Minorities is – along with its function to recommend measures for the welfare of the minorities – vested with quasi-judicial powers to look into complaints of religion-based discrimination against members of minority communities.[27] Similar bodies have since been set up in a number of states, but not in any of states where the national-level majority – the Hindus – is a minority.[28] Appointments to these bodies are made by the governments which are not bound by any specific selection process; and their independent functioning is amenable to political influence and bureaucratic control. In practice, they generally act as advisory bodies for the governments. The Commission's Chair is always an ex officio member of the National Human Rights Commission, as provided in the latter body's governing statute, and can place there the issues and grievances brought to its notice. The central and state Minorities Commissions often hold consultations with religious leaders on the problems of the respective communities, but the governing statutes do not make it mandatory.[29]

There are otherwise no bilateral formal relations between the State and the religious communities, and religious bodies are not recognized as interlocutors at the level of the State.

A full-fledged Ministry of Minority Affairs was set up by the central government a few years ago, and it is now the parent body for the other official agencies and departments relating to various socio-religious matters and welfare schemes pertaining to religious minorities. Some state governments also have Minority Welfare Departments, while in the Muslim-dominated state of Jammu and Kashmir there is a government Department of Religious Affairs.

The Constitution of India does not list the religious communities in the country; nor is there in place any system for compulsory registration of religious communities under any law. There is a specific provision in the Constitution clarifying that for the purposes of elections there will be a common electoral roll without regard to the religious affiliation of the citizens.[30] The Census Reports of India issued every twenty years, however, contain checklists of all religious groups and provide statistical information on their population in various parts of the country.

By a Government Notification issued in 1993 under the governing statute of the National Commission for Minorities referred to above, Muslims, Christians, Sikhs, Buddhists and Parsi Zoroastrians were recognized as national-level religious minorities;[31] and similar notifications have since been issued also by the governments of those states which have State Minorities Commissions. While in some states the Jains have also been included among the recognized religious minorities – treating Jainism as a religion separate from Hinduism – at the national level this has been a contentious issue not yet resolved – an appeal to the Supreme Court on this issue was not decided in favor of the community.[32]

Besides the central and state Minorities Commissions, there is a large-sized government-appointed non-statutory body known as the National Integration Council

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27. National Commission for Minorities Act 1992. This author was the Commission's Chair for three years during 1996-99.

28. State Minorites Commissions are operative in Andhra Pradesh, Bihar, Delhi, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan, Tamil Nadu, Uttar Pradesh, Uttarakhand and West Bengal.

29. A critical evaluation of the working of these bodies may be seen in this author's book *Minorities Commission: Minor Role in Major Affairs* (Pharos Media: 2001).

30. CONSTITUTION OF INDIA 1950, art. 325.

31. Welfare Ministry's Notification 27 May 1993 issued under Section 2 of the National Commission for Minorities Act 1992.

32. *Bal Patil v. Union of India* (2005) 6 SCC 690.

which periodically meets to and advise the government on issues of communal harmony.

V. STATE AND RELIGIOUS AUTONOMY

A. Separate Identity of Some Religions

As already noted above, neither the Constitution nor any legislative enactment prevents the State from intervening in matters even if they relate to religious doctrine or is otherwise of a purely religious nature. A major issue on which the State has adopted a policy is whether certain religions of India are variations of the same religion or represent different faith traditions independent of each other. Three minority religious communities – Sikhs, Buddhists and Jains – believe their respective religions to be independent faiths different from Hinduism, but many legal provisions bracket them (or some of them) with followers of the Hindu religion.

While empowering the State to remove by law caste-based restrictions on entry into Hindu temples, the Constitution declares that the word "Hindu" in this context would include Buddhists, Jains and Sikhs.[33] As the practice is not in vogue among any of these three communities, the idea probably was to allow them entry into the Hindu temples with a view to fostering solidarity among the four religious groups. The four family-law enactments of 1955-56, all titled "Hindu" laws, clarify that the word "Hindu" used in their text includes Buddhists, Jains and Sikhs; and various Hindu religious-endowment management laws are made applicable to the first two among them.[34]

The official bracketing of the three religious communities with the Hindu religion is sometimes resented by those communities – especially by the Sikhs who are the largest religious group among them.[35] Undoubtedly, it provides indirect support to those religio-political groups among the majority community who claim these faiths to be different streams or off-shoots of their religion and insist on distinguishing between religions of Indian and "alien" origins.

B. Legislation on Shrines and Pilgrimage

As noted above, the Constitution guarantees to all religious communities and denominations "freedom to manage their own affairs." At the same time, however, the Constitution places several religious matters within the reach of the central and state legislatures for the purposes of necessary legal regulation – among them are religious endowments and religious institutions, and pilgrimages within and outside of India.[36] Accordingly, administration of religious places is regulated by a number of general and community-specific legislative enactments under which the central or state government nominates its representative on the shrine-management boards.[37] Appointment of non-Buddhists on the management board of the most prominent Buddhist shrine in India situated in the city of Gaya has been an unresolved apple of discord.[38] Several inland and overseas religious pilgrimages of various communities (including the great Islamic

33. CONSTITUTION OF INDIA 1950, art. 25, Explanation II.

34. Hindu Marriage Act 1955, Hindu Minority and Guardianship Act 1955, Hindu Adoption and Maintenance Act 1955, Hindu Succession Act 1956, Bombay Public Trusts Act 1950, Bihar Hindu Religious Trusts Act 1950, Orissa Hindu Religious Endowments Act 1969, etc.

35. A Private Member Bill was once moved in Parliament for deletion of the provision of Constitution referred to above, and unsucessful attempts have been made to secure a separate family law act for the Sikhs.

36. CONSTITUTION OF INDIA 1950, art. 246 & Schedule VIII, Concurrent List (Entry 28), Union List (Entry 20), State List (Entry 7).

37. Laws enacted for this purpose include the central Wakf Act 1995, local Hindu Religious Endowments Acts in force in almost all states, Sikh Gurdwara Acts of Delhi and Punjab, and special statutes governing some prominent Hindu and Muslim shrines – e.g., the Vaishno Devi shrine in Kashmir and Sri Jagannath Temple of Orissa (Hindus), the Dargah of Ajmer (Muslims), and the Nander Gurdwara (Sikhs). The shrine-management bodies constituted and functioning under all these laws have government nominees among their members.

38. This is done under the provisions of the Bodh Gaya Temple Act 1949.

pilgrimage to the holy cities of Islam situated in Saudi Arabia known as the "Haj") are controlled and managed by government departments or statutory bodies.[39] Elaborate security arrangements and public facilities are provided by the State authorities at religious places and pilgrimage sites attracting large crowds.

Many religious buildings and places have been included among the protected monuments and archeological sites managed by State authorities functioning under central and state laws. These laws prevent the State from changing the religious character of such buildings and sites,[40] but congregational prayers are not allowed in many old mosques which the Muslim community resists.

Under several state laws, construction of new religious places or renovation of old ones requires prior official sanction.[41] Unauthorized construction of religious places on public lands has nevertheless been and remains an unchecked menace. Very recently, the Supreme Court of India has taken notice of the trend and directed the government to take remedial measures.[42] A general law relating to places of worship enacted in 1988 prohibits use of all religious institutions for promotion or propagation of any political activity, harbouring criminals, storing arms and ammunition, keeping contraband goods, putting up an authorized construction or fortification, carrying on any unlawful or subversive act, and promoting disharmony or feelings of enmity between various religious groups, etc.[43] Certain ancient religious practices of the Hindus relating to shrines have been prohibited by penal legislation. Among them are the customs of *devadasi* (perpetual dedication of young girls to deities), and *sati* (immolation of a deceased person's widow on his funeral pyre).[44]

In recent years a historically unsubstantiated belief propounded by some groups of Hindu religious leaders claim, that the site of an ancient mosque in the holy city of Ayodhya was the spot where the most popular Hindu god, Ram, was born in the pre-historic past, led to an enormous religious conflict. When the conflict was at its height and was spreading to some other old mosques too, Parliament enacted a law declaring that all places of worship in the country would retain their specific religious identity and affiliation as on the Independence Day (15 August 1947) and any attempt to convert a shrine belonging to one religion into that of any other will be a punishable offense.[45] The infamous Ayodhya mosque conflict which had already reached a point of no-return had to be specifically exempted from the scope of this law which was meant to ensure protection of other non-Hindu shrines from such disputes. While the long-drawn out litigation relating to the Ayodhya dispute was yet to be decided, the mosque was demolished in a mob frenzy – after which the site was acquired by the government through a special law.[46]

Another dispute relating to the Hindu god Ram relates to a part of the sea in South India. The government's plan to build a dam there was challenged in the Supreme Court by a group of Hindu religious leaders claiming it to be the spot where Ram's army had built a bridge to cross over to Lanka to fight the demon king Ravana. The court stayed the proposed action and has yet to finally dispose of the case.

C. Judicial Intervention in Religious Matters

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39. The Ministry of External Affairs manages the Hindu pilgrimage to Mansarover mountains around Tibet. Under the control of the same Ministry the great Haj pilgrimage of the Muslims is managed by a Central Haj Committee consituted and functioning under the Haj Committee Act 2002 – and on almost all international airports of the country there are separate "Haj Terminals."

40. See, e.g., Ancient Monuments and Archeological Sites and Remains Act 1958, Sections 5 and 16.

41. See, e,g,, Rajasthan Religious Buildings and Places Act 1954, West Bengal Religious Buildings and Places Act 1985, Punjab Religious Premises and Land (Eviction and Recovery) Act 1997.

42. Issued on 15 February 2010.

43. Religious Institutions (Prevention of Misuse) Act 1988.

44. Madras Devadasis (Prevention of Dedication) Act 1947, Karnataka Devadasis (Prevention of Dedication) Act 1982, central Commission of Sati (Prevention) Act 1987.

45. Places of Worship (Special Provisions) Act 1991.

46. Acquisition of Certain Sites at Ayodhya Act 1993.

Contrary to the practice of secular countries in the West, the judiciary in India has never hesitated in discussing, explaining and adjudicating on purely religious issues including the nature and characteristics of various religions of India. "Acceptance of the Vedas with reverence, recognition of the fact that means of salvation are diverse and realization of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion," observed the Supreme Court of India in a leading judicial decision.[47]

There have been judicial decisions ruling that a ban on sale of non-vegetarian food in the cities regarded holy by the Hindus, and teaching of astrology drawn on Hindu scriptures in State universities, do not contravene provisions of the Constitution relating to freedom of trade and vocation and religious freedom respectively.[48] While the Hindu family-law enactments of 1955-56 clarify that the word "Hindu" applies to all its "forms and developments" (especially signifying some of these including the Aryasamaj),[49] in numerous cases the courts have examined the tenets of various denominations and cults to rule that they are part and parcel of the Hindu religion.[50] In some cases, the courts have adjudicated also on religious disputes between the Hindus and one or another of the other three communities legally bracketed with them (as stated above). In a leading case, a High Court had to adjudicate a dispute between Hindus and Jains on the issue if a Jain temple could house a Hindu religious symbol.[51]

Disputes relating to Islamic beliefs and practices also often reach the judiciary. Besides entertaining and deciding in some case Sunni-Shi'a disputes over use of mosques and religious rituals, the courts have also examined the creed of the Ahmadiya community regarded by mainstream Muslims as heretics since they regard its founder a "sub-prophet" (running contrary to the mainstream Muslim belief that there can be no prophet after Muhammad), the courts have decided that they are Muslim [52]

The pivotal place of the Holy Qur'an in the Muslim faith, and of the Granth Sahib in the Sikh religion, have been examined and testified in some judicial decisions.[53] The courts have also entertained and decided religious disputes among various denominations and groups of the Christians and their churches.[54] In a recent case the right of Parsi Zoroastrians to build a residential colony on a state-allotted land reserved for their co-religionists was upheld.[55] Administrative bans on offering prayers on the roads outside the mosques have always been upheld.[56] Similar restrictions on the use of voice-amplifiers in the religious places of Hindus, Muslims and Christians, have been uniformly upheld by the courts.[57] The Jehovah's Witnesses, who consider singing of the National Anthem to be against their faith, have succeeded in obtaining a Supreme Court verdict in their favor.[58]

D. Working of Religious Organizations

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47. *Sastri Yahnapurushdasji v. Muldas B. Vaishya* AIR 1966 1119.

48. *Om Praksah v. State of Utta Pradesh* (2004) 3 SCC 402, *Bhargava v. University Grants Commission* (2004) 6 SCC 402.

49. Hindu Succession Act 1956, Section 2 and parallel provisions of the other three Hindu family-law enactments of 1955.

50. Among these are the Anand Marg Panth, the Swami Narayan Satsang and the Sri Aurbindo sect.

51. *Tejraj v Madhya Bharat* AIR 1958 MB 115.

52. *Shihabuddin Koya v Ahammad Koya* AIR 1971 Ker 206.

53. See, e.g., *Chandanmal Chopra v. State* AIR 1986 Cal 104, *Shiromani Gurdwara Praabandhak Committee Amritsar v. SN Dass* AIR 2000 SC 1421. The petion in the former case which sought proscription of the Muslim holy book on the plea that it excites violence against non-Muslims was forcefully dismissed by a non-Muslim judge of the Calcutta High Court.

54. See, e.g., *PMA Metropolis v. Moran Mor Marthoma* AIR 1996 SC 2001.

55. *Zoroastrian Cooperative Housing Society v. District Registrar, Cooperative Societies* (2005) 5 SCC 632.

56. *Masood Alam v. Police Commissioner* AIR 1956 Cal 9.

57. *Om Biranguna Religious Society v. State* (1996) 100 CWN 617, *Navin Kumar v. Bombay Administration* AIR 1989 Bom 88, *Church of God (Full Gospel) in India v. KKRM Colony Welfare Association* AIR 2000 SC 2773.

58. *Bijoy Emmanuel v. State of Kerala* AIR 1987 SC 748.

All religious communities in India are free to act in private non-religious spheres. Many of them have established health services and provide relief to victims of natural calamities and communal riots. The State controls these activities only in respect of funding from outside India. All associations having a "definite religious program" wishing to receive foreign contributions are required by law to register themselves with State authorities and inform them of each such contribution received. In the absence of such registration they need to seek prior clearance for every such transaction.[59]

Religious entities can seek voluntary registration under state laws on fulfilling certain conditions and this makes them *sui generis*.[60] A number of state laws exempt religious institutions or faith-based practices from their general provisions – among such laws being those relating to business, taxation, acquisition of private property by the State, policing and security forces.[61]

VI. Religion and Autonomy of State

A. Influence of Religion on Governance

There is no law in the country placing any restrictions on mixing up religion with politics. Several religio-political organizations either directly contest general elections, or sponsor and promote such parties.[62] An attempt was made in 1993 to empower the State to ban such parties and enforce complete separation of religion and politics by means of amendments to the Constitution and the election law of the country. The move had to be abandoned due to stiff opposition from various political and religious quarters.[63] In a leading judgment delivered at about the same time, the Supreme Court of India forcefully advocated complete separation of religion and politics, observing :

In a secular polity like ours mingling of religion with politics is unconstitutional, in other words, a flagrant breach of the constitutional features of secular democracy. It is therefore imperative that religion and caste should not be introduces into politics by any political party, association or individual, and it is imperative to prevent religious and caste pollution of politics...If a political party espousing a particular religion comes to power that religion tends to become, in practice, the official religion. All other religions come to acquire a secondary status, at any rate, a less favorable position. This would be plainly antithetical to the entire constitutional scheme.[64]

The court however stopped short of giving any binding ruling in the matter, and the ideology of religion and politics mix remains intact.

Though members of bureaucracy and armed forces are not allowed to directly participate in general elections, many of them are influenced by the ideology of the religio-political organizations operative in the country, and this is bound to adversely affect in practice the theoretical neutrality of the State to religion. No law has, however, been enacted to tackle this rather ticklish problem.

A social stratification called the "caste" system is part and parcel of the Indian society as a whole. Mistreating the so-called "lower" castes is declared to be an offense under the Constitution which also prohibits discrimination between citizens on the ground of caste, yet the State can make "any special provision" for what the Constitution calls the

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59. Foreign Contribution (Regulation) Act 1978.

60. The laws under which such registration can be sought are the Religious Societies Act 1880 and Societies Registration Act 1860.

61. See, for instance, the Companies Act 1956, Section 28, Income Tax Act 1961, Section 10 and Police Forces (Restriction of Rights) Act 1966, Section 3.

62. Among such political parties are the Hindu Mahasabha, Vishwa Hindu Parishad, Shiv Sena and Bajrang Dal (all Hindu), Muslim League and Ulama Council (Muslims), and the Church Council for Youth Movement of South India.

63. The Constitution (80th Amendment) Bill 1993 and Representation of the People (Amendment) Act 1993, both of which proved abortive.

64. *SR Bommai v. Union of India* (1994) 3 SCC 1.

"Scheduled Castes."[65] Such special provisions have been extensively made for them in several ways – reserved electoral constituencies, quotas in government employments and "triple-benefits" (quota, lower eligibility criteria, and rebate in payable fee) in educational institutions. The national policy is to give a fair representation to the Scheduled Castes in all government departments and at all levels. Two special laws have been enacted to prescribe stringent penalties for those degrading them or violating their civil rights.[66]

Under the Constitution, the list of Scheduled Castes was to be initially specified by the government (in the name of the President), and Parliament was given the power to amend and update the lists from time to time.[67] The Scheduled Caste net is until this day restricted to three chosen communities – Hindus, Sikhs and Buddhists.[68] The so-called "lower castes" are vocation-based and are shared by all Indian communities, yet Muslims and Christians (including the low-caste Hindus converting to these religions) have been persistently kept out of the ambit of Scheduled Castes on the plea that their egalitarian faiths as known to the rest of the world do not recognize the caste system. Both these communities have recently challenged the discriminatory law before the Supreme Court which has yet to arrive at a decision. Presence of a large number of religion-specific Scheduled Caste politicians and public servants in the central and state governments, as also in local bodies like district boards and city corporations, aggravates the already existing situation of imbalance of various religious communities' representation in the governance of the country.

Despite being the second largest religious community of the country, the Muslims are overly under-represented – in many cases unrepresented – in the governance of the country. Neither in the three organs of the State nor in bureaucracy does the extent of their presence go anywhere near their population figures. This has been confirmed time and again both by special committees constituted by the government and the various Minorities Commissions referred to above. Leaders of the community have since long been demanding a quota, but the demand has never found favor with the rulers who believe that this would be contrary to the provision of the Constitution against religion-based discrimination between citizens. In two south Indian states, this demand has been implemented to a certain extent, and a third state, in eastern India, has just announced the same, but the same step taken in a third state has recently been struck down by the local High Court for being allegedly *ultra vires* the Constitution.[69]

In 2004, the government had appointed a special national Commission to examine this demand of the Muslims and other religious minorities but its report submitted three years later recommending quota for them by way of positive discrimination and affirmative action is still unattended to by the government. [70] This Commission has also recommended that the Scheduled Castes net be made religion-neutral, but the proposal is being strongly opposed by various political groups and the government has not yet shown any inclination to take action on it.

VII. STATE FINANCIAL SUPPORT FOR RELIGION

There is no legal ban on the State providing financial and logistic support to any religious organization or institution. Religious endowments of all communities not only

65. CONSTITUTION OF INDIA 1950, art. 15-17.

66. Protection of Civil Rights Act 1955, Scheduled Castes and Scheduled Tribes (Protection from Atrocities) Act 1969.

67. CONSTITUTION OF INDIA 1950, art. 341.

68. Constitution (Scheduled Castes) Order 1950 – which originally restricted the net of "scheduled castes" to the Hindu community – as amended in 1956 and 1990 to include in it Sikhs and Buddhists respectively.

69. Quota for the Muslim groups is in force for a long time in Kerala and Karnataka, and has been recently introduced in West Bengal. The High Court of Andhra Pradesh has twice cancelled a similar step taken there.

70. The Commission (of which this author was a member), has also recommended that the Scheduled Caste net should be delinked from religion and opened to lower castes among all communities. Report of the National Commission for Religious and Linguistic Minorities, Ministry of Minority Affairs, Government of India, May 2007.

enjoy certain exemptions under tax laws, there are State-appointed and financially supported bodies to oversee their management. Educational and technical training centers controlled by religious organizations are also given periodic subsidies. State-aided management boards of religious endowments and shrines pay salaries to their staff. In one case, a state-controlled Muslim endowment board was recently directed by the Supreme Court to pay regular salaries to religious officials of the mosques under its management.[71] All state-subsidized religious bodies have, of course, to strictly comply with official accounts and audit regulations.

In the past, the State has subsidized special celebrations of religious figures and other similar activities, including centenaries of the founders of Sikh and Jain religions and an international Eucharistic Conference organized by the Christians. Constitutional validity of the subsidy being provided for a long time by the government to airlines carrying Muslim pilgrims to Saudi Arabia for the great Haj pilgrimage has recently been challenged in the Supreme Court which has yet to pronounce its decision.

VIII. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

Despite a provision in the Constitution for "endeavors" to be made by the State to "secure for the citizens a uniform civil code throughout the territory of India" there remains in force in the country a dual system of marriage laws under which individuals can make a choice between the secular and the religious matrimonial laws.[72] This choice can be exercised by all citizens living in or outside India at the time of getting married – and an already solemnized religious marriage can also, at any time during its subsistence, be converted into a secular marriage by registering it under the civil marriage law.[73]

Legal effects of marriages solemnized under the religious laws – including Muslim and Jewish laws which, unlike those applicable to other communities remain uncodified[74] – are fully recognized by the State on a par with those of civil-law marriages. The Hindus, Buddhists, Sikhs and Jains are now governed by common laws of marriage, family relations, and succession enacted by Parliament during 1955-56.[75] Members of these four communities can intermarry under these laws, and will in such cases continue to be governed by the Hindu laws of marriage, divorce and succession. Only for marrying outside these communities do they need to have recourse to the secular marriage law, in which case they and their children and future generations will be governed also by the secular succession law.[76] The matrimonial law among these statutes provides that a marriage may be solemnized by customary rites prevalent among either party's family, and the legal effects of some such rites are either recognized by specific legislation or have been affirmed by the courts. [77]

Post-marriage conversion to a religion other Hinduism, Buddhism, Jainism and Sikhism by either spouse is a ground for divorce in the hands of the other.[78] On the converting spouse, modern Hindu law imposes loss of all family rights including those to act as guardian of their children, be consulted by the non-converting spouse before adopting a child or letting their child be adopted by someone else, and receive maintenance from relatives in cases of minority or infirmity.[79] This is diametrically opposed to an old law of the British period still in force which (with an unacknowledged aim of promoting conversion of the natives to the then rulers' religion – Christianity) had provided that

71. *All India Imams Organization v. Union of India* AIR 1993 SC 2086.

72. CONSTITUTION OF INDIA 1950, art. 44.

73. The two laws on this subject are the Special Marriage Act 1954 and the Foreign Marriage Act 1969.

74. Codified community-specific laws are the Christian Marriage Act 1872, Parsi Marriage and Divorce Act 1936 and Hindu Marriage Act 1955.

75. Hindu Marriage Act 1955, Hindu Succession Act 1956.

76. Special Marriage Act 1954, Section 21-A, Indian Succession Act 1925.

77. See Hindu Marriage Act 1955, Section 7 (all communities), Anand Marriage Act 1909 (Sikhs), *Babay v. Jayant* AIR 1981 Bom 283 (Buddhists).

78. Hindu Marriage Act 1955, Secion 13 (1) (iii).

79. See such provisions in the four Hindu-law Acts of 1955-56.

change of religion would not result in loss of civil rights.[80] Since that law protects only the converting persons, the courts have upheld the provision of the modern Hindu succession law that children born to a Hindu convert after his or her conversion would not inherit from any of their Hindu relatives unless they reconvert to Hinduism before succession in any case opens.[81] The Muslim family and succession laws remain fully applicable to the Muslims, except if one opts for a civil marriage in which case secular laws of marriage and succession become applicable (whether it is a marriage within the Muslim community or outside it). Some aspects have been turned into statutes based on Islamic sources.[82] The secular law of transfer of property exempts from its scope the Muslim law of gifts, and gifts made in accordance with Islamic law take full legal effect.[83]

The Indian Penal Code regards bigamy as an offense only if the family law applicable to a case treats a bigamous marriage as void.[84] The Muslims therefore remain exempt from its ambit, while all other communities are now covered by this provision. This situation resulted into numerous cases of fake conversion to Islam by non-Muslim married men (including Hindus, Sikhs, Muslims and Christians) for the purpose of defeating anti-bigamy provisions of the laws applicable to them. The practice of such unscrupulous conversion by non-Muslims to Islam (under a mistaken belief that it gives them a free hand to indulge in bigamy) has now been stopped by the Supreme Court of India, laying down that a non-Muslim husband cannot remarry even after conversion to Islam without getting the first marriage dissolved.[85] The provisions of the Civil Service Regulations, both central and provincial, requiring civil servants to obtain government's prior consent before entering into a bigamous marriage (or, in the case of a woman employee, marrying a man who is already married) now apply only to the Muslims but are seldom used.[86] The validity of such provisions has in some cases been challenged for their alleged conflict with the religious-freedom clauses of the Constitution, but the courts provided no relief.[87]

The rule of Muslim law that apostasy of a husband would automatically dissolve the marriage and that the wife can thereupon marry someone else (without attracting anti-bigamy provisions of the Penal Code) remains in force, but the corresponding rule regarding a Muslim wife's apostasy is no more enforceable by virtue of a statutory provision. This provision has an exception to its rule meant to encourage re-conversion of women converting to Islam – if a non-Muslim woman marries a Muslim after converting to Islam but later reverts to her birth religion, her marriage to the Muslim husband would be automatically dissolved. [88]

The Christians are governed by marriage and divorce laws codified in the 19th century on the basis of laws then in force in Britain.[89] The provisions of these laws extending them also to marriages only one party to which is a Christian remain intact, but such marriages can also now take place under the general law of civil marriages. The Parsi Zoroastrians are governed by an old statute drawn on their religious sources.[90] The general law of succession – which exempts Hindus and Muslims from many of its provisions – contains two separate chapters applicable to Christians and Parsis, both based on religious principles.[91] Religious courts of various communities, known by different

80. Caste Disabilities Removal Act 1850.

81. Hindu Succession Act 1956, Section 26.

82. Dissolution of Muslim Marriages Act 1939, Muslim Women (Protection of Rights on Divorce) Act 1986.

83. Transfer of Property Act 1882, Section 129.

84. Indian Penal Code 1860, Sections 464-65.

85. *Sarla Mudgal v. Union of India* AIR 1995 SC 1531, *Lily Thomas v. Union of India* (2000) 6 SCC 224.

86. See, e.g., Central Services (Conduct) Rules 1964 (Rule 10), All India Services (Conduct) Rules 1968 (Rule 21).

87.The anti-bigamy provision of the Rajasthan Government Servants (Conduct) Rules 1971 was unsuccessfully contested in the Supreme Court of India very recently (February 2010).

88. Dissolution of Muslim Marriages Act 1939, Section 4.

89. Christian Marriage Act 1872, Indian Divorce Act 1869.

90. Parsi Marriage and Divorce Act 1936.

91. Indian Succession Act 1925, Part V, Chapters II and III.

names, remain operative in various parts of the country. The Parsi matrimonial courts and Church of Scotland Kirk Sessions among these have statutory recognition,[92] while decisions of the other such courts operating privately may be recognized by secular courts in their discretion as arbitration awards. In a writ petition challenging the constitutional validity of Muslim Shari'a at courts, pending for decision for long in the Supreme Court of India, the government has defended the system arguing that it is a form of alternative dispute resolution (ADR) which lessens the burden of State courts.

IX. RELIGIOUS EDUCATION OF THE YOUTH

Every religious community is free to establish and administer educational institutions of its choice, though according to the Constitution no citizen can be denied admission on the ground of religion to any institution maintained or aided by the State.[93] For the minorities, this freedom is specified by the Constitution as a Fundamental Right and the State is precluded from discriminating in any way against their educational institutions in giving financial aid.[94] Although under the Constitution this right of the minorities is unconditional, it has over the years been diluted to a large extent by the process of administrative regulations and judicial decisions. In a case relating to a prominent Christian college, the Supreme Court decided that in all minority educational institutions, minority community students should be admitted on only half of the total seats available – thus virtually creating an equal space for those of the majority community.[95] The ruling professedly given in the interest of "national integration" made no reciprocal arrangement for the minorities either in the state-established or majority-owned institutions.

The Constitution bans imparting of religious education in any educational institution "maintained wholly out of State funds" (except if one has been established under an endowment or trust requiring the same), but there is no such restriction on unaided and partially aided institutions.[96] It further says that if any religious instruction is imparted or a worship conducted in a state-recognized or aided institution, the students shall not be required to take part in it without their (or their guardian's if they be minors) free consent.[97] In practice, religious events and ceremonies do take place in most educational institutions, including those established and run by the State, and their students irrespective of their different faiths generally do not mind being in attendance. Also, there are thousands of educational institutions in the country with denominational or sub-denominational names recognized and aided by the State – most of which offer optional instruction in religion and theology – and a much larger number of seminaries established and run by different communities not receiving any State aid. The Ministry of Education at the Centre administers a "Modernization Scheme" for Muslim seminaries, but there have not been many takers, for fear of undue State intervention in their administration and curriculum. For the same reason, community leaders have not agreed to government's recent proposal to create a Central Board for regulating *madarsas* (Muslim religious schools), though such Boards are operating in some states.[98]

In 2004, working under the central government, a statutory National Commission for Minority Educational Institutions was created, empowered by its statute to help the minorities in the exercise of their educational rights under the Constitution, but its jurisdiction does not extend to religious schools.[99]

X. DISPLAYING RELIGIOUS SYMBOLS IN PUBLIC PLACES

92. Under the Parsi Marriage and Divorce Act 1936 and Church of Scotland Kirk Sessions Act 1897.
93. CONSTITUTION OF INDIA 1950, art. 29 (2).
94. Id., art. 30.
95. *St Stephen's College v. University of Delhi of India* (1992) 1 SCC 558.
96. CONSTITUTION OF INDIA 1950, art. 28 (1) & (2).
97. Id., art. 28.
98. Such Boards have been established in Bihar, West Bengal and some other states.
99. Established and regulated in its work by the Minority Educational Institutions Commission Act 2004.

Religion, culture and history are in fact so inter-mingled in India that it is really not possible to keep them in separate watertight compartments. The National Flag and Emblem of India are based on symbols which can be seen both as religious and historical or cultural, while the National Anthem is even more explicitly religious in its wording and meaning. A large number of religious days observed as festivals by various communities, including birth anniversaries of the founders of all religions, are public holidays in India. State dignitaries publicly celebrate these festivities and issue felicitation messages to the citizens on all such occasions. Religio-political parties, of which there is no dearth in the country, contest general elections at various levels with clearly religious symbols and slogans which have an obvious religious connotation; and the courts have upheld the practice, linking some such symbols and slogans with the culture of India.[100]

There is no law in India banning wearing of religious symbols in public places and the citizens' freedom in this regard is generally respected everywhere including educational institutions and public offices. Some legislators, judges, government officers and public servants freely wear religious dress or symbols without any restriction. The practice of the Sikhs to publicly carry a *kirpan* (sword) on ceremonial occasions is specifically protected by the Constitution as their Fundamental Right.[101] Their religious practice of growing a beard and wearing a turban, although not mentioned in the Constitution, are also recognized and respected everywhere including police and military services; they are also exempt from a security requirement of transport regulations that two-wheeler drivers must wear helmets. Many Muslims, too, wear a beard in public places, government offices and State educational institutions, but in some cases they have been denied this right and their appeals have been differently decided by various courts. In a very recent case, a Muslim student of a Christian school expelled for growing a beard against the school's discipline was given relief by the Supreme Court. [102]

Muslim women can freely wear anywhere the *hijab* (traditional scarf) or even a *burqa* (top-to-toe covering), though the custom is dying out among modern-educated Muslims. This practice is not interfered with by law except when a woman's photograph is legally necessary as a proof of identity for the purposes of obtaining passports, voters' cards and other official documentation.[103] The Christians and Jews, too, freely wear religious dress and symbols everywhere including government offices and State institutions and there never has been any dispute in this regard.

XI. Freedom of Expression and Offenses against Religion

The Indian Penal Code contains a separate chapter on "Offences against Religion," besides some related provisions found in some of its other chapters.[104] The offenses punishable under these provisions are (i) injuring or defiling a place of worship with an intention to insult the religion of any class of persons; (ii) deliberate and malicious act intended to outrage religious feelings of any class of persons by insulting their religion or religious beliefs; (iii) disturbing a religious assembly lawfully engaged in the performance of religious worship or ceremonies; (iv) trespassing in a place of worship or graveyard or disturbing an assembly for funeral with a view to wounding religious feelings of any person or persons; and (v) uttering words or making a sound or gesture with an intention to wound religious feelings of any person or persons. The Code further provides punishments for making, publishing or circulating (in or outside a place of worship or religious assembly) any statement, rumour or report with an intent to incite or likely to incite one community to commit an offense against another community or promote on grounds of religion or community feelings of enmity, hatred or ill-will between various

100. See, e.g,, *Ramanbhai v. Dabhi* AIR 1965 SC 669, *Manohar Joshi v. Nitin Patil* (1996) 1 SCC 169.
101. Constitution of India 1950, art. 25, Explanation I.
102. Case decided in December 2009.
103. *Sikdar v. CEO* 1961 Cal 289, *Peeran Saheb v. Collector* AIR 1988 AP 377.
104. Indian Penal Code 1860, Sections 153A, 153B, 295-298.

religious groups or communities.[105] The prescribed punishment for these various offenses is imprisonment up to three years and fines.

Statutory laws relating to armed forces provide for conviction by court martial and punishment of persons governed by the Act if they commit the offense of defiling any place of worship, insulting religion, or wounding religious feelings of any person.[106] The election law of India prohibits religious appeals in electioneering, declaring it to be both a ground for disqualifying a candidate and an offense punishable by law.[107]

None of these provisions of the Penal Code, armed forces laws and the election law is religion-specific – all are equally applicable to all religions. The validity of some of these provisions has been challenged in the courts under the freedom of speech and expression clause of the Constitution, but the courts have generally upheld the same.[108]

The Code of Criminal Procedure empowers the State governments to proscribe any newspaper, book or document which in its opinion is offensive to religion within the meaning of the provisions of the Penal Code mentioned above – mainly if it promotes religious enmity or disharmony or offends religious feelings of any community.[109] An order issued under this provision is appealable to the High Court which can set it aside in case the court differs from the government's opinion. The validity of this provision under the Constitution has also been upheld.[110] In several cases, both the State governments and the High Courts have used their respective powers under this provision -- among the books, movies and plays proscribed being those found offensive by the Hindus, Muslims and Christians.

XII. CONCLUSION

India is a unique State, believing in secularism and yet preserving its spirituality through constitutional provisions, legislation, State policy and judicial pronouncements. Maintaining a rational balance between secularity and religiosity, accommodating religious sensitivities of the people to a reasonable extent, avoiding religion-based discrimination among the citizens as far as possible, and endeavoring to put them on a par regardless of religious affiliation, are the basic features of religion-state relations in India. God and Caesar both have a place under the constitutional and legal set up of the country, but the scope of "what belongs to God" remains wider in India than in most other professedly secular societies.

105. Indian Penal Code 1860, Section 205.
106. Army Act 1950, Section 64, Air Force Act 1050, Section 66.
107. Representation of the People Act 1951, Section 125.
108. *Ramjilal Modi v. State of UP* 1957 SC 620, *Kedar Nath Singh v. State of Bihar* AIR 1962 SC 955.
109. Code of Criminal Procedure 1973, Sections 95-96.
110. *Gopal* (1969) 72 BLR 278; *Lal Singh* 1971 CrLJ 1519.

CARMEN GARCIMARTÍN

Religion and the Secular State in Ireland[1]

I. SOCIAL CONTEXT

From a sociological point of view, Ireland is usually considered a Catholic country. According to the findings from the Central Statistics Office shown below, an overwhelming proportion of Irish belong to the Catholic Church. In the latest decades, the proportion of Catholics diminished from around 93 percent to the present 87 percent. This has been due to two primary factors: first, a general trend in society to more non-religious attitudes; and second, a dramatic increase in immigration. On the one hand, there are increasingly less differences between the "Catholic Irish society" and continental countries, although the Catholic background is more easily perceived here than in other countries.[2] On the other hand, the inception of minority religious denominations, almost absent until now in the Island, ensued from immigration.[3]

However, there has not been a radical alteration in the religious pattern of Irish society, as far as Catholics are still a large majority. We could better say that there has been a change in lifestyle rather than a reshaping of the religious map.

Nationality	Irish	Non-Irish	Total
Total	3,706,683	419,733	4,172,013
Catholic	3,409,381	213,412	3,644,965
Church of Ireland (incl. Protestant)	86,990	31,197	118,948
Other Christian Religions	16,327	11,484	28,028
Presbyterian	13,628	7,741	21,496
Muslim (Islamic)	9,761	21,613	31,779
Orthodox	2,881	16,845	19,994
Methodist	5,077	5,612	10,768
Other Stated Religions	22,497	31,118	54,033
No Religion	105,356	68,444	175,252
Not Stated	34,785	12,267	66,750

Source: Central Statistics Office Ireland. Last Survey, 2006
Available at http://www.cso.ie/statistics/popnclassbyreligionandnationality2006.htm

Although the Catholic Church was never established as the official church of the country, Ireland has always been deeply influenced by Catholicism. Moreover, there is a long tradition of separation between church and state that still remains today, as it will be conveyed in next sections.

II. HISTORICAL APPROACH

The history of Ireland is a key element to understand the current Church-State relationship. Some particularly relevant events are described below.[4]

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1. The report will deal only with the Republic of Ireland.

2. We must also take into account that the revitalisation of religious life in Eastern countries since 1990 has changed the religious map in Europe. So, the Irish case will be faded away in a more heterogeneous context.

3. For a more detailed account on the minority churches in Ireland and its juridical status see COLTON, P., *Religious entities as juridical persons, Ireland*, in Friedener, Lars (ed.), "Churches and other religious organizations as legal persons," Peeters, Leuven (2007), 131 ff.

4. See broadly Blanchard, J., *The Church in contemporary Ireland*, Dublin (1963), xv ff.

a. The *importance of Ireland in ancient Canon Law and its particular monastic organization* are well known. The Island, which never was under the Roman Emperor authority, was divided up into small political constituents. This favored the development of a strong monastic system that endured until the XII century, and a weakness of the diocesan structure. This fact explains the high level of culture, renown and influence of Irish monasteries and abbeys.

b. The *Anglo-Norman domination*. The long centuries of Catholic tradition in Ireland were abruptly ended by the breach between Rome and Henry VIII created in 1534, as well as the tough implementation of the reform by Queen Elizabeth I. Three hundred years of trouble began then for the Irishmen.[5] Military conquest and economic dominion accompanied the imposition of the Anglican faith in Ireland. Catholics were subjected to disabilities: they could not hold public office, sit in parliament or vote, and their power to acquire land was limited.[6]

The so-called "Catholic emancipation" began to bear fruit in the early decades of the XIX century. Some of the restrictions on Catholics were loosened by those years. Yet, it was possible the foundation of St. Patrick's College of Maynooth – both a College and a Catholic seminary – in 1795;[7] since then, it has been a point of reference for Irish Catholicism.

In 1800, the *Act of Union* was approved, which was the end of the Irish independence. From that year on, until 1921, the British authorities governed Ireland. According to the *Act of Union*, the Churches of England and Ireland should also be united in an only Church, the United Church of England and Ireland, which was established as the official Church of the country.[8] Due to Daniel O'Connell's intervention, there was a greater demand of religious liberty. It got shaped as the *Roman Catholic Relief Act* of 1829, which overturned most of the disabilities on Catholics.[9]

Another highlight on this period was the separation between the State and the Church of Ireland, through the *Irish Church Act* of 1869. In 1870, the *Matrimonial Causes and Marriage Law Amendment* gave the civil courts power over marriage.

The fight for the independence, fuelled by the nationalist movement, was the core issue in the beginning of the XX century. As the separation from Britain took place, hallmarks of the Irish identity were prompted, and, one of the factors that most set apart the two countries was the religion.

Both the *Treaty between Great Britain and Ireland* of 1921 and the *Free State Constitution*, of 1922, declared the separation of church and state, and the latter also

5. This period is faintly mentioned in the Preamble of the Constitution, which in the second subsection states: "We, the people of Éire, Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers trough centuries of trial (…) Do hereby adopt, enact, and give to ourselves this Constitution."

6. Casey, J., *Constitutional Law in Ireland*, Dublin (2000), 2.

7. Nevertheless, it should be noted that, by then, the ideals of the French Revolution were spreading all over the continent. British authorities feared more the French ideals than Catholicism. If they allowed clergymen to be educated in France, revolutionary ideas could also widespread in Ireland. So, British not only enable the foundation of Maynooth; it even got public funding. See Blanchard, J., supra n. 4 at xx.

8. "That if be the fifth article of union that the churches of England and Ireland, as now by law established, be united into one protestant episcopal church, to be called 'The United Church of England and Ireland'; and that the doctrine, worship, discipline and government of the said united church shall be, and shall remain in full force for ever, as the same are now by law established for the Church of England; and that the continuance and preservation of the said united Church, as the Church of England and Ireland, shall be deemed and taken to be an essential and fundamental part of the union; and that in like manner the doctrine, worship, discipline and government of the Church of Scotland shall remain, and be preserved as the same are now established by law, and by the acts for the union of the two kingdoms of England and Scotland"

9. However, certain disabilities continued until 1920 (*Government of Ireland Act).* For example, Jesuits could not be lawfully ordained in Ireland; donations and bequests in favor of that order were also invalid; and so on. See Casey, James, *State and Church in Ireland*, in "State and Church in the European Union," Baden-Baden (2005), 188.

recognized the freedom of religion.[10] Unfortunately, it was not the end of Irish political trouble. That same year the Civil War began. After it was ended, in 1923, Eamon de Valera led the drafting of the Constitution in force, approved on 1937.

III. CONSTITUTIONAL CONTEXT

Two constitutional provisions must be considered in this section: the Preamble and Article 44.

The Preamble of the Constitution commences with an invocation of the "… Name of the Most Holy Trinity, from whom is all authority and to whom, as our final end, all actions both of men and States must be referred."[11] Although it appears to be a general statement in the Constitution of a denominational country, with an established Christian church and limited neutrality, it is not the Irish situation, as - will be proved below.

Generally, preambles of constitutions are not enforceable. However, Irish case law rested on the Preamble to support certain claims. *Quinn's Supermarket Ltd. v. Attorney General* referred to the Preamble to support the "firm conviction" that Irish people are "a Christian people."[12] Also, in *Norris v. Attorney General*, O'Higgins, CJ understood that the Irish people proclaimed in the Preamble a "deeply religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian beliefs."[13]The *Report of the Constitutional Review Group* of 1996[14] recommended the amendment of the Preamble, avoiding references that could be divisive nowadays.[15]

The Constitution of 1937 devotes Article 44 to the religious issue. It states:

1) The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honor religion.

2) 1º. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. 2º The State guarantees not to endow any religion. 3º The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status. 4º Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school. 5º Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious and charitable purposes. 6º The property of any

10. *Free State Constitution*, art. 8: "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denomination, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation".

11. An endnote to the text, only in Irish, dedicates it to the Glory of God and the Honour of Ireland (*Dochum Glóire Dé agus Onóra na hÉireann*).

12. *Quinn's Supermarket Ltd v. Attorney General* [1972] IR 1, at 23.

13. *Norris v. Attorney General* [1984] IR 36, at 64. Other references to the Preamble can be found in *Maguire v. Attorney General* [1943] IR 238; *McGee v. Attorney General* [1974] IR 284; *Attorney General v. Open-Door Counselling Ltd* [1988] IR 593.

14. The *Report* was prepared by an all-party Committee appointed by the Government of Ireland in 1994. Its target was reviewing the Constitution and defining the areas that should be modified. The Report was finalized in 1996, and it aroused a great interest in the political arena. Nevertheless, opinions regarding the Report were not unanimous. For example, according to Barret, discussions about the religious issue were brief, shallow, and a bit too defensive with regard to accusations of separatism. (See Barret R., *Church and State in the light of the Report of the Irish Constitution Review Group*, in 20 Dublin University Law Journal, n.s., 1998, 51 ff.)

15. See Casey, J., *Church and State in Ireland 1997*, in European Journal for Church and State Research, 1998, 24. Casey also mentions the sharp critic to this proposition made by the Archbishop of Dublin.

religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.[16]

A proper understanding of this article requires a brief explanation about its creation. De Valera followed up the drafting of the whole Constitution, but he specially oversaw everything related to religion. He wanted the Constitution to have a Catholic background, which reflected the Irish ethos, but he also wanted to avoid any kind of controversy with the Protestants. Finding the balance was a real challenge for the President.

De Valera sought an un-official approval of the text from the Vatican. Although the Holy See had some doubts regarding the first draft of Article 44,[17] it did not want to interfere in Irish domestic policies. Then, the Pope said that he neither approved nor disapproved the Constitution; simply *tacebat.*[18] The President also submitted the draft of the Constitution to the Irish Catholic hierarchy, and he had some conversations with the leaders of other religious denominations.[19]

Some scholars consider that the primary purpose of Article 44 was guaranteeing the freedom of religion.[20] However, when freedom of religion was first recognized in a Constitution, in 1922, it already had a long tradition in the Island, and its incorporation to the Constitution was logical. On the contrary, the other dispositions of Article 8 were a requirement of the Treaty of 1921; their aim was avoiding the establishment or the preference for any religious denomination –-obviously the Catholic Church-- which would have the undesirable consequence of a bigger breach between the North and the South. In 1937, it was even more necessary to define the position of the State with regard to the religious denominations, primarily the Catholic Church, which is the goal of the Article 44.

Three main questions arise from Article 44: what is the scope of the first subsection, the extent of the non-endowment clause, and the public funding of private religious schools? I will now address the first issue. For the others, see nn. 8 and 10.

Subsection 44-1 was one of the major innovations in the Constitution with regard to religious matters. This kind of declaration is unusual in European Constitutions. In the Irish case, it can be explained for sociological and historical reasons. However, its significance is far from clear.

There are two different statements in the subsection: the homage of public worship due to God, and the obligation of the State to honor and reverence Him.

Regarding the first one, it is not easy determining its exact nature and meaning. When it says that "Almighty God" deserves worship, it would be restricting that reference to monotheistic faiths. However, the Supreme Court considered that the Constitution states this duty in terms that do not confine the benefit of that acknowledgement to the Christian faiths.[21]

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16. Note that the Irish Constitution is written both in English and Irish; in case of contradiction, the Irish text prevails. A study on the differences between the Irish and the English text can be seen in the Report *Bunreacht Na hÉireann. A study of the Irish text*, by the All-Party Oireachtas Committee on the Constitution, dir. Micheál Ó Cearúil, Dublin (1999), 634 ff.

17. See below.

18. See Keogh, D., *The Constitutional Revolution: an analysis of the making of Constitution*, in F. Litton (ed.), "The Constitution of Ireland, 1937-1987," Dublin (1988), 43 ff. Nonetheless, the Vatican appreciated De Valera's efforts to draft a Constitution according to the Catholic principles. It is worth noting that the Holy See had been reluctant to De Valera's policy, because of his leaning to lower the religious differences between North and South Ireland; so, certain secularism was expected. However, Fianna Fáil -De Valera's political party- was not hesitant to the enactment of legislative acts that reflected the principles of the Catholic morality.

19. He talked to Edward Cahill, a prominent Jesuit, John Charles McQuaid, Bishop of Dublin from 1940 onwards, Paschal Robinson, Nuntius in Ireland; and with authorities of the Anglican Church, the Religious Society of Friends (Quakers), Presbyterians, Methodists and Jews.

20. See, among others, Casey, J., *Constitutional Law in Ireland*, supra n. 6 at 692.

21. *Quinn's Supermarket Ltd v. Attorney General*,supra n. 12. See also *McGee v. Attorney General*, aupra n. 13; *Norris v. Attorney General*, supra n. 13. The current interpretation of this provision is summarized in a more recent case, *Corway v. Independent Newspapers (Ireland Ltd)*, [1999] 4 IR, at 484: "The effect of these various guarantees is that the State acknowledges that the homage of public worship is due to Almighty God. It promises

Another controversial issue refers to the obligation that this statement imposes on the State. The Constitutional assertion could be understood in the sense that the public authorities should not only allow but also even participate in divine worship in public. This interpretation would be borne out by the Irish Language version of the Constitution, according to the *Report of the Constitutional Review Group,* and it may provide constitutional authority for some involvement of the State in public worship.[22] Another interpretation considers that the statement would only imply that the State is obliged to permit individuals to engage in public worship. If that were the case, it would be desirable for the statement to be conveyed in more direct language. Or, as the *Report* also said, this can be dealt with (if necessary) by a suitable amendment of Article 44-2-1º.[23]

Regarding this issue, Professor Casey points out that the overwhelming allegiance to religion in Ireland is mainly a matter of private practice, but there are many public manifestations of religion. Some examples are the ceremonies at defense establishments or the daily broadcasting of the Angelus. The only clear limit to those manifestations comes from Article 44.2.2º, which bans State endowment of religion. Otherwise, that is to say, if those practices do not carry any State endowment, it seems likely that any action to challenge them would fail, with the courts invoking Article 44.1 to uphold the impugned provisions.[24]

The second statement of the Article 44.1 is less obscure in its meaning, although it can also pose some difficulties. It imposes an obligation on the State to refrain from engaging in atheistic propaganda, and it prevents the State from taking any hostile measure to religion. It may also been understood that, although not expressly stated, that legal or statutory restrictions to proselytism –besides those based on public order reasons- are not enabled.[25]

In view of these arguments, the recommendation of the majority of the Review group favored the deletion of Article 44-1. In case it was not deemed desirable, it might be reformulated as follows: "The State guarantees to respect religion."[26] However, no action has been taken since 1996 to amend the Constitution in the aforementioned way.

But not only what Article 44.1 says is important. *What it does not say and what did not happen* is also interesting. The first version of Article 44 included two subsections which fuelled a sharp controversy both before they were approved and afterwards, until they were repelled in 1972. Article 44-2 and 3 read as follows:

> 2º. The State recognizes the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens. 3º. The State also recognizes the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation this Constitution.

These paragraphs were criticized for being too Catholic and for being not Catholic enough. The Constitution introduced a distinction between belief-systems that had not been in any other constitutional text before. Certainly, it was very loose, and it was not easy to see what kind of practical effect, if any, it might have.[27] But in fact, it indicated that with regards to religion and atheism, the State was not neutral; and with regards to

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to hold his name in reverence and to respect and honour religion. At the same time it guarantees freedom of conscience, the free profession and practice of religion and equality before the law to all citizens, be the Roman Catholics, Protestants, Jews, Muslims, agnostics or atheists. But art. 44-1 goes further and places the duty on the State to respect and honour religion as such. At the same time the State is not placed in the position of an arbiter of religious truth. Its only function is to protect public order and morality."

22. *Report*, supra n. 14 at 370.
23. *Report*, supra n. 14 at 377-378.
24. See Casey, J., *Constitutional Law in Ireland*, supra n. 6.
25. Id. at 690.
26. *Report*, supra n. 14 at 378.
27. Whyte, J. H., *Church and State in Modern Ireland, 1923-1979*, Dublin (1980), 54-55.

different denominations, the State was not neutral either, as far as the Catholic Church was singled out from the others by being granted a "special position." However, some Catholic authorities found the words extremely vague, and considered that these subsections did not give, *de facto*, any special position to the Catholic Church. Moreover, at some points the Constitution did not measure up to what the Catholic authorities might have desired, for example, Article 41, relating to marriage.[28]

Non-Catholic denominations welcomed this article, not because it granted them any advantage (it did not), but because, due to the historical context in 1937, the faint recognition of the Catholic Church and the explicit recognition of other denominations better than had been expected. When the Constitution was enacted, there was a remarkable consensus on religion and social issues, regardless any political affiliations. Ninety three per cent of the population was Catholic, and a vast majority followed the hierarchical guidance. Most of them supported the idea of enshrining the Catholic principles as part of the Law of the Land. If we take into account that the nationalist movement, which led to the establishment of an independent Irish state in 1922, derived its strongest support from the Catholic community, the surprising thing is that the 1937 Constitution did not establish the Catholic Church as the State religion.[29] The long oppressed Catholic majority did not take its revenge when it had the chance to do it.[30]

Those two subsections were overturned in 1972, through the Fifth Amendment of the Constitution, without any regard for the Catholic hierarchy.

According to the current version of the Constitution of 1937, there are three major principles that define relations between State and religion: freedom of religion, separation between church and state, and neutrality.

Freedom of religion is expressly mentioned in the Constitution. No special trouble usually arises from this principle. It must be noted that the *European Convention on Human Rights Act*, 2003, states in s. 2 that "in interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

Separation between church and state is the key principle, and a truly strong one, deeply rooted in Ireland. Perhaps *separation* is not the exact word to name this principle, assuming it has a precise meaning in Western countries that is not always accurate in Ireland. For example, state aid for denominational schools is not considered an entanglement between church and state. *Aloofness* is the word that would better reflect the relationship between church and state; it conveys the Church's reluctance to become entangled with the state, even though there might be advantages attached.[31] Several events in the recent history of Ireland reveal this aloofness in government. In the 19th century, Catholic bishops did not grant the State the power of veto in Bishop's name as a reward for the Catholic emancipation. Also, the Catholic Church rejected the funds other denominations received from the State. Besides, when the Church of Ireland was disestablished as the Church of the country, in 1869, the Catholic Church did nothing to hold that position; its attitude was the same in 1937, although Catholics had widely supported the nationalist movement. After the Constitution, the tradition of separation continued. For example, in the 1940s, Maynooth experienced a wide enlargementthat was

28. See McDonagh, E., *Church and State in the Constitution of Ireland*, en "Irish Theological Quarterly," XXVIII, 2, 1961, 131 ff.; Keane, R., *Fundamental rights in Irish Law. A note on the historical background*, in O'Reilly, J. (ed.), "Human rights and Constitutional Law," Dublin (1992), 25. This author thinks that the clause would have reached the courts, it would have been considered it had not juridical effects.

29. Hogan, G. W., *Law and Religion: Church-State Relations in Ireland from Independence to the present day*, en 35 American Journal of Comparative Law (1987), 55.

30. According to Keogh, there is a risk to underestimate the conflict between the Catholic Church and the State that arose from the Constitution, because it did not hurdle to the public arena. If it did not, it was mainly due to De Valera's diplomatic ability. See Keogh, D., *The Constitutional Revolution*, supra n. 18 at 118.

31. Whyte, J. H., *Church and State in Modern Ireland, 1923-1979*, supra n. 27 at 12.

funded without any public help; Canon Law was not recognized at all, and it was viewed just the same as any foreign Law; the Government played no part in the nomination of that church's bishops;[32] the Catholic Church forbid clergymen to take part in politics; and so on.

Of course, this principle also implies that no religious denomination has any role or special power in the secular government of the country,[33] nor has special powers to control any other religious communities.

In summary, Article 44 would be discharged as a policy of non-interference.[34] It might be surprising that given the history of Ireland, and the religious landscape of the population, there has not been any entanglement between the Catholic Church and state. The relative lack of contact, as explained above, enables the understanding of the harmony in their relations. That means that a number of issues which caused trouble in other countries -interferences in the appointment of bishops, legal effects of canon law marriage, eetc…- have never arisen in Ireland. The field of contact, and therefore of potential for conflict, was narrower.[35]

Indeed, Catholics might find a conflict, at several points, between faithfulness to the Church and allegiance to the State. The private and devotional nature of Irish Catholicism contributed to find a solution to the dilemma. A Catholic Irishman would surely defend that the priest's spiritual authority must be respected; but, at the same time, he will consider that politics was none of his business.[36] Because of that, unlike other European countries -Spain, Portugal, Italy, Austria, etc.-, Ireland is exceptional in that it has never produced an anti-clerical party. The Catholic Church in Ireland has not faced a proper anticlerical movement. Although some political factions (as Fenians, Parnellites, or Republicans) complained that the Church was exceeding the limits of its powers, they never dare to go so far as to say the Church had no claim in Ireland.[37]

It is worth noting that separation between church and state was not in accordance with the teachings of the Catholic Church during those years. The Popes had repeatedly condemned that doctrine.[38] In several European countries, the Catholic Church was then the Church of the State, or was funded by it, and when the separation of Church of State took place in France and Portugal, in the beginning of the 20th century, it was considered a breakup of the rights of the Church. Ireland follows the pattern of Anglo-Saxon separatism; it could be thought that it was an imposition of the British Government during the period of English supremacy, but facts showed the opposite.This principle is compatible with the strong influence of the Catholic Church in Irish life. Here we find an unparalleled pattern in Europe.

Neutrality, according to Clarke,[39] is the only principle clearly expressed in the Constitution. The State must remain neutral with regard to the different religious denominations. It can neither favor nor persecute any of them, and there cannot be discrimination on grounds of religious belief, whether such a distinction appears invidious or benign.[40] The issue of religious discrimination has been brought into sharp focus

32. In Whyte's words, "I have been unable to find any case where it has made even informal presentations to the ecclesiastical authorities" (Whyte, J. H., *Church and State in Modern Ireland,* id. at 14).

33. No church is guaranteed representation on civil statutory bodies, such us the Broadcasting Commission of Ireland, the Arts Council, the Censorship of Publications Board, and so on. However, it would be usual to appoint at least one member of a minority church. See Casey, J., *State and Church in Ireland,* supra n. 9 at 200.

34. Hogan, G. W. and Whyte, G. F., *J. M. Kelly: The Irish Constitution,* Dublin (2003), 2045.

35. See Whyte, J. H., *Church and State in Modern Ireland,* supra n. 27 at 16.

36. Id. at 12.

37. See Larkin, E., *Church, State and Nation in modern Ireland,* in "The historical dimensions of Irish Catholicism," Dublin (1997), 123.

38. Gregorio XVI, *Mirari vos,* 1832; Pío XI *Syllabus,* 1864; León XIII, on several encyclicals. See about this NORMAN, E. R., *The Catholic Church and Ireland in the age of Rebellion,* New York (1965) 282 ff.

39. Clarke, D., *Church and State,* supra n. 28 at 226.

40. *Quinn's Supermarket v Attorney General,* supra n. 12 at 16. The fact that discrimination on grounds of religion is specifically banned outside the framework of art. 40.1 [regarding principles of equality and non discrimination] can be assumed to be of some significance, particularly given that the anti-discrimination provision effectively reiterates what is already protected by art. 40.1, which has been held as prohibiting the

recently, with several media sources highlighting the operation by State-funded denominational schools of discriminatory enrollment procedures.[41]

Paradoxically, cooperation is not mentioned in the Constitution. There are some types of cooperation – as in education – but it is not considered as a constitutional principle.

IV. LEGAL CONTEXT

There is not specific legislation on religion, except the aforementioned articles of the Constitution.[42] Issues directly related to religion are not among the preferential topics chosen by the Law Reform Commission to be considered in the next years.[43]

Regarding the case law, there are two major cases in religious freedom: *Quinn's Supermarket Ltd. v. Attorney General*[44] and *In Re Article 26 and the Employment Equality Bill*, 1996.[45] Although they are mentioned in other sections, I will give a brief account of both.

In *Quinn's Supermarket*, several regulations that exempted Jewish Kosher shops from compliance with commercial trading hours were challenged. The plaintiff, a supermarket's representative, argued that the differential treatment was contrary to Article 44.2.3º of the Constitution, as it imposed discrimination on grounds of religion.

The Supreme Court accepted that Article 44.2.3° of the Constitution precludes all distinctions based upon religious belief, profession, or status. Thus, the aforementioned regulations were "unconstitutional on [their] face." However, the Supreme Court noted that Article 44.2.1º guarantees the free practice and profession of religion. In order to resolve the potential clash between the two sections, the Court looked to ascertain the "overall purpose" of Article 44. Looking to the Preamble as well as the historical context of the provision, the overall purpose was deemed to be "the freedom of practice of religion". And, as Walsh J. pointed out, "any law which by virtue of the generality of its application would by its effect restrict or prevent the free profession and practice of religion would be invalid having regard to the provisions of the Constitution, unless it contained provisions which saved from such restriction or prevention the practice of religion of the person or persons who would otherwise be so restricted or prevented."[46]

It means that provisions for discrimination on religious grounds were not only permitted but also positively required by the Constitution if its aim is to uphold the free practice of religion.[47]

In *Re Article 26 and the Employment Equality Bill* the Supreme Court, again, ruled that while it was not generally permissible to make any discrimination on grounds of religion, that distinction would be valid where necessary to preserve the constitutional guarantee of free practice and profession of religious freedom.[48]

State from discriminating upon religious grounds. See Daly, E., *Religious Discrimination Under the Irish Constitution: A Critique of the Supreme Court Jurisprudence*, 2008 Cork Law Review, 28.

41. In early 2007, a number of children of Nigerian origin in an area of North Dublin could not gain access to any local schools because they did not hold Catholic baptismal certificates, according to the press. A non-denominational school, catering almost exclusively for children of African origin, was subsequently established in that area (Guardian News & Media. Published http://www.buzzle.com/articles/153701.html 9/24/2007). See, on this issue, Daly, E., *Religious Discrimination Under the Irish Constitution*, supra n. 40 at 28.

42. It must be remembered that Irish Law is a system of common law.

43. See the Third Programme of Law Reform 2008 - 2014. The Commission's Programmes of Law Reform are the principal basis on which it is carried out the statutory mandate to keep the law under review with a view to its reform. The Third Programme of Law Reform contains 37 law reform projects.

44. [1972] IR 1, at 23.

45. [1997] 2 IR 321

46. [1972] IR 1, at 24.

47. See a fuller account of this ruling in Daly, E., *Religious Discrimination Under the Irish Constitution,* supra n. 40.

48. See, on this item, Casey, J., *Church autonomy and religious liberty in Ireland,* in Gerhard Robbers (ed.), "Church autonomy: a comparative survey," Frankfurt am Main (2001), 8-9; Daly, E., *Religious Discrimination Under the Irish Constitution*, supra n. 40 at 9.

The Bill challenged in this case exempted from the statutory ban on religious discrimination in employment any "religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values." These institutions were permitted to give favorable treatment in recruitment of employees on grounds of religion if necessary to uphold the "ethos" of the institution. However, it was widely criticized that the Supreme Court did not give any definition of what *ethos* is, entitling the Churches to decide on its meaning.

Therefore, the rationale of the two rulings is plain: the ban of religious discrimination if subordinated to the free practice and profession of religion. As a further implementation of this principle, the *Equal Status Act* 2000 enabled publicly-funded denominational schools to discriminate on grounds of religion in enrolment policy where necessary to uphold a denominational ethos.[49]

There are not bilateral formal relations between State and religious denominations. Although the Catholic ethos of the country would make logical an agreement with the Catholic Church, the principle of separation and its particular understanding in Ireland explains its non-existence. Furthermore, there has never been any serious attempt to sign an agreement.[50]

Occasionally, public authorities expressed their conviction that no agreement with the Catholic Church would be needed to regulate issues of common interest.[51] Then reciprocal relations are mainly pragmatic, and this is considered, both by State and religious denominations, as a fair and legitimate way of relation. If there are any conflicts, they are solved through diplomatic negotiations. Moreover, signing an agreement with a denomination would raise some doubts on grounds of Article 44: granting some advantages to certain denominations, and not to others, could defy the ban on discrimination.

V. THE STATE AND RELIGIOUS AUTONOMY

Article 44.2.5º of the Constitution deals with religious autonomy: "Every religious denomination shall have the right to manage its own affairs; own, acquire and administer property, movable and immovable; and maintain institutions for religious and charitable purposes." According to the *Report of the Constitutional Review Group*, this subsection is designed to preserve the autonomy of religious denominations, and it seems to do so satisfactorily.[52] The *Report* acknowledges that a strict interpretation of this subsection might not cover certain issues, like property held on trust for a religious body. However, the subsection should be accorded a purposive interpretation so that it covers property that, directly or indirectly, comes under the aegis of a religious denomination.

The Constitution does not define the religious denominations. The Supreme Court, in *Re of Article 26 and the Employment Equality Bill*, stated that this term "intended to be a generic term wide enough to cover the various churches, religious societies or religious congregations under whatever name they wished to describe themselves." This description would include the long-standing denominations, but it is not so clear if others would be included in the term.[53]

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49. Daly, E., *Religious Discrimination Under the Irish Constitution*, supra n. 40 at 2.

50. Unless, perhaps, the first draft of art. 42 of the Constitution of 1937. It stated that when Church and State powers required coordination, the State could sign agreements regarding civil, politic and religious issues with the Catholic Church or other religious denominations. See Keogh, D., *The Constitutional Revolution*, supra n. 18 at 22.

51. During its mission to obtain the approval of the Constitution from the Vatican, Special Ambassador J. Walsh pointed out that Irish Government considered that no agreement would be needed because Irish people were deeply Catholic. More recently, the Secretary of Foreign Affairs said that religious denominations were free to express their points of view, and members of Parliament were free to vote according to their conscience. See Keogh, D., *The Constitutional Revolution*, supra n. 18 at 71.

52. *Report*, supra n. 14 at 387.

53. Colton reports a statement made by the then Prime Minister, Bertie Ahern, when asked about the Government's intention to institute arrangements with churches and other non-confessional organizations. The

The guarantee of this subsection might collide with the non-discrimination clause of subsection 44-2-3º.[54] The Supreme Court, in *McGrath and Ó Ruairc v Trustees of Maynooth College*,[55] considered jointly the two guarantees and its potential clash. According to the Court, the non-discrimination provision must be construed in terms of its purpose: protecting and endeavoring freedom of religion and the independence of religious denominations. Therefore, the internal disabilities or differences of status that flow from the tenets of a particular religion are not a matter within the powers of the State. They do not derive from the State, so it cannot be said that it is the State that imposed or made them. As far as the State must protect the religious autonomy, "in order to comply with the spirit and purpose inherent in this constitutional guarantee, [public powers] may justifiably lend its weight to what may be thought to be disabilities and discriminations deriving from within a particular religion."

In the *Maynooth* case, it must be taken into account that it is – and has always been – a Catholic seminary, where the students are educated and trained for the Roman Catholic priesthood, regardless of whatever academic or educational accretions it may have gathered over the years. Because of that, its academic staff, or at least a part of it, is constituted of priests with a certain qualification, religious orthodoxy and behavior. As its own statutes declare, due standards are to be observed by those of the academic staff who are priests. The distinction drawn between priests and laymen in *Maynooth* tenets are not part of the ban or Article 44-2-3º of the Constitution. On the contrary, they amount to an implementation of the guarantee that is to be found in subsection 44-2-5º. These statutes are what the designated authorities of the Roman Catholic Church in Ireland have deemed necessary for this seminary. Their existence or their terms cannot be blamed on the State as an unconstitutional imposition.

Then, we can conclude that the Constitution widely recognizes and protects the autonomy of religions. Matters such as a church's teachings, their religious internal organization, or the number of ministers required for a certain task, do not fall within the powers of the State. It is fair to recognize that the State never claimed any such competences. Religious autonomy means that each denomination is entitled to create its own system: a church tribunal, with jurisdiction exclusively on internal affairs, like disciplinary matters. However, their decisions will not have civil effects.[56]

VI. Legal Regulation of Religion as a Social Phenomenon

Generally, churches and religious bodies have the status of unincorporated associations.[57] Although no disposition appears to prevent churches from acquiring corporate status, there is not any legal procedure for making churches corporate bodies under public law. This lack of corporate personality does not usually pose any practical problem. The only difficult issue would be church property, but it is usually vested in trustees, for a parish of a diocese.[58] There is also not a register of churches in Ireland.

Prime Minister said that there were prospects of conversations with some religious denominations, and mentioned up to 22. However, it cannot be considered as a closed checklist of the accepted denominations. (Colton, P., *Religious entities as juridical persons, Ireland*, supra n. 3 at 134.)

54. See a comment in Casey, J., *Church autonomy and religious liberty in Ireland*, supra n. 48 at 2.

55. [1979] ILRM 166, at 187. The plaintiffs, former priests, had been dismissed from their teaching posts at Maynooth (that is both a seminary and a recognised college of the National University of Ireland; as this latter, it receives State funding). The ground of the dismissals was that the plaintiffs had violated some college statutes. They claimed that those statutes discriminated between clerical and lay teachers and thus infringed art. 44.2.3º of the Constitution (Casey, J., *Church autonomy and religious liberty in Ireland*, supra n. 48 at 2-3).

56. However, Casey understands that the proceedings of any such tribunals would be open to review by the High Court, for example to ensure that they do not exceed their jurisdiction and that they observe fair procedures. See Casey, J., *Church autonomy and religious liberty in Ireland*, supra n. 48 at 3.

57. See a wider account on this issue in Colton, P., *Religious entities as juridical persons, Ireland*, supra n. 3 at 130 ff.

58. An exception is the Church of Ireland. As part of the disestablishment, the Church of Ireland created the Representative Church Body to hold his properties. This body was incorporated by Royal Charter of October

Public authorities may create procedures to enlist buildings for preservation on grounds of its interest. Those buildings cannot be altered of demolished without permission. Also, any monument associated with the local religious history constituted a "historic monument" under the *National Monument Act -1930-1987*.[59] Broadcasting of religious advertisements is forbidden by the *Radio and Television Act* 1988.[60] However, the *Broadcasting Act* 2001 enables the broadcasting of notices or events related to a particular denomination, provided it did not promote adherence to any religion or belief.[61]

Persons in Holy Orders, religious ministers, and vowed members of a religious community may be excused to serve on a jury.[62] There is no general exemption from Valued Added Tax for churches and religious bodies. However, churches that have a charitable status are exempt from payment of taxes. There are also other exemptions of taxes, such as for lands or buildings exclusively dedicated to worshipping.[63]

VII. State financial Support for Religion

Article 44-2-2º guarantees that the State will not endow any religion. This subsection comes from Article 8 of the Constitution of 1922 and Article 16 of the Treaty of 1921. However, the Constitution of 1937 goes further than the former texts. Both in the Treaty and in the Irish Free State Constitution, the non-endowment was considered as a self-imposed limitation of the State. On the contrary, in the Constitution of 1937 the State *guarantees* not to endow any religion, empowering itself as a defender of the neutrality of its own institutions.

The main challenge with regard to this article is defining the meaning and extent of the non-endowment clause. Some remarks can be made on this issue.

First, the Constitution precludes the State to enrich a religion by transferring property to or by providing it with a *permanent* income.[64] It is not clear, however, whether this clause bans also occasional donations made by the State to religious entities.

Second, the State could confer economic benefits or certain funds to religious bodies, assumed it bestow them on *non-discriminatory* basis. It appears to be not so easy concealing the non-discrimination criterion and the right of religious bodies to maintain its ethos. According to the *Report* of the Constitutional Review Group, there is "something of a discordance between the constitutional prohibition on the endowment of religion and no discrimination on religious grounds by the State on the one hand and the maintenance of a religious ethos in a publicly funded institution on the other."[65] The fair balance this subsection requires should be better addressed by a new clause to provide that institutions which retain a religious ethos should not be debarred from public funding, provided that they do not discriminate on grounds of religious belief or practice, save where this can be shown, in any given case, to be necessary in order to maintain their own religious ethos.

All this will apply, as Casey notes, only where the economic aid is for exclusively

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15th, 1870. Casey, J.., *State and Church in Ireland*, supra n. 9 at 193-194.

59. Id.

60. In the same sense, *Murphy v. Independent Radio and Television Commission* [1999] 1 IR 12.

61. See Colton, P., *Religious entities as juridical persons, Ireland*, supra n. 3 at 137.

62. *Juries Act* 1976.

63. See a wider account of financial benefits in Colton, P., *Religious entities as juridical persons, Ireland*, supra n. 3 at 137 ff.

64. See *Report*, supra n. 14 at 381. The Oxford Dictionary, cited in several cases and official documents, understands *endow* as "to enrich with property; to provide (by bequest or gift) a permanent income for a person, society or institution".

65. See *Report*, supra n. 14 at 382. It continues: "For example, there seems to be no constitutional objection to the State funding a hospital run by religious orders (on the basis that such funding was not primarily designed for the advancement of religion), but there might well were a publicly funded hospital to discriminate on religious grounds with regard to either employment or admissions policies. Thus, for example, if a publicly funded hospital were to give preference in its employment policies to adherents of a particular religious belief, this might well amount to a form of religious discrimination by the State. At the same time, if a hospital could not give preference to its own co-religionists, it might find it difficult to maintain its own religious ethos."

religious purposes. Providing public funds for equipment or salaries in hospitals or other social services run by religious bodies -as it happens in some of the largest hospitals in Ireland-, the State may not be acting contrary to Article 44.2.2º, even if only organizations belonging to a single church are engaged in this work.[66] The Supreme Court also clarified this issue in *Campaign to Separate Church and State v. the Minister for Education.*[67] The plaintiff considered that the State funding of chaplaincies – both Catholic and from the Church of Ireland – was against the non-endowment clause of Article 44.2.2º. The Court, on the contrary, understood that the impugned funding system was consistent with the Constitution, whenever the support for salaried chaplains was available to all community schools of whatever denomination on an equal basis, in accordance with their needs.[68]

Third, it raised some doubts whether concurrent endowment of religious denominations – that is to say, funding all religious denominations – should be allowed, assuming there was not discrimination. There is a precedent of this concurrent endowment in the history of Ireland. Before the disestablishment of the Church of Ireland, in 1869, the British Government partially funded two other denominations, granting the training of seminarians at Maynooth and part of the wages of the Presbyterian clergymen. When the Church of Ireland was disestablished, the concurrent endowment, funding all the religions on a non-discriminatory basis, was seriously considered, and finally rejected.[69]

In spite of its apparent rationale, the concurrent endowment would pose serious difficulties. For example, the Constitutional Review Group questioned how a non-discriminating method of allocating State funds could be achieved, or how would the religions with very small numbers of adherents be funded, apart from the unavoidable risk it would pose to the religious denominations autonomy. Because of those dire straits, the Group dismissed the concurrent endowment.[70]

Finally, the Constitution guarantees that the State will not endow any religion, but it does not expressly provide that the State will not establish a religion. Although there is a close relation between both concepts, they are different, and the non-endowment clause does not necessarily preclude establishment.[71] However, the establishment of a religion would almost certainly amount to discrimination on the ground of religious belief or status, and any such proposed establishment would be unconstitutional.[72] Also, the Supreme Court undoubtedly said that while there is not any explicit provision in the Constitution banning the establishment of a religion, it is obvious that such a decision "would be impossible to reconcile with the prohibition of religious discrimination."[73]

VIII. Civil Legal Effects of Religious Acts

The civil law does not recognize effects to religious acts, whether they stem from a religious court, a religious body or a religious authority. When the Church of Ireland was disestablished, jurisdiction in matrimonial matters was transferred to the civil courts.

66. Casey, J., *Constitutional Law in Ireland*, supra n. 6 at 696. Similarly, in *McGrath and Ó Ruaric v. Trustees of Maynooth College* the Supreme Court understood that the public funding of Maynooth was not unconstitutional, because this College is not only a seminary, but also a constituent College of the National University of Ireland.

67. [1998] 3 IR

68. See Casey, J., *Church and State in Ireland in 1998*, in "European Journal of Church and State" 6 (1999), 60.

69. See *Report*, supra n. 14 at 383.

70. Id. In the same sense, the Supreme Court concluded that art. 44-2-2º bans the concurrent endowment, and that statement that "the State guarantees not to endow *any religion*" must be construed as *all religions*. See *Campaign to Separate Church and State v. the Minister for Education*, supra n. 67.

71. We can find, in European countries, examples of States with an established Church, but without State endowment, like Great Britain, and States with concurrent endowment of religions, but with non established Church, like Germany.

72. *Report*, supra n. 14 at 384. Yet, the Constitutional Review Group recommends not amending the Constitution to introduce a non-establishment clause, because it might lead to some extreme undesirable results.

73. *Campaign to Separate Church and State v.. the Minister for Education*, supra n. 67 at 85.

Indeed, the *Matrimonial Causes and Marriage Law (Ireland) Amendment Act* 1870 required the civil courts to adopt the rules and principles that the ecclesiastical courts had followed. However, the civil courts have over the years departed from those principles. The Law Reform Commission declined in 1984 to recommend that decrees of nullity of marriage by an ecclesiastical court of the Catholic Church be given legal recognition.[74]

In *O'Callaghan v. O'Sullivan*[75] the Supreme Court held that canon law is foreign law, which must be proved as a fact and by the testimony of expert witnesses according to the well-settled rules as to the proof of foreign law, but only where it governs a relationship that is at issue.[76] It would not be correct to imply that this gives canon law precedence over civil law. In other circumstances, it may have no status and civil law may rule supreme, as is the case in ecclesiastical decrees of nullity of marriage.[77]For example, according to the *Civil Registration Act*, 2004, religious bodies may nominate solemnisers of marriages, for this only purpose. They will be recorded in a Register of Solemnisers.

Tribunals of the Catholic Church exercise jurisdiction over the annulment of marriages, but their rulings have no civil effects.

IX. RELIGIOUS EDUCATION OF THE YOUTH

Ireland has developed a complex education system, due to historical, cultural, and sociological reasons – see notes 1 and 3. It is shaped as a non-denominational system, but in practice the overwhelming number of schools is Catholic.

The Catholic Church always had a great influence in education. Since the independence of the Irish Free State, the Catholic Church struggled to preserve its prominent position in this field, and the State was careful when dealing with this issue, usually considered within the Church powers. This state of affairs was assumed both by church and state, and it was not highly controversial, as it happened in other European countries.[78]

The Constitution regulates education in Article 42.[79] There has never been a legal development of those provisions. As a consequence, there was a reliance on administrative circulars emanating from the Department of Education, but they lack the

74. See Murdoch, H., *Bell, book and candle,* in "Law Society Gazette," vol. 98, nº 10 (2004), 8 ff. There is neither any reported case in which religious factors have grounded a civil decree of nullity, civil separation or divorce. It appears that failure to fulfil a confessional obligation to go through a religious marriage could not invalidate a marriage valid under civil law. See Casey, J., *State and Church in Ireland,* cit., 206.

75. 1 IR 90, 1925. A similar case was held before High Court in Northern Ireland in 1991, in the legal battle between Bishop Cathal Daly and his curate (now bishop) Pat Buckley (*Buckley v Daly*, 1991 ITLR).

76. That is what happened in *Connolly v Byrne* (1997 IEHC, 195). In this widely publicised case, the court refused injunctive relief to parishioners who sought to restrain the bishop from altering the sanctuary of Carlow Cathedral. The defendants successfully contended that the property was held subject to canon law and that they had the right under canon law to carry out the alterations.

77. See Murdoch, H., *Bell, book and candle*, supra n. 74 at 11.

78. Osborough, W. N., *Education in the Irish Constitution,* in "The Irish Jurist," 13 (1978), 150 ff. See an historical approach to religious education in MCGRATH, E., *Education in Ancient and Medieval Ireland,* Dublin (1979).

79. It states: "1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children. 2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State. 3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State. 2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social. 4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation. 5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

necessary coherence.[80] Major reforms were adopted in the 1960 and 1970 decades.[81] Currently, other reforms are proposed, but nothing definitive was decided.

Primary education is mainly provided in national schools.[82] Despite their name, they are not public, but mostly owned and run by denominational bodies.[83] Unlike many other countries, Ireland does not have a parallel public system of non-denominational schools organized by the State, which would have avoided most of the problems that arose regarding religious education.[84] However, this system was deemed consistent with the Constitution. The first draft of the Constitution stated: *"The State shall provide free primary education;"* the current version says: *"The State shall provide for free primary education."* The Courts, in *Crowley v. Ireland,*[85] clarified the meaning of this provision; the Supreme Court understood that the State is not obliged to educate in public schools, but only to adopt all means needed to guarantee that all children receive free primary education.[86]

Parents may choose home schooling for their children. The origin of this provision is the clause of conscience in the XIX century, but the choice is not necessarily linked to religious reasons.[87]

The highest controversial issue is State funding of religious education.[88] As it has seen above, Article 44-2-2º of the Constitution that bans endowment of religion is not clear enough in regard to the State economic aid to the religion bodies, which fulfill a social need. Article 42-4º asserts that the State will give "reasonable aid" to private schools, although it must be done on non religious-discriminatory basis, according to subsection 44-2-4º.

All these constitutional provisions must be interpreted together. This integrated interpretation confirms that the State can fund religious education, if some requirements are accomplished.[89] I will examine them.

The first one, funding must have been established by legislation. The only Acts that authorize public funding of denominational education are the *Appropriation Acts*,

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80. See Hogan, G. W. and Whyte, G. F., *J. M. Kelly: The Irish Constitution*, surpa n. 34 at 1059-1060.

81. There were radical changes in the primary curriculum; compulsory education until 15 was imposed; vocational and training schools were open. It is a significant indication that in this period, public investment in education raised form 3'45% PIB till 6'29 (See Whyte, J. H., *Church and State*, surpa n. 34 at 337 ff).

82. The *Education Act* 1998 does not use the term "national school" and instead uses "primary" school. The name is not particularly significant except that national school clearly denotes that the school is state aided while a primary school can be private or state aided.

83. In practice, the Catholic and Church of Ireland bishops are the patrons of the schools within the diocese, with the parish priest usually carrying out the functions on behalf of the bishop.

84. It is unrealistic, as the Constitutional Review Group recognizes, to expect that the State will provide such as system, at least in the near future. Apart from other reasons, there will be a wasteful of scarce resources. See *Report* supra n. 14 at 386.

85. [1980] IR 102.

86. The ruling appeals also to historical reasons, when remembers that "the history of Ireland shows how tenaciously the people resisted the idea of State schools. The Constitution must not be interpreted without reference to our history and to the conditions and intellectual climate of 1937 when almost all schools were under control of a manager or of trustees when were not nominees of the State. That historical experience was one of the State providing financial assistance and prescribing courses to be followed at the schools. But teachers, though paid by the State, were not employed by and could not be removed by it; this was the function of the manager, of the school who was almost always a clergyman (…). The effect [of art. 42-4º] is that the State is to provide the buildings, to pay the teachers who are under no contractual duty to it but to the manager of trustees, to provide means of transport to the schools if this is necessary to avoid hardship, and to prescribe minimum standards." Some years later, in the National Education Convention (October 1993), the representative of the Secretary for Education said that the State fulfils its constitutional obligation providing for the biggest part of the capital and school maintenance, paying for the teachers' expenses and providing for free transport when needed. See *Report* supra n. 14 at 343.

87. The aim of this clause was guaranteeing that no child would receive a religious education that its parents rejected. See Keane, R., *Fundamental rights in Irish Law. A note on the historical background*, supra n. 28 at 22.

88. A general approach to the matter can be found in Williams, D., *State support for Church Schools: is it justifiable?*, in 11 "Studies in Education" (1995), 37 ff.

89. See *O' Shield v. Minister for Education*, [1999] 2 IR 321.

approved yearly, although drafters of Article 44 of the Constitution probably envisaged that this legislation would be specific in character and establish a permanent statutory scheme whereby such aid might be disbursed. So, this non-statutory rule conforms to the letter, but not the spirit, or Article 44.[90]

Secondly, there must not be discrimination between denominational schools. This requirement may pose some difficulties. The State established some specific conditions for a school to get financial aid. Any group of parents, with or without a religious background, can apply for public help to create a school if they demonstrate there are a potential number of students. Parents -or institution- will provide for the sole and 15 percent] of the building cost, and the State will fund the other 85 percent, the 80 percent of the total amount of running the school, and the teacher's wages.

These requirements are identical for all private schools, denominational or non-denominational. No legal barriers exist for the creation of schools running by religious denominations other than Catholic, funded by the State. Yet, its existence depends upon sociological and demographical elements. Due to the religious affiliation of Irish population, the Catholic Church will have much more chances to fulfill those requirements than any other religious denomination. On the other hand, this system enables the State to satisfy the real demand. It would not be attainable funding all kind of educational schools any group wanted to establish.

The ultimate conflict arises from the exigencies linked to receiving public funds, and the need of the denominational schools to adopt some measures to preserve its religious ethos. Some of the problems are the preference given to applicants of the religious denomination, the appointment of faithful only as teachers, and so on, will come out. There is not a definitive solution for this problem.[91]

The third requirement stems from Article 44-2-4º, which recognizes the right of any child to attend a school receiving public money without attending religious instruction at that school. Since the reform of education of 1971, religious education has been integrated in all the subjects that compose the *curriculum.*[92] Then, parents that desire that their children attend a denominational school may ask -and the school must grant it- that they were exempted of religious classes. However, it is not easy to attend a denominational school and not receive any religious education at all. It is not possible to ask a denominational school not to give an education with a religious background, because it will be contrary to their religious ethos.

Sometimes, the controversy might not be a question of choice: if the only available school nearby for a child is a denominational school, and parents reject the denominational education, the child might be deprived of the opportunity of attending the nearest and most convenient school or even (to take a more extreme case) denied any effective opportunity of attending school. As in the previous requirement, there is not a general solution. Actually, problems are not as frequent, and they have been avoided to

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90. See *Report*, supra n. 14 at, 373-374. The Constitutional Review Group understands the situation is likely to change in a forthcoming Education Bill.

91. See, more detailed, *Report*, supra n. 14 at 386 ff.; McCrea, R., "The Supreme Court and the School Chaplains Case," in 2 *Trinity Coll. L. Rev*. (1999) 26. Later developments did not apparently change anything. In the *Employment Equality Bill 1996* ruling, the Supreme Court upheld a bill allowing for religious discrimination in the employment of staff in denominational schools. Years after, the *Equal Status Act* of 2000 allowed publicly-funded denominational schools to discriminate on grounds of religion in enrolment policy where necessary to uphold a denominational ethos (Daly, E., *Religious Discrimination Under the Irish Constitution*, supra n. 40 at 29).

92. Section 68 of the *Rules for National Schools* states: "Of all the parts of a school curriculum Religious Instruction is by far the most important, as its subject-matter, God's honour and service, includes the proper use of all man's faculties, and affords the most powerful inducements to their proper use. Religious Instruction is, therefore, a fundamental part of the school course, and a religious spirit should inform and vivify the whole work of the school. The teacher should constantly inculcate the practice of charity, justice, truth, purity, patience, temperance, obedience to lawful authority, and all the other moral virtues. In this way, he will fulfil the primary duty of an educator, the moulding to perfect form of his pupil's character, habituating them to observe, in their relations with God and with their neighbour, the laws which God, both directly through the dictates of natural reason and through Revelation, and indirectly through the ordinance of lawful authority, imposes on mankind".

date largely by *ad hoc* and pragmatic responses to particular situations.[93]

The last requirement is that State financial aid to denominational schools does not mean, in practice, endowment of religion. Both scholars and jurisprudence considered this requirement. Brian Walsh, former Chief Justice of the Supreme Court, stated in an extra-judicial statement that there is not a constitutional objection to State funding of denominational education if parents want it. As contributors, parents are free to decide which kind of education they want for their children, and this cannot be considered endowment of religion. He also appeals to the Irish tradition, with such a strong commitment to separation between church and state, and a long-standing system of denominational education, without identifying this aid with endowment of religion.[94]

The Supreme Court understands it the same way: funding denominational education is allowed by the Constitution, and it does not mean endowment of that denomination.[95] It would have been contradictory to include a provision on the Constitution – the ban of endowment – that precludes another one to be operative -State financial aid for denominational schools.

The Constitutional Review Group considers that Article 44-2-4º – regarding State aid to denominational schools – is something of an exception to the general rule contained in Article 44-2-2º – the State shall not endow any religion.[96] However, it says that if a denominational school accepts public funding, it must accept that this aid is not given unconditionally. Requirements that the school must be prepared in principle to accept pupils form denominations others than its own and to have separate secular and religious instruction are not unreasonable or unfair.[97] The Report does not add, as it would have been desirable, how it will be put into effect, because it seems unattainable. The truth is that this statement seems more of a wish that can not be achieved. No change in the Constitution has been proposed regarding this matter, and no other developments took place after the Report was published.

The secondary schools are privately owned and managed. They are under the trusteeship of religious communities, boards of governors or individuals. Since 1964, the State funds 80% of the building costs, teacher's wages and maintenance of these schools.[98] Furthermore, the State gives Catholic schools a specific amount for pupil every year. The protestant schools receive that State aid not directly, but through the Funding Committee of the Protestant Education that perceives the State aid and distributes it.[99] Religious education will be imparted by the religious denomination, under its responsibility; the school shall guarantee that those students who do not want to attend religious instruction will not be compelled to do it.[100] Surprisingly, religion is not an examinable subject.[101]

There are also vocational schools, with a more technical orientation. They are not

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93. *Report,* supra n. 14 at 386.

94. Whyte, G. F., *Education and the Constitution: convergence of paradigm and praxis*, in "The Irish Jurist," 25-27 (1990-92), 103. See, against it, Farry, M., *Education and the Constitution,* Dublin (1996), 131.

95. See *Campaign to Separate Church and State v. Minister for Education,* supra n. 67 at 88-89, 99-100.

96. The *Report* (see 386) mentions art. 44-2-3º, but I assume it is a mistake.

97. *Report,* supra n. 14 at 386.

98. Until 1964, the then known as *intermediate schools* could only apply for grant aid through a system of payment by results: the schools were paid on the basis of the success of their students at yearly examinations conducted by a Government body, the Intermediate Board. See *Report…,* supra n. 14 at 341.

99. The main reason for this difference is that there are areas of the country where no protestant schools are available. The Committee, then, may use the funds to provide for boarding grants in protestant schools (See Casey, J., *State and Church in Ireland*, supra n. 9 at 199).

100. See Coolahan, J., *Irish Education. History and structure,* Dublin (1991), 159.

101. In March 1994, a statement of the Irish Catholic Bishops called for a change on this matter; they understood that religion was a very important part of people's lives, and it was not consistent that it was not recognised as an examinable subject in the secondary level. The Department of Education stated that there could be some legal difficulties, even constitutional, to do that. However, the Department did not give any hint about what legal obstacles banned that modification. See Casey, J., *Church and State in Ireland 1994,* in "European Journal of Church and State" 2 (1995), 25.

denominational, but there is religious formation (non compulsory) and usually, there is a member of the Catholic Church in the board.

In the sixties, the State announced the creation of comprehensive schools, and in the seventies, as a further development, community schools. The latter, in some cases, stemmed from the unification of vocational schools and secondary schools. It began, then, a sharp debate between the Catholic Church and the State. The State wanted these new schools to be pluri-denominational, but no agreement was reached; actually, they are Catholic or protestant. Yet, the Catholic Church did not want to lose the control over or Catholic identity of those secondary schools that became community schools. The first regulation was modified, and the Catholic Church retained some chairs in the board of Directors, although less than in the draft.

This pattern was widely accepted. However, a lawsuit in 1998 challenged it.[102] The Supreme Court ruled that this model of management of the community schools was adequate; the only exigency was that those community schools that had Catholic education and Catholic acts of worship must be dubbed "Catholic community schools."

This same decision dealt with the problem of funding of chaplaincies in community schools.[103] In the lawsuit, the plaintiff deemed the State funding of chaplaincies as a kind of endowment of religion, because their functions are related more to worshiping than to education (unlike religious teachers, whose funding were not controversial). Then, it would be against Article 44 of the Constitution. The Supreme Court upheld the funding of chaplaincies. It considered it is a way the State fulfills its duty of helping parents in their educational task; the economic aid to chaplaincies also contributes to the religious formation of children, mentioned in Article 42-1 of the Constitution, and that is different from the religious education, mentioned in Article 42-4.[104]

Ireland is the only European State where the Catholic Church called for separate education at university level. Until 1908, only protestant or non-denominational universities existed in Ireland. The Irish Catholic hierarchy was suspicious of those entities, and asked for the establishment of a University acceptable for Catholics. The Government accepted its demand, and established the National University of Ireland. Although non-denominational, it was designed to ensure an influence of the Catholic hierarchy in its governing bodies. The principle of separate education is not in force any more.[105]

X. Religious Symbols in Public Places

There is a close link, again, between this issue and endowment. As a general rule, it could be said that no problem would arise if there were not any kind of State funding of the religious symbol. Otherwise, it can be considered an endowment of religion.[106]

XI. Freedom of Expression and Offenses against Religion

Article 40-1-6º of the Constitution states: "1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality: (…) 6. The right of the citizens to express freely their convictions and opinions. (…) The publication or

102. *Campaign to Separate Church and State v. the Minister for Education*, supra n. 67.

103. Chaplaincies in community schools were considered as a means of provide for the religious education in non-denominational schools. This problem did not arise before because most community schools were run by Catholic orders, and a number of professors were priests; so, professors could also act as chaplains. (See Forde, M., *Constitutional Law in Ireland*, Dublin (2004), 620; Whyte, G. F., *Education and the Constitution*, cit., 106-107).

104. The decision was unanimous, granting that there will not be any discrimination.

105. Whyte, J. H., *Church and State in Modern Ireland*, supra n. 27 at 19.

106. That happened when the State financed a statue of F. Pio di Peltrecina, placed in a hospital run by a Catholic order. See *Moloney vs. Southern Health Board*, cited in "The Irish Jurist" n.s., 21 (1986), 146 ss. The case settled on terms favorably to the plaintiff, although it might be questioned whether the erection of a statue can constitute, as the plaintiff argued, an endowment of religion (Hogan, G. W. and Whyte, G. F., *J. M. Kelly: The Irish Constitution*, cit., 1103).

utterance of blasphemous, seditious, or indecent matter is an offense which shall be punishable in accordance with law."

The first *Defamation Act* was enacted in 1961.[107] It made blasphemy a statutory crime, although in practice it was unenforceable because it did not contain a definition of what blasphemy consists of.[108]

A Report on the Law Reform Commission of 1991 concluded that Ireland's blasphemy laws were in need of reform and were unlikely to withstand a challenge before the European courts.[109] The Commission said that it was "absurd" that a crime existed in Irish law, carrying a potentially lengthy term of imprisonment, whose component parts were "totally uncertain." It was believed that the law of blasphemy was discriminatory in that it only protected religions in the Judeo-Christian tradition. Accordingly, the Law Reform Commission concluded that the offense had no place in a society that valued free speech. It recommended that this crime should be abolished and religious adherents protected by incitement to hatred legislation.

The Commission's hands were tied because of the constitutional ban on blasphemy (there would have to be a referendum if the crime of blasphemy were to be abolished). The Commission, therefore, reluctantly recommended a redefined, and more limited, offense against outrage to the adherents to a religion by insulting content concerning matters held sacred by that religion. The offense would be extended to protect Christian and non-Christian religions. The prosecution would, however, have to show that the publisher knew that the material was likely to cause outrage and that this was the sole intent.[110]

The Seanad passed a new Defamation Bill on 11 March 2008 and by the Dáil on 8 July 2009. Report back to the Seanad on Dáil amendments took place on 9 July 2009. The Bill is awaiting signature by the President. It was scheduled to come into force in November 2009.[111] This new Bill defines blasphemy, and punishes it with a fine.

Section 36 states:

> A person who publishes or utters blasphemous matter shall be guilty of an offense and shall be liable upon conviction on indictment to a fine not exceeding 25,000 Euros."A person publishes or utters blasphemous matter if (a) he or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and (b) he or she intends, by the publication or utterance of the matter concerned, to cause such outrage.
>
> This Act will be applied equally to all religions or beliefs. However, as expressly stated, "religion does not include an organization or cult – (a) the principal object of which is the making of profit, or (b) that employs oppressive psychological manipulation – (i) of its followers, or (ii) for the purpose of gaining new followers."

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107. It stated: "Every person who composes, prints or publishes any blasphemous or obscene libel shall, on conviction thereof on indictment, be liable to a fine not exceeding five hundred pounds or imprisonment for a term not exceeding two years or to both fine and imprisonment or to penal servitude for a term not exceeding seven years."

108. See *Corway v. Independent Newspapers*, [2000] 1 ILRM 426 SC and [1999] 4 IR 484 SC. Lacking a legal definition, the common law definition of blasphemy was useless, because it presupposed an established church.

109. The Law Reform Commission, Thirteen Annual Report (1991), 5. (It can be found in http://www.lawreform.ie/publications/data/volume10/lrc_70.html).

110. See Kealey, M., *Publish and be damned*, in "Law Society Gazette," April 2006, 22 ff.

111. Editor's Note: The bill (S.I. No. 517 of June 2009) became law on 23 July 2009, and came into effect on 1 January 2010. See http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2006/4306/document1.htm. Passage was followed by protests, including those by Irish atheists who published deliberately blasphemous statements on the internet to challenge the ban. On 14 March 2010 Dermot Ahern, Ireland's Minister for Justice, Equity and Law Reform, announced that he would proposed a referendum to remove the reference to blasphemy from the law.

NATAN LERNER

Religion and the Secular State in Israel

I. INTRODUCTION

The general rapporteurs on Religion and the secular State write in their Introduction that the focus of their work would be to determine how different States interact with religion through law and other institutions.[1] They also point out that the relations between State and religion "depend on a number of factors closely linked to the history, culture and social structure of each country."[2] In few cases this dependence and linkage are so obvious as in the case of the State of Israel.

This writer attempted to summarize the religious, political and constitutional history of Israel in an article published about two years before the preparation of this report. [3] Since the article's publication, there have been very few changes or innovations in the relationship between State and religion in Israel, but those that are relevant will be mentioned. I shall try to follow as much as possible the guidelines of the general rapporteurs and the structure of their questionnaire. This report deals exclusively with the situation in the State of Israel, and not with the territories under Israeli administration as a consequence of the 1967 Six Days War.

On 14 May 1948, following the 1947 United Nations resolution on partition of the territory under the Mandate of Great Britain,[4] the State of Israel was established as a sovereign "Jewish and democratic state,"[5] partially fulfilling the program of the Zionist movement, created in 1987.[6] But the sixty-one-year-old State sees itself, in terms of history, as the successor of the Jewish State that existed in the same region two millennia earlier. As such, Israel considers itself the national state the Jewish People, who are a world-scattered community including the Jews of Israel (the large majority of the population of the State) and the Jews of the Diaspora (namely the Jewish communities living in different locations almost all over the world).[7] This description is explicitly stated in the already mentioned Declaration of Independence, which refers to the recognition by the United Nations of the right of the Jewish people "throughout the Diaspora" to establish their own sovereign State.[8] It does not imply any political ties between the State and the Diaspora.

This report is not the place to discuss the identity of the State as a *Jewish* state but few will contest the fact that the long history of the Jews, or the Jewish people, is closely related to the role of Jewish religion in defining that history. Not every Jew, in Israel or elsewhere, is a religious individual. It is in collective terms that religion has been an essential ingredient in the self-definition and behavior of the Jews, believers or not,

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1. See Memorandum from Javier Martinez-Torron & W. Cole Durham, General Rapporteurs for Religion and the Secular State: Questionnaire for the Preparation of National Reports for the IACL Congress Washington 2010 to Natan Lerner, Proessor at the Faculty of Law of the Herzliya Interdisciplinary center (on file at International Center for Law and Religion Studies, Brigham Young University).

2. Id. at 2.

3. Natan Lerner, "Religious Liberty in the State of Israel," *Emory Int'l L. Rev*. 21 (2007): 239.

4. G.A. Res. 181(II), U.N. Doc. A/RES/181(II) (May 14, 1947).

5. See, Declaration of the Establishment of the State of Israel, 1 L.S.I. 3–5 (1948).

6. For the Zionist program and development, see generally Walter Laqueur, *A History of Zionism* (London:Weidenfeld and Nicolson 1972).

7. Lerner, supra n. 3 at 240.

8. See Declaration of the Establishment of the State of Israel, 1 L.S.I, at 5 (1948). See also, The Law of Return, 1950, and its amendments. This Law proclaims the right of every Jew to immigrate to Israel and deals with the difficult issue of "Who is a Jew" in legal terms to the effect of immigration. It is beyond the scope of this report to discuss this issue.

observant or not. For that reason, it was aptly stated that Judaism conceived of itself not as a denomination but as the religious dimension of the life of a people. Hence peoplehood is a religious fact in the Jewish universe of discourse. In its traditional self-understanding, Israel is related not to other denominations but to the "'nations of the world'… Israel's… body is the body politic of a nation."[9]

This is the meaning of the reference to a *Jewish* state in all international texts: the term *Jewish* means pertaining to Jews.

The State of Israel is a secular State. Its Parliament, *Knesset*, makes its laws.[10] If a religious law should be applied, it would only be the consequence of a secular law giving it such force. Affirming that it is a secular State is however not enough to explain the role of religion in the state. That role differs from one state to another on the basis of the respective constitutional provisions, and in Israel's case, no formal written Constitution has been adopted until now (although this should not be interpreted as implying that there are no constitutional rules in the state) adding an additional complication. How secular laws govern religion and the role of religion in the state is a main subject of this report.

II. THE SOCIAL CONTEXT

According to the official information of the Central Bureau of Statistics, Israel had a population of about 7,374,000 persons including those "not classified by religion" in 2008. About 75 percent, or 5,569,200, were Jews with varying degrees and forms of identification with Judaism or the Jewish religion; 1,240,000 were Muslims; 153,100 Christians belonging to the various denominations, including Arabs and non-Arabs; 121,900 were Druze.[11] Relevant to this report is a study on the attitudes of the population concerning religion. Forty-four percent of the Jews above the age of twenty declared themselves as "secular" or not practicing; 27 percent as "traditional"; 12 percent as "traditional religious"; 9 percent as "religious," and 8 percent as "haredi" (ultra-orthodox). Eighty-one percent of the population identified themselves as "Jews"; 12 percent as Muslims; 3.5 percent as Christians (Arabs or other); 1.5 percent as Druze; 1.5 percent as atheists; and 0.5 percent as belonging to other groups.[12] It would be inadequate to conclude solely from this demographic information that the State of Israel can be reputed to be a secular State. It is the constitutional system of a state that determines formally that character, and not the views of individual citizens.

III. THEORETICAL CONTEXT

How do the State and religion relate to each other? How secular should the State, described in all official, national and international, documents as a *Jewish state*, be considered? What does the term *Jewish* mean? Is it an adjective describing the religious character of the state, or does it possess a sociological, anthropological, or demographic meaning applicable to the majority of the population, explaining how members of that majority relate to Israeli society, culture and way of life? Does "Jewish State" mean something similar to "French State" or "German State" or "Italian State," or does it mean something similar to "Catholic State" or "Muslim State"?

These are seminal and difficult questions that must be answered, despite discrepancies, in order to avoid misunderstandings. It seems reasonable to accept that the reference to Israel as a "Jewish State" is equivalent to stating that in historical, political, and legal terms, it is the state of the Jewish people – a worldwide community of

9. The Jerusalem Colloquium on Religion, Peoplehood, Nation and Land, Jerusalem, October 30-November 8, 1970: Proceedings (Marc H. Tanenbaum & R. J. Zwi Werblowsky eds., 1972).

10. See Haim Cohn, *Human Rights in Jewish Law* (New York: Ktav, 1984), 17.

11. Central Bureau of Statistics, *Statistical Abstract of Israel*, table 2.2, Population by Religion (2009), available at http://www.cbs.gov.il/reader/shnaton/templ_shnaton_e.html?num_tab=st02_02&CYear=2009.

12. M. Basuk, "Survey" 44 percent of Jewish Israelis Call Themselves Secular…", *Haaretz***,** 10 April 2006.

indisputable religious origin scattered all over the world (about half of which is presently concentrated in the State of Israel, established in 1948, not including the 25% non-Jewish portion of the population).[13] The Balfour Declaration of 1917, addressed to the Zionist Organization by a spokesman of Great Britain; the British Mandate over Palestine of the League of Nations of 1922;[14] the 1947 United Nations' General Assembly Resolution 181 (II),[15] all refer to a *Jewish* state, and *Jewish* means, in all of them, pertaining to Jews, namely the individuals seeing themselves as composing the Jewish people, or nation, or community.[16] It clearly does not mean the body of religious precepts, commands or convictions regulated by the *Halakha*, the Jewish religious law developed over centuries.

IV. CONSTITUTIONAL CONTEXT

This brings us to the constitutional system developed in Israel. The country lacks a written and integrated Constitution.[17] One of the main reasons for that absence is certainly the issue of defining the character of the state and the meaning of the term *Jewish*. While all points to a secular, not religious, use of the term in legal texts,[18] "[t]he precise meaning of Israel's self-definition as a Jewish State has never been clearly delineated and is a matter of controversy", with views varying "from minimalist descriptive notions – which regard the Jewish majority as the only element that makes Israel the 'State of the Jews' – to Messianic visions of the state as an instrument in ushering in the millennium."[19] In a draft Constitution proposed by a Knesset committee in 2006, the words "a Jewish and Democratic State" seem to mean the State in which the Jewish people implement their right to self-determination.[20] In the same line, constitutional law professors refer to the Jewish State (or the State of the Jews or the State of the Jewish people) "in the sense that it is the political framework in which the right of the Jewish people to self-determination materializes.[21]

An official report submitted by Israel to the Human Rights Committee in 1998,[22] combining the initial and first periodic report on the implementation of the ICCPR, describes very well the complicated character of the state-religion relationship in Israel. Referring to that relationship as "quite labyrinthine", it states: "History, political expediency, party politics, the lack of a constitution which specifically deals with freedom of religion, and the broad power of the Knesset to legislate in religious matters have resulted in a patchwork of laws and practices that are not easily susceptible to generalization."[23]

Dealing with the Israeli model concerning state and religion, the Report says:

> There is no established religion in Israel, properly so-called. Nor, however, does Israel maintain the principle of separation between matters of religion and the institutions of Government. Rather, the law and practice of Israel regarding religious freedom may best be understood as a sort of hybrid between non-intervention in religious

13. See Lerner, supra n. 3 at 243–46.

14. U.N. Special Comm. on Palestine, Report to the General Assembly, U.N. Doc. A/364 (3 September 1947).

15. G.A. Res. 181(II), U.N. Doc. A/Res/181(II) (14 May 1947).

16. See Lerner, supra n. 3 at 243–44.

17. See id. at 244.

18. See generally Amos Shapira & Keren C. DeWitt-Arar, *Introduction to the Law of Israel* (The Hague: Kluwer, 1995).

19. David Kretzmer, "Constitutional Law," in id.

20. *Proposals for a Constitution*, Constitution, Law and Justice Committee of the Sixteenth Knesset, 13 February 2006.

21. A. Rubinstein & B. Medina, *The Constitutional Law of the State of Israel* (5th ed., 2005) 318–19 (in Hebrew)

22. HRC, "Civil and Political Rights, Human Rights Council Consideration of Initial Report of Israel", U.N. Doc. CCPR/C/81/Add.13 (9 April 1998) (hereinafter *Israel HRC Report*).

23. See supra note 22. The report was prepared by the Ministries of Justice and Foreign Affairs and was preceded by a Foreword written by the general directors of both ministries.

> affairs, on the one hand, and on the other hand the interpenetration of religion and Government in several forms, most notably by legislation establishing the jurisdiction of religious courts of the different faiths in specified matters of 'personal status'; by government funding of authorities which provide religious services to several of the religious communities, and by a series of legal institutions and practices which apply Jewish religious norms to the Jewish population. While it may be said that Israel has been quite successful in guaranteeing the freedom of religious practice and the use of sites to the three monotheistic faiths, particularly for the non-Jewish communities, it is more difficult to claim that 'freedom from religion' is fully protected, particularly for the Jewish population.[24]

Still, as stated by Justice Sussman in a classic case,[25] "there can be no freedom of religion if the citizen is not free not to belong to any religion", a principle accepted in theory, but sometimes clashing with the realities of a system of recognized communities implying automatic membership for the majority of the population.

Although Israel has been correctly described as "a multi-religious state, where various religions are recognized, yet no religion enjoys the status of official state religion."[26] Israeli legislation reflects the Jewish historical continuity. Examples of this historical continuity are the Law of Return, 1950 (as modified); the Flag and Emblem Law, 1949 (adopting traditional Jewish symbols such as the Jewish prayer shawl, the seven-branched candelabrum and the national anthem, *Hatikva*); the Days of Rest Ordinance 1948 (designating the Sabbath and Jewish holidays as official days of rest, with exceptions for non-Jews); the Martyrs' and Heroes' Remembrance Day Law, 1959 (concerning the Holocaust); and the 1952 World Zionist Organization-Jewish Agency (Status) Law, (granting special status to certain Jewish organizations).[27] Traditional Jewish law "has legal standing and societal potency in Israel"[28] and the Legal Foundations Act 1980 includes principles of the "Jewish heritage" among the complementary sources of law.[29]

The fact that six decades after its establishment the State of Israel was still unable to enact a written, coherent Constitution is mainly due to the disagreements concerning religion, secularism and the meaning of the term "Jewish."

The starting point of the constitutional process was the Declaration of Independence adopted in 1948,[30] which foresaw a swift adoption of a Constitution. This did not happen, despite the fact that the country became a functioning democracy with institutions according to international standards.[31] Rather, a constitutional assembly elected early-on became the first regular Knesset (Parliament) and this body decided not to adopt an organic Constitution, but instead prepared a draft composed of separate chapters, each having the character of a basic law. These basic laws require special majorities to amend.[32]

Since then there have been several proposals and drafts of a Constitution. The last one, already mentioned, was prepared by the Constitution, Law, and Justice Committee of

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24. *Israel HRC Report*, supra n. 22, at par. 532.
25. H.C. 130/66, *Segev v. Rabbinical Court*, P.D. 21(2) 505..
26. A. Maoz, "Religious Human Rights in the State of Israel," in Johan D. van der Vyver & John Witte, Jr., *Religious Human Rights in Global Perspective: Legal Perspectives* (The Hague: Nijhoff, 1995). 349, 359
27. See Lerner, supra n. 3.
28. On the role of *Halakha* in Israeli legislation, see A. Kirschenbaum, *An Introduction to Jewish Law* (Tel Aviv 2005) 133.
29. See Lerner, supra n. 3 at 247.
30. 1 L.S.I. 3,4 (1948).
31. See Lerner, supra n. 3 at 249.
32. Id., 250–51.

the Sixteenth Knesset in 2006.[33] The draft engendered controversies. The drafters themselves acknowledged the shortcomings of the text, which avoided confronting the problems related to the so-called *status quo* concerning religious issues, family law and personal status.[34] This situation seems to have its origin in agreements concluded by the political parties in the early stages of the State and kept, with some exceptions, during all these years.

The main issues of religion and religion-State relations are consequently not addressed in any organic basic text. The principles governing those issues are therefore to be found in legislative texts and case-law. On the whole, religious freedom is protected, although some limitations exist, mainly for the Jewish non-Orthodox sector of the population. There is no formally preferred or privileged religion, and the *Halakha* or Jewish law plays a minor role as a subsidiary source of law.

There is no absolute equality between religions in fact, with the religion of the majority playing a role in public life, despite the overall respect for freedom of conscience and religion.

V. LEGAL CONTEXT

In order to achieve a general overview of the major features of the legal setting concerning state and religion in Israel it is necessary to refer to the two regimes that preceded the creation of the State, namely the Ottoman period (1517-1917) and the British Mandate over Palestine (1918-1948). The Ottoman rule permitted non-Muslim communities to enjoy autonomy in their communal affairs, religion included.[35] Those communities, based on religion and called *millets*, had their own courts in matters of personal status, while the *Mejelle*, the Islamic civil law, governed the same issues for Muslims. Foreigners, under consular jurisdiction, were not subject to Ottoman law. A stated consequence of this system is that Israel is "the only modern state in the world lacking a territorial law of marriage and divorce."[36]

The British, during the Mandate established by the League of Nations, did not change the system. The principal provisions are contained in the Palestine Order in Council of 1922, art. 83 of which recognized ten communities: Eastern Orthodox, Latin Catholic, Gregorian Armenian, Armenian Catholic, Syrian Catholic, Chaldean Uniate, Greek Catholic Melkite, Maronite, Syrian Orthodox, and Jewish (called *Knesset* Israel).[37] Muslims were not considered a "recognized community" and the Muslim courts enjoyed jurisdiction over all matters of personal status regarding Muslims, even foreign nationals. A 1939 amendment introduced by the British with the aim of permitting marriage between persons who were not Muslims or members of the recognized communities was never implemented.

The State of Israel maintained the status quo, with some minor changes.[38] Religious law rules matters of personal status and the recognized communities have retained their jurisdiction. Additional religious communities, such as the Druze, the Evangelical Episcopal Church and the Baha'i were recognized. Other communities, such as the Lutherans, Baptists, Quakers and others, also operate in the country, despite not having been formally recognized.[39] One major change introduced under the State of Israel related to the Jewish population – Jewish religious institutions became state bodies, exercising authority over all Jews of the country, without consideration to their self-definition and

33. An English translation is available at http://experts.cfisrael.org:81/admin/proposals.pdf.

34. See Lerner, supra n. 3 at 250–51.

35. Yoram Schachar, *History and Sources of Israeli Law, in* Amos Shapira & Keren C.DeWitt-Arar , *Introduction to the Law of Israel*; also, See generally, A. Rubinstein, "Law and religion in Israel," Israel Law Review 2 (1967) 380.

36. Declaration of Indepedence, supra n. 30 at 3-4.

37. For the Palestine Order in Council, 3 *The Laws of Palestine* 2569 (Robert Harry Drayton, ed., 1936).

38. Lerner, supra n. 3 at 253.

39. Id. at 253-55.

views on religion.[40] This affects particularly family law. Atheistic or non-religious Jews have to undergo a religious ceremony conducted by an Orthodox rabbi if they wish to marry in the country. While a couple can marry abroad by a civilian authority or can sign a private marriage contract and both acts will be recognized by the Israeli general courts and taken notice of by the Population Registry, the marriage will be ignored by the rabbinical courts. While this report is being drafted, the Knesset is to consider, in second and third lecture, a draft law permitting civil marriage for people who do not belong to any religious community.[41] This legislation has been praised by those who see in it a way of breaking Orthodox monopoly; others consider it an insufficient step that may be meaningful for a portion of the population but is far from solving a major issue of principle.

The non-recognized communities also enjoy full religious freedom and rights, including the right to establish institutions, but they do not have their own courts with jurisdiction over their members.[42] Although they enjoy certain tax benefits, they do not receive government funding, as do Jewish religious bodies and recognized non-Jewish communities. Some also enjoy tax exemptions.[43] Relevant to this issue is also the Fundamental Agreement with the Holy See,[44] signed in 1993 (but still the subject of negotiations), dealing with the material rights of the Catholic Church.

A related issue is the situation of the non-Orthodox branches of the Jewish religion, not recognized as separate communities. Although they are totally free to practice Judaism the way they understand it, the rabbis of these communities – Conservative, Reform and Reconstructionist – do not enjoy the status of the Orthodox rabbis and cannot authorize marriages. Also non-religious Jews consider themselves discriminated against.[45] It is impossible to precisely estimate the proportion of Jews who are non-observant. Many non-religious Jews observe some precepts, like circumcision, *bar mitzvah* celebrations, and religious weddings, although they may claim that no religious motivation is present in those acts and the are participating due to the desire to ensure recognition for the future generations. This may also be related to the overlapping of religion and nation in the long Jewish history.

The already mentioned Article 83 of the Palestine Order in Council, 1922[46] is the starting point of Israeli legislation concerning state and religion. It proclaims that all persons "shall enjoy full liberty of conscience, and the free exercise of their forms of worship subject only to the maintenance of public order and morals. Each religious community recognized by the Government shall enjoy autonomy for the internal affairs of the community…." The Order in Council nullified limitations on freedom of religion and worship and prohibited discrimination on religious grounds. After the creation of the State, the Order in Council remained in effect but does not prevail on the laws of the Knesset, which takes precedence over all Mandate legislation, as declared by the Supreme Court when it denied to Jewish couples the right to perform private weddings. The Court referred the case to the Rabbinical Courts, which rule over questions of marriage and divorce.[47]

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40. Id. at 253.

41. Editor's Note: "A minimized version of the civil marriage bill passed its second and third Knesset readings on Monday [15 Mar 2010], with a majority of 56 Knesset members voting in favor of regulating the nuptials of 'non-denomination' Israelis. … The new law allows non-Jewish Israelis, or citizens defined by the State as lacking religious denomination, to marry via the soon-to-be-formed marriage registrar bureau." See report at http://www.ynetnews.com/articles/0,7340,L-3863253,00.html.

42. Supra n. 38 at 254.

43. See, Maoz, "Religious Human Rights in the State of Israel," 366-72.

44. Israel Ministry of Foreign Affairs, Fundamental Agreement Between the Holy See and the State of Israel (30 December 1993), available at http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1993/12/ Fundamental percent20Agreement percent20- percent20Israel-Holy percent20See.

45. Lerner, supra n. 3 at 255–56.

46. Supra n. 26.

47. Cf. C.A. 450/70, *Rogozinsky v. State of Israel*, P.D. 26(I), 269.

The Declaration of Independence proclaims that the State of Israel "will guarantee freedom of religion and conscience, of language, education and culture" and will "safeguard the Holy Places of all religions." The Declaration is, of course, not a Constitution, but it was always considered a guideline for Israeli legislators and courts, and the principles it contains were extended in the Basic Law: Freedom of Occupation and in the Basic Law: Human Dignity and Liberty, as amended in 1994.[48]

The official Report submitted to the Human Rights Committee[49] summarizes "the accommodation between Jewish religious law and the institutions of the secular state."

The State recognizes the jurisdiction of the Rabbinical courts over all Jewish inhabitants in matters of personal status, deciding these issues according to the *Halakha.* A similar jurisdiction is granted to the other recognized communities over those belonging to them.

The State confers powers upon the Chief Rabbinate, which is organized under law[50] and state funded. It also confers powers on Religious Councils, similarly organized and funded.[51] The Knesset has enacted laws with a religious background regarding the Sabbath and Jewish holidays, dietary laws and other matters related to religion.

The actions of all state institutions that act in the religious sphere are subject to review by the High Court of Justice, including matters related to the application of religious law. Religious courts exceed their jurisdiction if they issue judgments contrary to provisions of secular laws regarding equal rights for women, adoption and spousal material relations.[52]

VI. THE STATE AND RELIGIOUS AUTONOMY

Public authorities do not intervene in the life or organization of religious communities and the law does not restrict the autonomy of the religious communities to govern themselves. Still there have been some complaints about attempts of the authorities to influence internal affairs such as, for instance, the appointment of religious personnel or the granting of admission visas to such personnel. No bilateral agreements between the State and religious communities have been concluded, except for the 1993 agreement with the Vatican and related ongoing negotiations. No interference in doctrinal issues has been denounced.

Religious communities are not represented as such in the legislature and no particular religion has been given power to control other religious communities. The geographic concentration of certain communities reflects itself obviously in policy matters and may lead to differences in treatment.

The regime of State recognized communities has its impact on several issues and implies civil effects. Recognized communities have their own courts in subjects related to the personal status and their competent officials can authorize acts affecting their status.[53]

Although freedom of religion and worship exists for every group claiming to be a legitimate religion, the problem of sects or cults caused some preoccupation and a parliamentary committee conducted a survey on this issue.

The religious communities are in charge of managing cemeteries.[54] There have been problems when persons not belonging to any community, or who did not want to be submitted to a religious burial ceremony, and such cases went to court. Since 1996, the Right to Alternative Civil Burial Law permits the existence of alternative cemeteries respecting the desires of the deceased or his or her family. The Supreme Court denied the Orthodox Burial Society the right to limit the inscriptions on headstones in Jewish

48. See Basic Law: Human Dignity and Liberty, 1992, S.H. 90.
49. See supra n. 22.
50. See Chief Rabbinate Law of Israel, 1980, 34 L.S.I. 97 (1980).
51. See Lerner, supra n. 3 at 260.
52. Israel HRC Report, supra n. 22 at 231-232.
53. See Lerner, supra n. 3 at 246.
54. Id. at 266.

cemeteries. The High Court of Justice ordered the competent authorities to ensure equality in the allocation of funds for Jewish and Arab cemeteries.[55]

Israeli legislation in matters of religious human rights was negatively influenced by some external factors such as the security situation, party politics and above all the secular-orthodox conflict. Such shortcomings led the judiciary, particularly under the activist leadership of retired Chief Justice Aaron Barak, to play a constructive role in this area through a broad interpretation of the basic human rights laws. Some of the achievements of the courts were, however, frustrated by legislation playing to party interests. The final result, however, is that Israel is a country where the rule of law prevails and fundamental rights are respected and enforced.

Religious institutions – recognized communities and other legally constituted religious entities – enjoy various taxation benefits and exemptions.[56] The establishment of places of worship, the celebration of meetings, the distribution of literature, and other activities necessary to the work of religious associations are regulated by general principles proper of a democratic society. Some extremist religious groups have opposed what they deem to be missionary activities, in some cases violently, but, on the whole, the spread of religious ideas and convictions is being conducted freely and protected by the law and authorities against religious intolerance.[57]

There have been some difficulties concerning slaughtering of animals, *kashrut* (dietary laws), and import and sale of pork and other non-*kosher* meat, all of which have reached the courts. Regulation, either legislative or jurisprudential, while cooperative with religion, is aimed at protecting basic individual rights. The Ministry of Interior has records of the religious affiliation of individuals, and religious affiliation has legal consequences as a result of the recognized communities system. Problems of conscientious objection were raised in connection with the mandatory military service, but were not invoked with regard to laws or contractual clauses of general applicability.

VII. State Financial Support for Religion

Concerning financial support for religion, or rather for religious services, the *IHRC Report* states bluntly that, in comparison with funding of Jewish religious institutions, "the non-Jewish communities are rather severely undersupported by the Government."[58] The State supports religious institutions, by direct funding and by tax exemptions. There are no clear-cut norms that might ensure equality between the various religions. The system has frequently been criticized by the Supreme Court. In 1995, following strong criticism by the State Comptroller, a public committee elaborated rules for the allocation of state subsidies. The taxation legislation exempts religious institutions from income tax. Christian churches and Baha'i have also received some preferential treatment.[59]

The Fundamental Agreement between the Holy See and the State of Israel contains provisions regarding property and fiscal matters. The Supreme Court declared in 1995 that the State engages in "unlawful discrimination" when it allocates land on the basis of religion or nationality.[60] Clearly, the whole issue of State funding of religious institutions lacks appropriate regulation and is open to general criticism concerning its treatment of State-church relationships.

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55. There is abundant jurisprudence on this matter. See, e.g., S. Ct. 53/31, *Frederika Shavit v. Chevra Kadisha Rishon Letzion,* P.D. 53 (3) 600; S.Ct. 54/31, *Adalah v.Minister of Religious Affairs* P.D. 52(2) 164.

56. See Israel HRC Report, supra n. 22 at 226.

57. There were incidents and activities particularly against a group called "Messianic Jews" – Jews that believe in Jesus. The press denounced some cooperation of the Ministry of Interior with an ultra-Orthodox small organization engaged in persecuting the Messianic Jews. See, *Haaretz weekly magazine* (2 October 2009) 21.

58. Supra n. 22 at 228.

59. Cf., "Religious Human Rights in the State of Israel," 372.

60. H.C 6698/95, *Ka'adan v. The Israel Lands Administration,* P.D. 54(1) 258. The case dealt with a complaint of an Arab couple that was refused to build its home in a communal settlement that claimed that only Jews may belong to it.

VIII. Civil Effects of Religious Acts

In Israel, the acts enacted by religious authorities have civil effects. The secular law recognizes the jurisdiction of religious courts and gives effect to their decisions adopted in accordance with law. Within the framework of the already mentioned status quo, various aspects of family law are regulated by religious law. Members of the different religious communities are subject to the respective religious laws of their communities, which differ between communities. The legal settlement of family law matters is split between religious and civil law. Matters such as child custody, including adoption, inheritance and property relations between spouses are settled by civil, generally territorial, law.[61]

This same split exists in the judicial system. Religious courts decide matters in their competence on the basis of the positive religious law. Except in those cases in which civil law is mandatory, the civil courts are competent and also apply general law. The Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953 deals with Jewish matters; the Palestine Order in Council established the jurisdiction of the Muslim courts; the Druze Religious Courts Law, 1962, that of the Druze. The jurisdiction of the religious courts is exclusive in certain areas and concurrent in others. The Supreme Court determines the competence and jurisdiction of the courts when conflicts arise.

IX. Education

Religion and education are closely connected in Israel. There is a State Education Law[62] several times amended. The system, which existed in the pre-state period, consists of various schools. There is a general education system and an Arab education system. Within the Jewish majority there are various schools: non-religious public schools, with curricula including many religious elements, such as Biblical studies; religious public schools under Orthodox control; ultra-orthodox (*haredi)*, non Zionist oriented, including several sub-schools depending on religious affiliation. There is a core program, which is not always respected. Party politics strongly affects this area. Israel has adopted integrationist policies inspired by social and cultural considerations, but did not attempt to change the pluralist pattern of fragmented education, particularly within the Jewish majority. The integrationist efforts have lost intensity in recent years. All the schools enjoy financial support of the State, which also funds some religious schools, among them church schools not recognized formally by the State.

X. Religious Symbols

There are no restrictions on the use of religious symbols in public places, and there is no law governing the use of such symbols. Kipot, crosses, head coverage are a normal part of the landscape. A Muslim girl was not accepted in a Christian private school and the Court abstained from interfering because of the private character of the school.

XI. Freedom of Expression and Offenses against Religion

Israeli legislation contains many provisions intended to guarantee religious liberties. The Penal Law of 1977[63] punishes desecration of places of worship, disruption of funerals, or publication and uttering of offenses against religious feelings or beliefs of any person. The numerous holy places for the different religions are safeguarded by the Protection of Holy Places Law of 1967. The Basic law: Jerusalem, Capital City of Israel, 1980 and the Antiquities Law, 1978, contain similar provisions. A well known ongoing controversy relates to the Temple Mount, which engendered many conflictive situations.

There is no legislation on blasphemy or defamation of religions. Limitations on hate speech are applied equally to all religions and beliefs.

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61. See, Ariel Rosen-Zvi, "Family and Inheritance Law," in Amos Shapira & Keren C.DeWitt-Arar , supra n. 35 at 75–76.

62. State Education Law, 1953, 7 L.S.I. 113.

63. 4 L.S.I. 54, at par. 323-27.

XII. Controversial Issues

The special character of the State of Israel, the tensions caused by political and security issues, the conflict with the Palestinians, demography, the recognized communities regime, the status quo arrangements concerning religious issues within the Jewish majority, and other issues have engendered many controversies and required judicial intervention. They can only be listed here, but not examined in depth. Several among them deserve special mention. The Sabbath and Jewish festivals are days of rest according the Law and Administration Ordinance of 1948 and the Hours of Work and Rest Law of 1951. Non-Jews can choose their own day of weekly rest. The Sabbath issue came several times before the courts. This is, of course, a matter affecting mainly the Jewish majority.

Cemeteries, burial, dietary laws, equality in the allocation of State land, State financing and support for religious and/or educational institutions, holy places and access to them, have all been the subject of judicial settlement and caused tensions and complaints. Another significant controversial matter concerns proselytism and conversion. The right to convert was clearly recognized in a well known case, *Pessaro (Goldstein) v. Minister of Interior*.[64] In practice, the difficulties relate to conversion into Judaism, a matter in which the Orthodox monopoly is being challenged by the other Jewish religious trends and in which politics plays an indisputable role. A 1977 law never applied punishes material enticement to conversion.

XIII. Concluding Remarks

Israel is a democracy and generally respects religious liberties. Its legal system concerning religion is not, however, fully compatible with norms observed in Western democracies. The foundations for this situation can be found in history and in the complex character of the State established in 1948, which has developed into a modern but complex democracy during its six decades of existence. As indicated by the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, in her report on her mission to Israel in 2008,[65] religious minorities living in Israel acknowledge "that there is no religious persecution by the state. Within the Israeli democracy, she would like to emphasize the important role that the Supreme Court played in the past and can continue to play for safeguarding freedom of religion or belief."

I have attempted to provide a general picture of the situation concerning the role of religion in a secular state such as Israel. The picture is far from complete, but I believe it may help in understanding the peculiarities of this part of the world, influenced by history, politics, and a most complicated, but to a large degree successful, process of state-building in difficult conditions.

64. H.C. 1031/93, *Pessaro (Goldstein) v. Minister of Interior*, P.D. 49(4) 661

65.Human Rights Council Report of the Special Rapporteur on Freedom of Religion or Belief, UN doc. A/HRC/10/8/Add.2 (2009).

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Religion and the Secular State: The Italian Case

I. SOCIAL FACTS

Italy is a predominantly Catholic country, though it is difficult to estimate the number of Italians practicing Catholicism because the national census does not include questions on religious affiliation. These questions are considered incompatible with the secular character of the State which follows a traditional liberal and individualistic approach with respect to religious orientation inquiries. Keeping track of the religious convictions of citizens, classified among the sensible data and protected by the legislation on matters of privacy,[1] is considered to be inappropriate. Moreover, the fluid nature of many religious affiliations is not accuratley reflected in a rigidly conceived census, and not all declarations reported by it can be interpreted as a manifestation of faith or strict affiliation to religion.

Nevertheless, in some circumstances people are requested to publicly declare their religious affiliations (e.g., to receive religious assistance in hospitals, prisons, the army, and as a member of law enforcement; to attend religious classes at school; and to offset donations against taxes). Moreover, the census is an occasion to register and recognize the contemporary pluralization of the national religious landscape.[2]

Apart from the reliability of the statistical data, the available figures are often contradictory. About ninety percent of the pupils at State schools take part in Catholic religious education classes, whereas less than forty percent of taxpayers give the Catholic Church the part of income tax (*imposta sulle persone fisiche*, IRPEF) allotted to religious denominations or State social welfare institutions. About sixty percent of all religious marriages take place according to Catholic rites, but – in spite of the high percentage of citizens who have received Catholic baptism – less than twenty-five percent regularly take part in Sunday mass. In addition, the Papacy resides in Italy, which gives the Catholic Church great influence over political and social events in the country regardless of the statistical figures on the religious beliefs of Italians.

Amongst the members of other denominations – about four percent of the population – Muslims, with roughly one million followers, form the most important group because of the massive stream of immigrants from North African countries. They are followed by the Orthodox Christians and the Jehovah's Witnesses, these latter for a long time the second largest religious presence in Italy.

The presence of Jews and Valdensians, though they have a long tradition in the country, is numerically less significant (less than 50,000 followers each). The spread of

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1. Cf. the section "Tutela dati personali" in http://www.olir.it/areetematiche/80/index.php (accessed 26 January 2010)

2. In 2001 the introduction of a voluntary question on religious affiliation in the UK census was welcomed by Muslim organizations because it officially confirmed that Islam had become the second religion of the country: cf. T. Abbas, *United Kingdom and Northern Ireland*, in *Yearbook of Muslims in Europe*, I, ed. Jørgen S. Nielsen, Samim Akgönül, Ahmet Alibašić, Brigitte Maréchal, Christian Moe, Brill, Leiden 2009, 363-364.

the "new religious movements" (an inappropriate expression which has, however, become common) seems to be less significant than in other Western European countries.[3]

II. THEORETICAL SCHOLARLY CONTEXT

The Italian theoretical and scholarly context reflects the history of a country with a strong dominant religion and weak state institutions.[4] The dynamics of Italian unification have given Italy a nation-state more than a state-nation character. This means that social cohesion has been entrusted more to certain cultural-religious influences and also, in part, by considerations of mythical homogeneity, rather than to some notion of patriotism founded on the conscious participation of Italians in a common bond of citizenship based on national public institutions and civil symbols.[5] This also explains the relatively scarce anticlericalism among Italian scholars and, especially in recent times, the consensus for a "contractual separation" between state and religion.[6] This contractual separation emphasizes the possibility to openly combine separation and bilateral agreements between the state and religious denominations.

In fact, many Italian scholars who do not support a rigid separation want to guarantee equal religious freedom to all and accept a positive intervention of public authorities for responding to religious needs. From this perspective, agreements are seen as a way to create an articulated legal framework able to deal with religious differences through a "custom-made" treatment.[7] This approach is also highlighted by the peculiar features of Italian *laicità*, classified by the Constitutional Court among the "supreme principles of constitutional order."[8] For the Court, *laicità* does not imply the state's indifference towards religions but rather the state's guarantee for safeguard of religious freedom in a regime of confessional and cultural pluralism.[9] Consequently, the principle of *laicità* is not an instrument to fight the religious presence in the public square or to foster the secularization of the Italian State and civil society.[10] For this reason, Italian *laicità* can be

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3. Due to the lack of "official" sources it is worth consulting http://it.wikipedia.org/wiki/ Religioni_ in_ Italia (accessed 26 January 2010); see also US Department of State, *International Religious Freedom Report 2009* (Italy), available at http://www.state.gov/g/drl/rls/irf/2009/ 127317.htm; Eurispes, *Rapporto Italia 2009*, in http://www.eurispes.it/index.php/Rapporto-Italia/rapporto-italia-2009.html, 1104- 1113, accessed 26 January 2010, and id., *Rapporto Italia 2010* (anticipation), in http://www.eurispes.it/index.php/Comunicati-stampa/rapporto-italia-2010.html, accessed 31 January 2010.

4. Cf. A. C. Jemolo, *Church and State in Italy*, Dufour Editions, Philadelphia 1961 or Id., *Church and State in Italy. 1850-1950*, Blackwell, Oxford 1960. More in general see C. Duggan, *The Force of Destiny. A History of Italy since 1796*, Allen Lane – Penguin Books Ltd, London 2007. Cf. also A. Ferrari, "Civil Religion in Italy : 'A Mission Impossible'"*?*, in *Geo. Wash. Int'l L. Rev*., in press.

5. Cf. P. Segatti, *Perché è debole la coscienza nazionale degli italiani*, in "il Mulino," XLVIII, 381, 1 1999, 15-23.

6. The term "contractual separation" reflects the French experience and it has been used in the Italian context by F. Margiotta Broglio, *Vers une séparation contractuelle: le nouveau regime des cultes en Italie*, in "Revue d'étique et de théologie morale Le Supplément," 175, 1990, 79-93. Cf. also S. Ferrari, *Separation of Church and State in Contemporary European Society*, in *Journal of Church and State*, Autumn 1988, 533-47. The seventies represented a sort of parenthesis in the Italian recent history and were characterized by an important process of secularization. In those years Law 898/1970 and Law 194/1978 were enacted (respectively about the institution of divorce and the voluntary termination of pregnancy) and many scholars supported the abrogation of the Lateran Pacts and the end of the concordatarian system: cf. *Individuo, gruppi, confessioni religiose nello Stato democratico, Atti del Convegno nazionale di Diritto ecclesiastico*, Siena 30 novembre-2 dicembre 1972, Giuffrè, Milano 1973 and *Nuove Prospettive per la legislazione ecclesiastica, Atti del II Convegno nazionale di Diritto ecclesiastico*, Siena 27-29 novembre 1980, Giuffrè, Milano 1980.

7. Cf. S. Berlingò, G. Casuscelli, S. Domianello, *Le fonti e i principi del diritto ecclesiastico*, Utet, Torino 2000.

8. Cf. the decision n. 203 of 11 April 1989 in http://www.olir.it/documenti/?documento=370 (accessed 26 January 2010). Neither the Constitution nor the laws define the principle of *laicità*. The Constitutional Court derived it from the interpretation of the constitutional articles related to religious freedom (art. 2, 3, 7, 8, 19 and 20).

9. Id.

10. The Constitutional Court affirmed five specific State obligations: 1) the obligation to safeguard religious freedom in a regime of confessional and cultural pluralism (203/1989, supra n. 8); 2) the obligation to respect

assimilated neither to laicism (if this word is intended to be synonymous with anti-religiousness) nor to secularism (if this word is intended to be synonymous with the invisibility of religions in the public square). *Laicità* supposes the existence of a plurality of value systems – the same dignity of all personal choices in the field of religion and conscience – it entails equal protection for religious and non religious beleifs, and it requires State neutrality regarding both of them. As a result, this principle does not refer to state-church relations only, but it is a synthesis of the values and duties of the contemporary plural and democratic state in which religion plays a full role, like each other component of a civil society.

For these reasons, Italian *laicità* could be interpreted as a "habermasian" and "rawlsian" *laicità* at the same time – a positive and active *laicità*, closely connected with the contemporary obligation of the Welfare State to pursue not just "formal" but "substantial" equality.[11]

If the official doctrine of the Constitutional Court seems quite clear and coherent, the situation is more complex when we pass from the supreme principles to the jurisprudence of lower courts and, above all, to the legislative and political domain. At this level the mono-confessional Italian tradition significantly limits the pluralism connected with *laicità* as a juridical principle. A system based on the idea of the superiority of the Catholic Church tends, inevitably, to privilege religious over non-religious beleifs (*favor religionis*)[12] and cannot easily assimilate a religious-friendly *laicità* with pluralism and equal freedom for all denominations. Given the Italian historical and social context, some authors think that an "*Italia laica*" is simply impossible.[13] Consequently, the Italian *laicità* is a limited one or, as some have said, a "baptised *laicità.*"[14]

Following this interpretation, the privileged position of the Catholic Church appears perfectly compatible with the Italian Constitution once Catholicism is considered not only a specific religion but, rather, a cultural expression of the core national heritage.[15] This approach, which perfectly shows the nation-state character of Italy, implies also that religious and cultural needs are primarily interpreted not from the secular constitutional

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confessional autonomy, with the prohibition to interfere with the internal life of religious denominations (259/1990, in http://www.olir.it/documenti/?documento=377 accessed 26 January 2010); 3) the obligation to be equidistant and impartial towards all religious confessions, which entails the illegitimacy of systems based on a National Church or a State Church or, more generally, of forms of public "*confessionismo*" (203/1989, id.); 4) the obligation to protect the conscience of everyone, irrespective of credo or conviction (440/1995, in http://www.olir.it/documenti/?documento=467 accessed 26 January 2010), which entails the prosecution of offenses against religious feelings, irrespective of the denomination to which an individual belongs; 5) the obligation to distinguish between civil matters and religious matters and the illegitimacy of the political use of religion and the religious use of politics (334/1996), in http://www.olir.it/documenti/?documento=368, accessed 26 January 2010. Cf. G. Casuscelli, *La laicità e le democrazie: la laicità della "Repubblica democratica" secondo la Costituzione italiana*, in "Quaderni di diritto e politica ecclesiastica," 1, 2007, 169-202, S. Domianello, *Sulla laicità nella Costituzione*, Giuffrè, Milano 1999 and S. Ferrari, *Le principe de neutralité en Italie*, in "Archives des Sciences Sociales des Religions," 101, 1998, 53-60.

11. This also includes the principle of *ragionevolezza*, which imposes to grant each person and group his or her due.

12. Cf. G. Dalla Torre, *Il fattore religioso nella Costituzione. Analisi e interpretazioni*, Giappichelli, Torino 1995, 28-29. A good example is provided by the "atheistic-bus", an initiative promoted by the Atheists and Rationalists Union and aimed at placing on the municipal buses in Genoa atheistic advertisings which proclaimed: "The good news is that in Italy there are millions of atheists. The best news is that they believe in freedom of expression." This sentence substituted another which was perceived as offensive: "The bad news is that God does not exist. The good news is that you do not need it." These advertisings were contested not so much in relation to an obligation of neutrality of the municipality and its services, but because they were considered an offense to the Catholic feelings of the population. Cf. *La Repubblica*, 12 January 2009 and http://www.guardian.co.uk/world/2009/jan/06/ atheist-bus-campaign-nationwide (accessed 26 January 2010).

13. Cf. O. Giacchi, *Posizione della Chiesa cattolica e sistema concordatario*, in *Individuo, gruppi, confessioni religiose nello Stato democratico*, supra n. 6 at 791.

14. For the opposition between juridical and "narrative" *laicità* cf. A. Ferrari, *De la politique à la technique: laïcité narrative et laïcité du droit. Pour une comparaison France/Italie*, in *Le droit ecclésiastique en Europe et à ses marges (XVIII-XX siècles)*, sous la direction de B. Basdevant Gaudemet et F. Jankowiak, Peeters, Leuven 2009, 333-345.

15. See infra, Section VIII, the section devoted to religious symbols.

point of view, but rather from the point of view of the national – religious and cultural – Catholic tradition.[16]

Finally, the problematic implementation of *laicità* is also visible in the lack of a general law regarding religious freedom that is capable of offering a legal framework for all faiths independently from specific agreements.[17] This shortcoming in the law, and the subsequent amount of excessive discretion given to public powers in signing the agreements with religious denominations, is presently considered by most to be the relevant weakness of the church-state system in Italy.

III. Constitutional Context

A. Political History

From the beginning, Italian institutions have been strictly entangled with Catholicism. Article 1 of the Statuto Albertino – the constitution that King Charles Albert I conceded to the Kingdom of Piedmont-Sardinia on 4 March 1848 – defined Catholicism as the only state religion.[18] Later on, when the peninsula was unified under the lead of the Piedmont monarchy, the Statuto became the constitution of the unified Kingdom of Italy and remained in force until 1948. Nevertheless, the confessional character of this constitution does support the notion that a difference of faith constitutes an exception to the enjoyment of civil rights.[19] The Statuto, therefore, did not prevent the progressive reduction in influence of the Catholic Church over state institutions. The unification of Italy (1860–70) caused a serious crisis in the relations between the Catholic Church and the new state. The liberal governments started a process of secularization of the institutions and public life (e.g., introduction of compulsory civil marriage, 1865; restriction of Catholic religious education in state schools, 1877; reform of the criminal law provisions that protected religion, 1889; state control of the welfare and charitable institutions, 1890), which provoked the opposition of the Church hierarchy, further aggravated by measures aimed at weakening the economic power of the Church (especially by way of abolishing some Church entities and confiscating their property, 1866-67). The fact that the unification of Italy was attained by destroying the secular power of the Popes gave particular strength to the hostility of many Catholics towards the Kingdom of Italy, although the predominantly moderate policy of the Italian Government made the relations with the Church progressively less tense.[20]

However, the outbreak of World War I prevented any concrete effects of this rapprochement. Following the war, the Fascist Party, which took power in 1922, started a policy of reconciliation with the Catholic Church which culminated in the Lateran Treaties of 1929.[21] These treaties solved the problem of Rome by creating the Vatican

16. For example, n. 25 of the *Charter of values, of citizenship and integration* declares that "Italy respects the symbols and the signs of all religions" not because of its constitutional principles but "on the basis of its religious and cultural tradition," cf. http://www.interno.it/mininterno/export/sites/default/it/assets/ files/14/0919 _charter_of_values_of_citizenship_and_integration.pdf, accessed 26 January 2010.

17. Cf. *Proposta di riflessione per l'emanazione di una legge generale sulle libertà religiose*, ed. by V. Tozzi and G. Macrì, Jovene, Napoli 2010, in press.

18. For the history of the Church-State legislation of the "liberal Italy" see F. Ruffini, *Corso di diritto ecclesiastico. La libertà religiosa come diritto pubblico subiettivo*, F. lli Bocca, Torino 1924 (re-edited as *La libertà religiosa come diritto pubblico subiettivo*, il Mulino, Bologna 1992); A.C. Jemolo, *Church and State in Italy*, cit.; *La legislazione ecclesiastica. Atti del congresso celebrativo del centenario delle leggi amministrative di unificazione*, ed. by P. A. D'Avack, Neri Pozza, Vicenza 1967 and *Chiesa e religiosità in Italia dopo l'Unità (1861-1878), Atti del quarto Convegno di Storia della Chiesa*. La Mendola 31 agosto-5 settembre 1971, Vita e Pensiero, Milano 1973.

19. Law of 19 June 1848.

20. Cf. A. Ferrari, *The Italian accomodations. Liberal State and Religious freedom in the "Long Century"*, in *L'État canadien et la diversité culturelle et religieuse 1800-1914*, ed. by L. Derocher, C. Gélinas, S. Lebel-Grenier and P. C. Noël, Presses de l'Université du Québec, Québec 2009, 143-153.

21. Cf. F. Margiotta Broglio, *Italia e Santa Sede dalla grande guerra alla conciliazione*, Laterza, Bari-Roma 1966 and R. Pertici, *Chiesa e Stato in Italia. Dalla Grande Guerra al nuovo Concordato. Dibattiti storici in Parlamento*, il Mulino, Bologna 2009.

State and restored a part of the privileges – concerning marriage, economic matters, and religious education in state schools – the Church had lost during the liberal period.

B. Current Constitutional Provisions

The Republican Constitution of 1948, on one hand, confirms the Lateran Treaties signed by the State with the Catholic Church, naming them explicitly them in Article 7; on the other, it creates the basis for a system of religious freedom more compatible with the principles of freedom and equality.

At the same time, the new Constitution gives a special emphasis to the "institutional" profiles of religious freedoms. Articles 7 and 8, devoted to the relationships between the State and religious denominations (*confessioni religiose*), are included among the fundamental principles, strictly connected to the "material constitution" of the State and, consequently, commonly held as uncheangeable. On the contrary, Articles 19 and 20 deal with freedom of religion as an individual right (not necessarily connected with its institutional dimension). They are placed in the part of the Constitution concerning the civil relations.

The special relevance accorded in the institutional context is explained by the historical bonds between the Italian State and the Catholic Church and has a significant influence on the Italian system of religious freedom.[22]

1. The "Individual" Side of Religious Freedom

Article Nineteen[23] recognizes religious freedom for "everyone," irrespective of citizenship,[24] guaranteeing not only freedom *of* religion (*e.g.*, public propaganda,[25] building places of worship and religious cemeteries, and ritualistic animal slaughterings) but also freedom *from* religion, with the only limit of rites contrary to public morality, identified in the sexual decency protected by the criminal code.[26] Consequently, Article Nineteen is considered to protect all positions in matters of conscience, including the atheistic and agnostic ones, and it is also invoked to ground laws (and claims) on matters of conscientious objection.[27]

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22. Cf. A. Ferrari, *Laïcité et multiculturalisme à l'italienne*, in "Archives des Sciences Sociales des Religions," 53, 141, janvier-mars 2008, 133-154.

23.Art. 19: "Anyone is entitled to freely profess his religious belief in any form, individually or with others, and to promote it and celebrate rites in public or in private, provided they are not offensive to public morality."

24. Therefore the enjoyment of religious freedom by foreign citizens is not subordinated to the principle of reciprocity. Obviously, from a political point of view, the support by the Italian Muslim communities of the enjoyment of equal rights by non Muslim believers in "Muslim countries" would help their integration in the Italian system.

25. The Code of Criminal Law contains provisions that punish blasphemy against Deity (of whatever religion), offenses against members of religious denominations and religious objects, disturbances of religious ceremonies (arts. 724 and 403-405). Incitement to violence or discrimination for religious motives is punished by the law 654/1975 (as modified by the law 205/1993), that applied in Italy the U.N. International convention on the elimination of all forms of racial discrimination (1965).

26. In any case, religious freedom must respect some fundamental values that art. 9 of the European Convention of Human Rights identifies in public order, health or morals, the protection of the rights and freedoms of the others. The member of a religious community who violates these limits with his/her acts, writings or words, will be punished like any other individual and cannot invoke obedience to a precept of his/her religion as a cause for impunity. But these limitations of freedom only concern the manifestations of a religion and not the religious belief itself: no-one can be punished for the sole fact of belonging to a religious group.

27. The introduction of special rules allowing conscientious objection to military service (1972) and – limited to medical doctors – to participation in abortions (1978) has solved some important problems of religious freedom. Others however remain unsolved, given the fact that there is no general right of objection of conscience and a specific law is required to dispense from the observance of a legal rule. The main problems are caused by religious groups which have settled in Italy relatively recently. The refusal of medical treatments (the prevailing jurisprudence acknowledges the possibility of refusing any medical treatment which is not compulsory, insofar as such a refusal - for instance of blood transfusion - does not endanger the life of another person) and the refusal to work on religious holidays (this right is granted only to the adherents of denominations which have concluded an agreement with the Italian State) are the most frequent issues: cf. V. Turchi, *I nuovi volti di Antigone. Le obiezioni di coscienza nell'esperienza giuridica contemporanea*, Edizioni Scientifiche Internazionali, Napoli 2010.

Article Twenty deals with the "social side" of the Article Nineteen.[28] Remembering some 19th-century laws that dissolved religious organizations and confiscated their properties, Article Twenty protects all kind of religious associations from discriminatory interventions motivated by their religious character.

2. The "Institutional" Side of Religious Freedom

Italian law considers religious denominations as the most complete and structured form of religious associations.[29] These denominations are the specific object of Articles Seven and Eight of the Constitution.[30]

Article Seven is devoted to the relationships between the State and Catholic Church, which is considered the paradigm of religious denominations; Article Eight, the first paragraph excepted, is devoted to the relationships between the State and non-Catholic denominations.

The first section of Article Seven and the second section of Article Eight guarantee, respectively, the mutual independence and sovereignty of both the State and Catholic Church and the free organization of non-Catholic denominations.

The first section of Article Seven, taking explicitely into account the historical relevance of the Catholic legal system, affirms that the Church and the State are independent and sovereign; and, consequently, that the latter cannot interefere with internal Church laws and statutes, which are in the total disposition of the ecclesiastical authorities.[31] The same guarantee is granted to non-Catholic denominations by the second section of Article Eight. This gives non-Catholic denominations the possibility to have internal rules which will be respected by State authorities if they are in accord with the fundamental principles of the Italian legal system.[32]

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28. Art. 20: "No special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organization on the ground of its religious nature or its religious or confessional aims."

29. The problem of defining what a "denomination" is has become significant in Italy with the spread of the "new religious movements." As there is a complete absence of statutory definitions, some commentators are of the opinion that the State is neither able nor competent to provide such a definition and affirm that the State should rely on the self-assessment of the adherents of the groups which want to be recognized as denominations: in other words, if the group members are of the opinion that they form a denomination, the State authorities would be bound to accept this assessment. On the contrary, some decisions of the Constitutional Court (and in particular Decision Nr. 467 of November 1992, in http://www.olir.it/documenti/?documento=432, accessed 27 January 2010) affirm that the term "denomination" must have an objective and not a subjective basis. Another group of scholars has tried to identify some characteristics which should qualify every group wanting to be classified as a denomination. Such characteristics are the belief in a transcendental reality (not necessarily in God), capable to answer fundamental questions on man's origin and destiny, to provide a moral code, to create an existential interdependence between the faithful and this transcendental reality (manifested, amongst other things, by worship), and an organizational structure, however minimal. Besides the three religions of Abrahamitic derivation, many religions of Oriental origin would fit this paradigm, while parapsychological, spiritualist and occult groups etc. would be excluded. Some of the "new religious movements" such as the Scientology Church are borderline cases (as it is shown by the contradictory decisions of the courts on this matter). In any case art. 7 and 8 are traditionally applied to religious groups with some degree of internal cohesion and not to "liquid" religious associations, which can be protected by art. 19 and 20: cf. S. Ferrari, *La nozione giuridica di confessione religiosa (come sopravvivere senza conoscerla)*, in *Principio pattizio e realtà religiose minoritarie*, ed by V. Parlato and G. B. Varnier, Torino, Giappichelli 1995, 19-47 and B. Randazzo, *Diversi ed eguali. Le confessioni religiose davanti alla legge*, Giuffrè, Milano 2008, 21 ff.

30. Art. 7: "The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments."

Art. 8: "All religious denominations are equally free before the law. Denominations other than Catholicism have the right to self-organization according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives."

31. Cf., in particular, Constitutional Court, decision 334/1996, supra n. 8 and J. Pasquali Cerioli, *L'indipendenza dello stato e delle confessioni religiose: contributo allo studio del principio di distinzione degli ordini nell'ordinamento italiano*, Giuffrè, Milano 2006.

32. Consequently, if denominations decide to have (or if they decide to create some associations with) a statute, the only constitutional limit is not referred to the religious principles but just to the internal laws regarding the organization of the group that should not contradict the member's basic constitutional rights. This

The second section of Article Seven and the third section of Article Eight ratify the "bilaterality principle," which is a direct consequence of the principle of religious autonomy. This principle stands for the proposition that the State may only deal with the legal organization of a denomination by way of a Concordat with the Catholic Church or an agreement with non-Catholic denominations (i.e., under the condition of reaching an understanding with the denomination).[33] In other words, the bilaterality principle requires that the State regulate all questions strictly connected with the specific needs of a specific denomination through these agreements.[34] Both Concordats with Catholic Church and *intese* with non-Catholic denominations need to be ratified (the Concordat) or approved (the *intese*) by a law of the Parliament once they have been signed by the President of the Council of Ministers and the representative of the religious organization.[35] This law is atypical because, once approved, it can be amended only on the basis of a new agreement between the State and the denomination. No amendment based on a unilateral initiative of the State is possible.[36] In this way the Catholic Church and the denominations which have reached an agreement with the State have the guarantee that their legal status cannot be altered *in peius* against their will.

Under Articles Seven and Eight, one agreement between the State and the Catholic Church and six agreements with non Catholic denominations have been concluded and translated into State law. In 1984, the Catholic Church, entered into the Agreement of Villa Madama *(Accordo di Villa Madama)*, which replaced the Lateran Concordat of 1929. This general agreement was followed by more specific agreements –the most important of them are concerned with the regulation of Church entities and property

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does not mean that denominations should "marry" the democratic principle. But, if they want to keep their autonomy, they must not violate fundamental human rights, such as, for example, the right to act and to defend in a judgement promoted by religious authorities and the right to freely withdraw from the group. In any case, State control regards only the rules that discipline the group's life: therefore, no judicial control is admitted in relation to "sacred texts" at the bases of the religious credos. Consequently, the principle of autonomy exempts civil judges from the duty to investigate and to select "the true interpretation" among the many that are always possible when a religious text is invocated. At the same time, autonomy does not forbid public authorities to prosecute a concrete violation of law. In other words a Jehovah's Witness will be punished if he refuses military service (if it is compulsory) but the Christian Congregation of Jehovah's Witnesses cannot be dissolved because it advocates the refusal of military service; or a Muslim will be punished if he contracts a polygamous marriage but the same sanction will not be applied to the whole of the Muslim community due to the sole fact of considering such a marriage licit according to its religious precepts.

Cf., in particular, Constitutional Court decisions 259/1990, supra n. 8; 43/1988 in http://www.olir.it/documenti/?documento=2304 and 239/1984, in http://www.olir.it/documenti/? documento=376 all accessed 26 January 2010. A classic text in this matter is P. Floris, *Autonomia confessionale. Principi-limite fondamentali e ordine pubblico*, Napoli, Jovene 1992.

33. Atheistic organizations cannot sign agreements with the State, first of all because of their lack of a self-qualification as religious denominations.

34. In other words, "bilateral legislation" should be exceptional and unilateral State laws on religious freedom the common rule. Nevertheless, not only many matters that could have been disciplined through a general law have been regulated through specific agreements but also the agreements, as a consequence, are practically identical to each other.

35. Law 400/1988 attributes the general competence in the field of Church-State relations to the Council of Ministers, while the Legislative Decrees 300/1999 gives some specific competences to the Ministry of Interior (they range from the "guarantee of the order and public safety " to the "guarantee of the civil rights, including those of religious confessions, of citizenship, immigration and asylum ").

36. Consequently these laws, although formally are ordinary laws, have a greater force than other ordinary laws. This is an important difference with other concordatarian systems (with the Spanish one, for example) in which the State can denounce and abrogate the agreements stipulated with the Holy See without resorting to the procedure required for modify a constitutional provision. Moreover, the Constitutional Court has clarified that a law which ratifies a Concordat with the Catholic Church cannot be abrogated by referendum (decision 16/1978, in http://www.olir.it/documenti/?documento=5030); that only the contrast with one of the principles qualified as "supreme principles of the constitutional system of the state" by the Constitutional Court itself could justify a declaration of illegitimacy of a Concordat provision (decisions 30/1971, http://www.olir.it/documenti/?documento=5091; 175/1973, http://www.olir.it/documenti/?documento=5094 and 1/1977, http://www.olir.it/documenti/?documento=5095, accessed 26 January 2010). Cf. S. Ferrari, *Il Concordato salvato dagli infedeli*, in *Studi per la sistemazione delle fonti in materia ecclesiastica*, ed. by V. Tozzi, Edisud, Salerno 1993, 127 ff. and the others contributions in the same volume.

(1984), Catholic religious education in State schools (eight agreements from 1985 to 2004), Church holidays (1985), protection of cultural and religious heritage (three agreements from 1996 to 2005), and pastoral care in the police force (1999).[37] Regarding non-Catholic denominations, the Parliament has approved agreements with the *Tavola Valdese* (Valdensians) (1984), the Christian Churches of the Seventh-day Adventists (1986), the *Assemblee di Dio* (Assemblies of God, a Pentecostal Church) (1986), the Union of Jewish Communities (1987), the Christian Evangelical-Baptist Union (1993) and the Lutheran Church (1993).[38] Other agreements have been successively signed, but they have not yet been approved by the Parliament.[39]

There are two main problems that come from a strict application of the bilaterality principle. First, the neeed for representative institutions of religious denominations at the national level,[40] is a requirement that proved to be problematic for some religions, such as Islam, for example.[41] Second is the excessive amount of discretion which the public powers possess in deciding whether to accept or reject the proposal of a denomination to enter into negotiations for an agreement.

Certainly it is convenient to keep a margin of flexibility in dealing with the different scenarios, especially concerning their contents; however, the complete lack of rules governing the decision-making process according to objective criteria (e.g., number of adherents, length of their presence in Italy or other countries, type of organization) facilitates abuse.[42]

Another debated issue is the differentiation among denominations introduced by this system of concordats and agreements. Differentiation is not excluded by Constitution. Art. 8 sect. 1 does not refer to equality but to "equal freedom," legitimizing in the name of the principle of reasonableness, the possibility to give different legal answers to different

37. Unlike the Concordat, these agreements are subject to the ordinary control of the Constitutional Court, which has the power to declare the illegitimacy of their provisions whenever they clash with some articles of the Constitution and not only when they clash with one of the "supreme principles of the constitutional system of the State" (Const. Court decision 1/77, supra n. 8): cf. http://www.governo.it/Presidenza/USRI/confessioni/accordo_intese.html, accessed 27 January 2010.

38. Churches represented by the "Waldensian Table" (Law 11 August 1984, n. 449); Italian Union of the Adventist Churches of the Seventh Day (Law 22 November 1988, n. 516); Assemblies of God in Italy (Law 22 November 1988, n. 517); Union of the Jewish Italian Communities (Law 8 March 1989, n. 101); Christian Evangelical Baptist Union of Italy (Law 12 April 1995, n. 116); Evangelical Lutheran Church in Italy (Law 29 November 1995, n. 520), cf. http://www.governo.it/Presidenza/ USRI/confessioni/intese_indice.html#2, accessed 27 January 2010.

39. In April 2007 six agreements have been signed ,with the Jehovah's Witnesses; the Italian Buddhist Union; the Italian Hindu Union; the Apostolic Church in Italy; the Church of Jesus Christ of Latter-day Saints, and the Greek Orthodox Archdiocese of Italy and Exarchate of Southern Europe. The Jehovah's Witnesses and the Italian Buddhist Union had already signed an agreement with the State in 2000, but these agreements were never approved by the Parliament.

40. In this sense the Italian case is – so far - different from the Spanish one, because in Spain the *Acuerdos* have been signed not with specific religious denominations but with federation of more denominations. In Italy something similar happened with the agreement between the State and Waldensians because the Waldensians Table, from 1979, also represents the Union of Methodist Church.

41.All religions that have concluded an *intesa* have had to adapt tjeir organization to the dualistic model of Western Christianity, which involves stressing the distinction between religious or holy people and activities on the one hand and people and activities without such qualifications. The "confessional" model adopted by the Jewish communities to conclude the *intesa* is an interesting example, and it will also be very interesting to see what will be the choice of the Muslim community. In 2005 the Ministry of Interior created a consultative body, the Council for Italian Islam, whose members were selected by the Minister himself. This body has to face many problems and especially 1) the fact that the its task was far from homogeneous, concerning matters connected to immigration and integration that did not regard only Muslims; and 2) the fact that this (implicit) governamental selection of the Islamic representativeswas in conflict with the Constitution that forbids public authorities to select the leaders of religious organizations. In any case, since 2008 this Council stop to be convoked.

42. According to the Constitutional court the small number of members of a denomination is not, in itself, a valid reason to refuse an agreement (cf., for example, Constitutional Court, decision 925/1988, in http://www.olir.it/documenti/?documento=446 accessed 27 January 2010). The conclusion of an agreement should only depend on the necessity to provide for specific needs of a denomination, independently from its dimension or political influence.

needs. Of course these differences cannot jeopardize legal equality of individuals[43]: some examples of this delicate balance may be found in the sections of this chapter devoted to financing of the denominations and religious education in State schools.

The correct relation of liberty (i.e., the possibility of a special regulation for each denomination) and equality (i.e., the necessity of a common set of rights and duties for all) is a central problem of Italian ecclesiastical law in its present stage of development and the principal test for Italian *laicità.*

IV. THE LEGAL CONTEXT

A. Difficult Implementation of Constitutional Provisions

The implementation of the constitutional provisions has revealed two main interconnected problems: a) the tendency to use the bilaterality principle not as an instrument for reaching "equal freedom" among individuals and denominations but as a political tool for a selective public recognition of these latter; b) the substantial similarity of all the agreements that have been signed.

Agreements are used by the State to concede a set of rights to "recognized denominations." In this way, many matters that could be included in a general law on religious freedom (because they express needs common to all denominations) become matter of specific agreements signed by public powers that have great discretion. Consequently, these "photocopy" agreements are seen by the religious groups more as an instrument of political legitimation than as an opportunity for expressing their identity.

This state of affairs is full of negative repercussions. On the one hand, the benefits deriving from agreements have given rise to a rush to get them. On the other hand, the absence of any procedural limit to the discretionary powers of the government[44] can easily result in discrimination against denominations excluded from the agreements. Denominations whitout agreement with the State are ruled by the old law on "admitted cults" of 1929[45]: they are not only excluded from the more favorable provisions contained in the agreements but also barred from benefits reserved to the "agreed religions by the State and the regional legislator. The Constitutional Court has (in vain) affirmed that this last situation to be illegitimate.[46] On the other hand itrejected the request to condemn the failure to extend promotional interventions which, though agreed in the *intese*, do not answer a specific need of the contracting denomination.[47] In this way a "general law of the *intese*" has been created, which can be enjoyed only on the basis of substantially uncontrolled government powers of discretion. If the treatment of religious confessions by public authorities is unreasonable, it may lead to genuine inequality and to a different measure of freedom not only among them but also among their believers, in contrast with the limit fixed by the first section of Article 8 of the Constitution.[48]

43.Cf. S. Ferrari, *Libertà religiosa individuale ed uguaglianza delle comunità religiose nella giurisprudenza della Corte costituzionale*, in "Giurisprudenza Costituzionale," 1997, 3085 ff.

44. The government is free to refuse or slow down negotiations for an agreement and to obstruct parliamentary approval when it gets cold feet and wants to retrace its steps.

45. Law 24 June 1929 n. 1159 and Royal Decree 28 February 1930 n. 289.

46. Cf. Constitutional Court 195/1993 and 346/2002, in http://www.olir.it/documenti/?documento=378 and http://www.olir.it/documenti/?documento=891 accessed on 27 January 2010 (two regional laws had reserved the public funding for the building of places of worship only to the religions with agreement although a general law of the State extended it to all denominations). Despite this decision, the regional lawmakers continued to provide privileged treatment for the religions with an agreement (for example, in the legislation on non-profit-making organizations (Legislative Decree 4 December 1997, n. 460), in that on privacy (Legislative Decree 11 May 1999, n. 135) and in the general policy law for the realisation of the integrated system of interventions and social services (Law 8 November 2000, n. 328).

47.Cf. Constitutional Court, decision 178/1996 and 235/1997, in http://www.olir.it/documenti/? documento= 433 and http://www .olir.it/documenti/?documento=435 accessed 27January 2010.

48. In this case, not only the first paragraph of art. 8 and art. 19 is violated, but also the first paragraph of art. 3 of the Constitution: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions."

B. A Four- Tier System

The different social status of religions is reflected in their legal status. Any group with religious aims may be founded without the necessity of any authorization or prior registration and may operate within the Italian legal system. The only limits are set by considerations of public order and common decency.

Nevertheless, the denominations (or, more precisely, their legal entities) may choose between various types of legal capacity.

First of all, they may constitute themselves as non-recognized associations *(associazione non riconosciuta*, Article 36-38 of the Civil Code): it is the simplest model which is also used by political parties and trade unions. In this way, the denomination attains legal capacity (including independence in property matters and the ability to receive donations, take legal actions, etc.) in complete liberty, without their constitutive act or statute being submitted to any form of State control. More precise and binding rules apply to recognized associations (associazioni riconosciute) according to Articles 14-35 of the Civil Code and to Dpr. 10 February 2000, n. 361. They obtain legal personality through registration at the Prefecture, provided they fulfil a socially useful purpose and have sufficient economic means.

Civil law legal capacity may also be obtained according to Article 16 of the *Disposizioni sulla legge in generale* (Provisions on law in general), which grants foreign legal entities the rights of Italian legal entities on terms of reciprocity, and furthermore according to Art. 2 of the Treaty of Friendship, Commerce and Shipping with the United States, concluded in 1948. About forthy denominations (or denominational legal entities) have obtained legal capacity in this way. Following some changes in the law interpretation which resulted in the loss of the tax advantages established in the Treaty, they enjoy now a legal status similar to that of recognized associations.

Up to now only, the possibilities of obtaining legal capacity in the same forms provided by general law for all groups, independently of their religious or other aims, have been discussed. For the religious groups however there is a further possibility of which the most important minority denominations have made use: that is, obtaining legal capacity on the basis of a law conceived exclusively for groups with religious aims (Law Nr. 1159 of 1929).[49] This law, by establishing the equal treatment of organizations with religious aims with those of welfare and education, grants important tax privileges (and so extends the advantages accorded to the associations of this latter type). On the other hand, this law subjects groups with religious aims to the control of the government and gives the State authorities the right to annul the decisions of their administrative bodies and to replace them with a State commissioner.[50] Apart from of all the advantages and disadvantages linked with these provisions, the acknowledgement of legal capacity

49. Forty different religious entities have been recognized on the base of this law: among them there are Orthodox entities, including the Orthodox Christians Association in Italy; the Russian Orthodox Church in Rome and in San Remo; one Islamic entity, the Islamic Cultural Centre of Italy; different Evangelical entities and the "Mormon Church"; the Soka Gakkai; the Italian Hindu Union; the Italian Buddhist Union; the Foundation for the Preservation of the Mahayana tradition; the "Christian Science"; the Pentecostals Christian Congregations and the Salvation Army: cf. http://www.interno.it/ mininterno/export/sites/default/it/assets/files/ 14/0853_enti_di_culto_riconosciuti_D.P.R.pdf, accessed 27 January 2010.The competence for this recognition is attributed to the Minister of Interior. The recognition can concern the church itself (e. g., the Evangelical Lutheran Church in Italy); a national representative institution (e. g., the Christian Congregation of Jehovah's Witnesses); a central "patrimonial" body (e. g., the Baptist Evangelical Christian Union of Italy); a cultural centre (e. g., the Islamic cultural centre of Italy) or even single entities that are connected with the central ones. The discretionary power of the Minister of the Interior is greater in reference to the entities of the religions without concordat or agreement. According to Law 1159/1929, the Minister of Interior will take into consideration the assets of the entity that claims recognition (these must be sufficient for the activities foreseen in its statute); the number of members and how widespread they are in the country; the compatibility between the statute and the main principles of the Italian legal system and the aim of the entity, which has to be "prevalently" of religion and cult.

50. All these powers raise serious questions of legitimacy, concerning the respect of the constitutional principle of religious autonomy.

according to Law Nr. 1159 of 1929 has great significance, because it confirms the religious nature of the recognized group. It forms the basic precondition (in fact, if not in law) for an application for an agreement with the Italian State.

The six denominations which have come to an agreement with the Italian State are no longer subject to Law Nr. 1159 of 1929, which has been replaced in their case by the (far more favorable) provisions contained in the separate agreements. However, the legal capacity obtained on the basis of this law is maintained by the six denominations. The Jewish communities and their Union, on the other hand, were never subjected to the law 1159/1929; they obtained legal personality by a law (Nr. 1731 of 1930) especially created for them, which regulated their activity in detail. The law was abrogated when the agreements were concluded, but the communities and their Union have maintained the legal capacity granted them on the basis of this law. Parallel provisions apply to the *Tavola Valdese* and the consistories of the churches in the Vaudois Valleys, which have – even after the conclusion of the agreements - kept the legal capacity which they had obtained not on the basis of legal provisions, but because of "*antico possesso di stato*" (long-standing possession of status, which means they had legal capacity even before the Italian State was founded).[51]

A final remark concerns the Catholic Church which has public law legal capacity, even if it is in no way comparable to the bodies which form part of the State organization. It can, if at all, be compared to foreign States which are public law subjects in Italian law.

Consequently, it is possible to say that Italian ecclesiastical law forms a four-tier system. The most prominent position is held by the Catholic Church, which, because of the number of its adherents and its special significance in Italian history enjoys a preferential position secured by the Agreement of Villa Madama and numerous other regulations in various ordinary laws.

An intermediate position is held by those denominations which have come to an agreement with the State. The groups concerned here are those which have existed in Italy for a long time (i.e., the Valdensians and Jews) or more recent groups which however have no characteristics incompatible with Italian law. They are guaranteed a position equivalent, although not equal, to that of the Catholic Church, participating in the 0.8% system and enjoying tax-deduction from donations; tax reductions for religious activities; facilities for a presence in state schools, the army, prisons and hospitals; regional facilities for public financing of places of worship; facilities in being financed as non-profit-making organizations.

In a lower tier are the denominations regulated by the Law Nr. 1159 of 1929 that allows tax reductions for religious activities; the possibility, under some conditions, of a presence in state schools, the army, prisons and hospitals and that make easier regional facilities for the financing of the places of worship.

Finally, in the lowest tier are the denominations - some of them with a significant number of adherents (e.g., the Muslims) - which have only relatively recently settled in Italy and which are sometimes characterised by doctrines and practices which are, according to the predominant interpretation, in more or less open conflict with public order (it is the case of some controversial "new religious movements," e.g., the Scientology Church): these groups are regulated by the general laws on associations and are excluded from some important privileges (for instance with respect to financing, religious education and pastoral care). These denominations can simply enjoy the benefits guaranteed by the general law to all private groups. Consequently, they do not enjoy the benefits specifically laid down for religious groups although they should have the right, for example, to receive public money for building places of worship and to enjoy the tax

51. This is also the case for the Holy See, the oldest Catholic parishes, seminars or cathedrals, and the Orthodox groups living in the old Habsburg possessions of Venice and Trieste. In other cases legal personality can be recognized through a specific law: this is the case of the National Conference of Catholic Bishops (recognized by the new concordatarian legislation); of the Jewish Communities and their central Union, recognized by the *intesa* which confirmed their previous legal status and of the entities of the Adventist Church and of the Assemblies of God, equally recognized by their respective *intese*.

reduction for their specific religious activities. Nevertheless, this seldom happens because of the resistance, in the forst case, of the regional authorities, which have a preference for more traditional and institutionalized religions, and in the second of the tax authorities which apply tax reductions only to the groups that are recognized in the forms laid down by Law Nr. 1159/1929.

Roughly speaking, this four-tier system is based on Italian history and culture; however, this does not mean it is above criticism.

The first remark concerns the extent of the system of treaties and agreements, which was expanded to include matters which could have been dealt with by State law - with more satisfactory results with respect to the principle of equality. For instance in the field of the financing of the denominations the present system excludes Muslims and Jehovah's Witnesses (which, considering the number of adherents, form the second and third largest religious communities in Italy): without an agreement with the Italian State, they neither participate in the distribution of the 0.8 percent *IRPEF* nor can deduct from their taxable income sums donated to their religious community.

A State law extending these channels of funding to all denominations (which are recognized as such by Italian law) would show more respect for the "equal freedom" guaranteed by Article 8 Const. A similar criticism applies to other areas of Italian law. There is no law common to all religious communities concerning problems which could be solved uniformly (besides financing, this applies to pastoral care in public institutions, access to schools, etc.).

Such law would leave to the treaties and agreements only the regulation of problems which are of special interest to specific denominations (for example refusal of blood transfusions for Jehovah's Witnesses, ritual slaughter of animals for Jews, Sabbath rest for Jews and Adventists.[52]

V. State Financial Support for Religion

The Agreement of Villa Madama of 1984, which also makes use of the new possibilities created by the *Codex Iuris Canonici*, has fundamentally changed the system of State funding of the Catholic Church.

As a consequence of the Law Nr. 222 of 20 May 1985, which gave effect to the provisions of the agreement on Church entities and property reached between the Italian State and the Catholic Church in the preceding year, two systems of financing have been established: they apply both to the Catholic Church and to the other denominations which have signed an agreement, benefit. The first type concerns a quota of 0.8 percent of the revenue from IRPEF *(imposta sul reddito delle persone fisiche*, income tax, which is paid annually by all Italians liable to taxation who earn more than a minimum income). In the tax declaration the taxpayer, by ticking the respective box, can determine to devolve the money to one of the following:

a) The Italian State for extraordinary measures against famine in the world, natural disasters, aid to refugees, the conservation of cultural monuments;

b) The Catholic Church, for the religious needs of the population, the support of the clergy, welfare measures benefiting the national community or third world countries;

c) One of the denominations which have signed an agreement with the Italian State.

The quota of 0.8 percent is distributed on the basis of the declarations of the taxpayer. If a person does not declare any preference, his quota is distributed among the different recipients in proportion to the choice made by the rest of the taxpayers.[53]

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52. The problems connected with this four-tier system are widely examined by Randazzo, *Diversi ed eguali* …, supra n. 29 at 181 ff.

53.There are certain peculiarities which must be mentioned. The Christian Evangelical-Baptist Union, which has an agreement with the State, originally declined to take part in the distribution of the 0.8% of IRPEF but in 2008 changed opinion, and it is now trying to reach a new agreement with the State. The Pentecostals have decided to give up their right to the part of the 0.8% IRPEF corresponding to the persons who did not express any choice. Moreover, together with the Adventists and Waldensians, they decided to use the 0.8%

The second type of financing concerns the possibility of off-setting from taxable income donations up to Euro 1,032.91 to the Catholic Central Institute for the Support of the Clergy (or similar institutions of other denominations).

Scattered amongst various other legal provisions are additional forms of direct or indirect funding of the denominations. For instance many regional laws destine lots and parcels of land for the erection of places of worship and Law Nr. 390 of 1986 facilitates the loan or hire of State real property to Church bodies. In both cases it is uncertain whether these provisions apply only to the Catholic Church and the denominations with an agreement or to all denominations.

There is no doubt that the present system of financing, which follows the Spanish model,[54] is a step forward compared to the situation existing in Italy before 1984 and is in certain respects preferable to the systems that are in force in other European countries, characterised by inflexible mechanisms which may sometimes come into conflict with religious freedom. However, apart from certain details (i.e., the distribution of the quota of IRPEF pertaining to persons who have not declared their preference), there are some fundamental features of the present system which may be problematic. As already said, the access to the two main channels of finance (0.8% IRPEF and donation deductible from taxable income) is dependent on the conclusion of a concordat or an agreement with the Italian State: this pre-condition excludes from any form of financial support the denominations which cannot or do not want to conclude such an agreement or whose application for an agreement is rejected by the State.

In the area of taxation the denominations and their entities enjoy numerous privileges. Italian tax law is particularly fragmentary and only its basic principles can be mentioned here. The starting point is the equal treatment of the organizations with religious aims and those with welfare and education aims. This provision applies both to the Catholic Church entities (Art. 7 Nr. 3 of the Agreement of Villa Madama) and to the other denominations (Art. 12 of the Royal Decree of 28 February 1930, which implements the Law Nr. 1159 of 1929. The extension of the legal regime of welfare/education organizations to religious organizations gives these latter numerous advantages, for instance a rebate of 50% on corporation tax *(imposta sul reddito delle persone giuridiche,* IRES), the exemptions from inheritance and donation tax, value added tax *(imposta sul valore aggiunto, IVA),* and local land transfer tax *(imposta comunale sull'incremento di valore dei beni immobili).*

Finally it must be noted that the real property of the Holy See located on Italian territory (Articles 13 and 14 of the Lateran Treaty) as well as the other real properties named in Articles 13 and 14 of that Treaty are exempt from any kind of tax or duty toward the State or other public entities.

VI. Legal Effects of Religious Acts

The religious rules that govern the internal activities of religious groups can have civil effect in the Italian legal systems provided they are not in contrast with its fundamental principles. When a religious entity of denomination with agreement has a

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revenues for social and humanitarian purposes only, because they are of the opinion that the financing of the Church and the maintenance of the clergy should be exclusively based on donations by the Church members. The available data show the following distribution: in 2004 about 40% of the taxpayers made a choice, and 87 % of these (which roughly equals 35% of all taxpayers) opted in favor of the Catholic Church, whereas 10% preferred the Italian State and the remaining 3% are divided among the Seventh-Day-Adventists, the Assemblies of God (Pentecostals), the Valdensians, the Lutherans and the Union of Jewish Communities. Of the sums thus attributed to the Italian Conference of Bishops, 35% was used for the maintenance of the clergy, about 20% for welfare measures and the remaining part (about 45%) for purposes of worship to the benefit of the population: cf. http://it.wikipedia.org/wiki/Otto_per_mille, accessed 28 January 2010.

A disputed question is the choice of the State to use its part of 0.8% to finance the restoration of … Catholic buildings: cf. I. Pistolesi, *La quota dell'otto per mille di competenza statale: un'ulteriore forma di finanziamento (diretto) per la Chiesa cattolica ?*, in "Quaderni di diritto e politica ecclesiastica ", 2006/I., 163-182

54. Cf. C. Cianitto, *Il finanziamento delle confessioni religiose in Italia e Spagna: scelte a confronto*, id. 197-201.

legal status internal rules can also have full effects in matter of property and exchanges between religious organizations and thirds if they are published, and consequently cognizable, in registers of legal persons of Prefectures.

Where religious acts have a more evident civil relevance is in the field of marriage. Article 34 of the Concordat of 1929 restored the civil law validity of Catholic marriages after that the Civil Code of 1865 had recognized the civil marriage as the only form with legal effects. The Concordat of 1929 stated that Church marriages could be registered in the registers of births, marriages and deaths kept in every Italian municipality: once registered, they obtain full validity in State law. Additionally it was ruled that the Church courts (not the State courts) were competent to deal with annulments and dissolution of the registered Church marriages (the so-called "concordat-marriages," *matrimoni concordatari)* and that the decisions of these courts, which were pronounced on the basis of Canon Law, obtained civil law validity through a (highly summary) recognition procedure *(giudizio di delibazione)* by the Italian courts of appeal. It was of course still possible to celebrate a civil law marriage (which was completely regulated by State law and subject to the jurisdiction of the State courts) and, for the members of non-Catholic denominations, Law Nr. 1159 of 1929 introduced the possibility of being married by a minister of their own denomination: but, differently from the "concordat-marriages," the regulation of these marriages and the power to declare their nullity were matters for the legislation and the courts of the State.[55]

Article 34 of the Concordat and Law Nr. 847 of 1929, which was passed for its implementation, have caused numerous problems which the Agreement of Villa Madama has tried to solve, without changing the fundamental principles of the system laid down in 1929.

Article 8 of this new Agreement recognizes civil law effects of the marriages concluded according to Canon Law, provided that the certificate issued by the minister conducting the marriage is registered in the state register of births, marriages and deaths. The marriage starts having civil law effects since the moment of its celebration, even if it is registered at a later date. It is not possible to register and so give civil law effects to Church marriages of persons who have not reached the age of consent for civil law marriage (18, or, with a court authorization, 16 years of age) or when there is an impediment to the marriage which is regarded as insurmountable by civil law (n. 4 of the Additional Protocol to the Agreement of Villa Madama regards as such the impediments for reasons of insanity, previous marriage, crime and direct blood relations). In order to ascertain the existence of impediments, the parties are required to publish the banns at the town hall, according to the rules that apply to civil marriages too.

In this way religious marriages are prevented from obtaining civil law validity through registration when they could not have been concluded under the provisions of the Civil Code, so that equality of citizens in matters of marriage is granted regardless of the denomination to which they belong. The same article also provides that the court of appeal may, on application of the parties, declare the civil validity of the annulments of marriage declared by the Church courts. Before giving civil effects to these ecclesiastical courts decisions, the court of appeal must however establish that (a) the Church court had jurisdiction to acknowledge the grounds of annulment; (b) during the anulment procedure in front of the Church courts, the fundamental principles of Italian law concerning the rights of the parties had been respected[56]; and (c) the preconditions for the recognition of

55. Cf. A. C. Jemolo, *Il matrimonio*, in *Trattato di diritto civile*, ed. by F. Vassalli, Utet, Torino 1957, III, I, I, 246 ff. and F. Finocchiaro, *Del matrimonio, art. 79-83 cod. civ.*, in *Commentario del codice civile*, ed. by A. Scialoja and G. Branca, Zanichelli - Società Editrice del Foro Italiano, Bologna-Roma 1971, 196 ff.

56. Recently Italy has been condemned by the European Court of Human Rights (Pellegrini v. Italy, n. 30882/96, July 20, 2001) because the Court of Appeal of Florence had given civil effects to a Church court decision that had annulled a "concordat-marriage": according to the European Court, the Church judgment had not respected the principles of fair judgment granted by art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in http://www.olir.it/ documenti/?documento=1154, accessed on 28 January 2010.

foreign judgements in Italy were met, which means that the decision of the Church court cannot contain provisions that are in conflict with Italian law. Consequently it is argued that Church decisions annulling the marriage for typically denominational reasons (for instance *disparitas cultus*, ordination and vow of chastity) may not be declared valid in Italian law, because this would conflict with the principle of religious freedom. The Constitutional Court has also emphasised the existence of a similar conflict regarding the Church decisions which annull a marriage on the grounds of a deception by one of the parties only: in this case it is possible to declare these decisions valid in Italian law only with the consent (or at least without the dissent) of the party who was in good faith or after proof that the deception was known (or at least recognisable) to the latter at the time of marriage.[57] On the subject of the jurisdiction of the Church courts, Article 8 of the Agreement of Villa Madama is worded ambiguously (perhaps purposely because of the difficulty of overcoming the differences of opinion between the parties during the negotiations). This Article does not repeat the clear wording of Article 34 of the Lateran Concordat, which stated that the cases concerning the annulment of marriages (and the dissolution of marriages which had been concluded but not consummated) were reserved to the competence of the Church courts: it declares that the Church decisions of annulment are valid under the conditions listed in the Article, without any reference to the exclusive character of the Church court jurisdiction.

Because of the lack of any reference to the exclusivity of Church jurisdiction, some commentators argued that the State courts are competent alongside the Church courts to declare the nullity of concordat marriages. This opinion was adopted by the Court of Cassation in a decision of February 1993 and it is has been followed by the majority of the Italian courts.

Questions related to religious marriages have been of great relevance in the past, but today they (while remaining of great theoretical interest) have only a small practical importance: since the introduction of divorce in 1970, the number of applications to give validity to decisions of annulment of the Church courts has dropped to a few hundred per year. As has been mentioned, citizens who do not wish to marry "*in facie Ecclesiae*" may conclude a civil marriage or, if they are members of a denomination other than the Catholic one, may be married by a clergyman of their own denomination according to the provisions of law Nr.1159 of 1929. This law is no longer applied to those denominations which have concluded an agreement with the Italian State but the provisions on marriage contained in the agreements – although introducing significant changes (for instance the abolition of the preliminary State authorization for the clergyman who celebrates the marriage) - do not change the structure of the institution, which remains a marriage concluded in religious form but ruled completely by civil law.

VII. RELIGIOUS EDUCATION

In Italy since 1873 there are no theological faculties in the State universities. There are no particular problems regarding the right of the denominations to establish schools and other educational institutions of every level and type: this possibility is in fact granted to all private law persons by Article 33 Cost., and the provisions of the Agreement of Villa Madama and some of the agreements with other denominations merely repeat and apply this rule. The question of the legitimacy to publicly fund private (including religious) schools has being discussed for a long time. In any case, in 2000 a new law established that families which send their children to private schools recognized by the State (*scuole paritarie*) are entitled to a partial refund of the fees.[58]

57. Cf. R. Botta, *Matrimonio concordatario*, in *Il diritto di famiglia*, I *Famiglia e il matrimonio*, ed. by G. Bonilini, C. Cattaneo, Utet, Torino 1997, 213 ff.; S. Domianello, *I matrimoni davanti a ministri di culto*, in *Trattato di diritto di famiglia*, ed. by P. Zatti, vol. I, *Famiglia e matrimonio*, ed. by G. Ferrando, M. Fortino, F. Ruscello, t. 1: *Relazioni familiari, matrimonio, famiglia di fatto*, Giuffrè, Milano 2002, 202-492 and N. Marchei, *La giurisdizione dello Stato sul matrimonio "concordatario" tra legge e giudice*, Giappichelli, Torino 2008.

58. Cf. A. Ferrari, *Libertà scolastiche e laicità dello Stato in Italia e Francia*, Giappichelli, Torino 2002.

In the field of education, discussion focused on the topic of religious education in State schools. Neither the Italian Constitution nor ordinary laws contain any provision specifically devoted to religious education.[59] Rules on this matter can only be found in the law on "admitted religions" (n. 1159 of 1929), in its executive decree (n. 289 of 1930) and in the agreements concluded by the State with some denominations. In line with the attention paid to the institutional profiles of religion, the Italian legal system considers religious education in schools from a strictly denominational point of view, in relation to the needs of the pupils and families belonging to a specific religion. In Italian schools the cultural teaching of religious phenomenon ("education about religion") is still barely developed.

Concerning religious education in State schools there is a clear difference between the provisions applying to the Catholic Church on one hand and to the other denominations on the other. The Agreement of Villa Madama stipulates that two classes of religious education will be taught in play schools and primary schools and one class at senior schools per week; no religious education is provided at university level. The State bears the total financial burden of Catholic religious education. Every year the pupils – or, up to the end of intermediate school, which is usually completed at the age of 13, their parents – must declare whether they intend to attend the Catholic religious education classes or not.[60] If they decline, the pupils may concentrate on other subjects during this period or may leave the school premises (this right was granted the pupils by the decision Nr. 13 of the Constitutional Court in 1991).[61]

The teachers of Catholic religious education are chosen by the diocesan bishop from a list of people who have been trained in theology and Church disciplines and (since 2003) have won a regional competition (which is proof of their knowledge of school system). The recognition by the Church authority takes the form of a written confirmation (*nihil obstat*) which certifies that they are suitable to teach religious education. If this recognition is withdrawn[62] or if there are not students enough, the teacher must leave the teaching of Catholic religion and will be assigned to the teaching of a different subject (if he/she is qualified to do so) or will be given a different job in the public sector.[63] The curricula for Catholic religious education in each type of school are determined through an agreement between the Minister of Public Education and the Chairman of the Italian Conference of Bishops: the curricula must consider the teaching of religion "in the framework of the goals of the school," avoiding all forms of (strong) proselytism or discrimination. The school books must have the *nihil obstat* of the Conference of bishops and of the bishop of the diocese in which the school where the books will be used is located. The concrete experience generally shows that the teaching of Catholic religion is pluralistically oriented and open to the study of other religious traditions, revealing the role played by the Catholic Church in adapting Italian society to the growing pluralism.

The six denominations which have reached an agreement with the Italian State may send their own teachers to the State schools where pupils, their parents or the school teachers require the teaching of a certain religion (e.g., Judaism) or the study of "the phenomenon of religion and its implications" in general (as it is said in Article 10 of the agreement with the *Tavola Valdese*). The provision of this teaching is agreed by the competent school authority and the representatives of the denomination, while the

59. For a minor exception see art. 1 of the Legislative Decree n. 59 of 19 February 2004.

60. When students are less than 18 years old, their choice needs to be confirmed by their parents.

61. It is for this reason that this teaching is said to be voluntary and not optional. The teaching of the Catholic religion was followed in 2008-2009 by 91% of students: more in the South (98.2%) than in the North (85.1%); more in primary schools (94.2%) than in high schools (85.3%); less in big cities: cf. http://www.chiesacattolica.it/pls/cci_new_v3/V3_S2EW_CONSULTAZIONE.mostra_pagina?target=0&id_pagina=328, accessed 27 January 2010. Cf. A. Gianni, *L'insegnamento della religione nel diritto ecclesiastico italiano*, Cedam, Padova 1997.

62. For some examples of behavior in conflict with Catholic doctrine (e. g., re-marriage after divorce; pregnancy without marriage) cf. V. Pacillo, *Contributo allo studio del diritto di libertà religiosa nel rapporto di lavoro subordinato*, Giuffrè, Milano 2003, 334-363.

63. Cf. law n. 186 of 18 July 2003.

financial burden is borne by the denomination.[64]

Finally, according to the Law of 1929, denominations without agreement may use the classrooms of State schools for religious education when the students belonging to a denomination are in a considerable number in a school and there are no places of worship of their religion available in the proximity of the school. All the costs are paid by the denomination and an agreement between the religious group and the Director of the Regional School Office is necessary. It is interesting to note that this possibility has never been used by the Muslim communities and that it has never been mentioned in the public debate about the possibility of an Islamic religious education in State school.[65]

The regulation of religious education contained in the Agreement of Villa Madama and in the agreements with minority religions has been the object of numerous conflicts. However, since the intervention of the Constitutional Court, the system seems to have attained a point of equilibrium. Some doubts remain concerning the obligation of the pupils to declare whether they want to attend Catholic religion classes (with reference to the protection of privacy), the fact that the State is charged with the financial burden of Catholic religious education (but not that of the other denominations; in some cases the State financial support has been rejected by the denominations themselves) and the limitation of religious education classes only to pupils of the denominations which have concluded an agreement. These problems are however general problems which depend on the fundamental choices which are at the basis of the whole reform of Italian Church-State relations law and which reappear in all parts of the system, although in other forms.

Finally, it must be noted that special provisions in the Agreement of Villa Madama (Article 10, which reappears in the agreements with some other denominations) state that seminaries and educational institutions in Church disciplines are free from any kind of State interference and are solely under the authority of the Church. The same article stipulates that the appointment of the professors at the Catholic University of the Sacred Heart *(Università Cattolica del Sacro Cuore)* is subject to the consent of the Church authorities as far as religion is concerned.[66]

VIII. RELIGIOUS SYMBOLS IN PUBLIC PLACES

The Italian Catholic tradition and the Italian interpretation of the principle of *laicità* facilitate wearing religious symbols in public places, included schools, hospitals and public offices, allowing a relevant degree of freedom to public servants also.[67] Sections 25 and 26 of the Charter of Values, Citizenship and Integration published in 2007 under the auspices of the Ministry of Interior declare that "on the basis of its religious and cultural tradition, Italy respects the symbols and the signs of all religions. No one can say to be offended by the signs and symbols of a religion different from his/her own. As

64. The agreements between some minority denominations and the Italian State also contain provisions excluding forms of "widespread" religious education (i.e. which takes place under cover of other subjects) and prohibiting pupils being forced to participate in religious acts or acts of worship. This has raised the problem of some practices traditionally wide-spread in State schools, for instance the blessing of the class-rooms (which is done once a year by a member of the Catholic clergy), the participation of the pupils in religious ceremonies during school hours (usually a mass celebrated according to the Catholic rites), and the meetings of the pupils with the diocesan bishop on the occasion of his pastoral visits. A decree of the Ministry of Public Education (1992) granted the collegial bodies of the schools the right to decide on such activities, provided the participation of the pupils is voluntary, but some courts have affirmed that these activities are illegal.

65. Cf. A. Ferrari, *La scuola italiana di fronte al paradigma musulmano*, in *Islam in Europa/Islam in Italia tra diritto e società*, ed. by Id., Il Mulino, Bologna 2008, 171-198.

66.Cf., on this matter, the decision of the ECHR of 20 October 2009, n. 39128/05 which condemned Italy for recognizing the dismissal of a professor of the Catholic University of Milan without verifying the concrete respect of the fair process rules by the University authorities: http://www.olir.it/documenti/index.php?documento=5133, accessed 27 January 2010.

67. This right is particularly disputed in relation to courtrooms, where judges can forbid the attendance of persons with covered head. art. 6 of the agreement with the Jewish communities explicitly allows to take an oath with covered head. Cf., in general, V. Pacillo, *Contributo allo studio del diritto di libertà religiosa nel rapporto di lavoro subordinato*, cit., 312 ff.

established by international Charters, it is convenient to educate the youth to respect the other's religious beliefs, without finding in them elements of division. In Italy there are no restrictions on people's attire, as long as it is chosen freely and it is not detrimental to human dignity." The only limit would be in relation to symbols which impose to « cover the face because this [would impede] the person's recognition and [would hinder] establishing relations with others »[68]. Consequently, it is possible to wear headscarves in State school and when photos for identity cards are taken, if the face is well visible,[69] but there is some tolerance toward some other disputed symbols as the *kirpan*.[70] Nevertheless, in recent times, the fear of Muslim immigration and a lively debate around the preservation of Italian identity has made the situation more complicated focusing the question around two paradigmatic symbols, the crucifix and the burqa.

In relation to the first, it is disputed validity and the constitutional legitimacy of the decrees (which date back to the fascist regime) that allow the exposition of the crucifix in the classrooms of State school and in courtrooms. Some people think that these rules are not more in force and that the exposition of crucifix is contradictory with the constitutional principle of *laicità*, which prescribes cultural and religious pluralism. But the legal scholars and the Courts that share this idea[71] are a minority in Italian society. The presence of the crucifix in State schools is supported by the majority as an expression of Italian *laicità*[72] giving constitutional relevance to the Catholic cultural tradition of the country.[73] According to the Administrative courts, the crucifix represents a sign of national identity and cannot be considered a threat to freedom of conscience: on the contrary, it allows all children, and especially the extra-communitarian ones, to perceive the universal values of tolerance written in the Constitution.[74] Finally, in relation to courtrooms, the Consiglio Superiore della Magistratura (the self-governing body of the Italian judges) has expelled from the judiciary roll a judge who refused to have hearings in a courtroom where a crucifix was displayed.[75] What the history of the crucifix issue seems to say is that a particular interpretation of national identity prevails on both neutrality of institutions and individual rights. These latter would also be violated by some draft laws which propose to ban the burqa from the public spaces, considering it as a symbol of Islamic fundamentalism directed against both women and national security.[76]

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68. Cf. nn. 25 and 26 of the Charter, supra n. 16.

69. Cf. art. 289 of the royal decree 635/1940 and the circulars of the Ministry of the Interior n. 4/1995 and 14/07/2000.

70. Cf. Criminal Courts of Vicenza (28 January 2009, in http://www.olir.it/documenti/ index.php?documento =4950) and Cremona (19th February 2009, in http://www.olir.it/documenti/ index.php?documento=4939), which confirm the status of "accepted minority" enjoyed by the Sikh community, which is well integrated in North Italy where Sikh work as specialised farmers.

71. Cf., for example, the ordinance of the Cassation Court 15614/2006, in http://www.olir.it/documenti/? documento=3751, accessed 27 January 2010.

72. Cf. Council of State, sentence n. 556 of 13 February 2006, in http://www.olir.it/ricerca/index.php? Form_Document=3517, accessed the 27th January 2010.

73. Beside the decisions quoted in the note above, see the opinions of the Council of State of 15 February 2006 (in http://www.olir.it/ricerca/index.php?Form_Document=3638) and 27 April 1988, n. 63 (http://www. olir.it/ricerca/index.php?Form_Document=730), accessed on 27 January 2010. Cf. also J. Pasquali Cerioli, *La laicità nella giurisprudenza amministrativa*, in http://www.statoechiese.it/index.php?option=com_content &task=view&id=244&Itemid=40 and N. Marchei, *Il simbolo religioso e il suo regime giuridico nell'ordinamento italiano*, in *Symbolon/Diabolon. Simboli, religioni, diritti nell'Europa multiculturale*, ed. by E. Dieni, A. Ferrari & V. Pacillo, il Mulino, Bologna 2005, 261-301.

74. Cf. Council of State, opinion of 15 February 2006, cit. Recently the ECHR condemned Italy, considering the display of the crucifix a violation of individual religious freedom and freedom of conscience: decision of 3 November 2009 n. 30814/06, in http://www.olir.it/documenti/index.php?documento=5146, accessed on 27 January 2010.

75. Decision of 22 January 2010, http://www.csm.it/comunicati%20stampa/CommStampa.php?i dcomuni= 161, accessed on 27 January 2010.

76. Differinf from France, the Italian draft laws ban the burqa in all public spaces: cf., for example, the proposal n. 2422 of 6 May 2009, in http://www.camera.it/_dati/leg16/lavori/schedela/ trovaschedacamera _wai.asp? Pdl=2422 and the proposal n. 2769 of 2 October 2009, in http://www.camera.it /_dati/leg16/lavori/ schedela/trovaschedacamera_wai.asp?Pdl=2769, both accessed on 27 January 2010.

KYOKO KIMPARA

Religion and the Secular State in Japan[1]

I. SOCIAL CONTEXT

The contemporary society of Japan appears to be comprised of *both* secular and religious influences. The reality is that the Japanese society reflects an ambivalent feeling towards religion shared by the majority of the Japanese people and is the key to understanding the social, political and legal context in the theme of "Religion and the Secular State."

In this setion of the report, both the current breakdown of religious affiliations in Japan and a brief historical explanation of the major religious traditions in Japan are given. According to the latest reliable statistics available concerning the religious affiliation of the Japanese, 51.2 percent are Shintoists (Shinto is traditional polytheistic religion of Japan), 43.3 percent are Buddhists, 1.0 percent are Christians, and 4.4 percent are other religions. The total number of Shintoists and Buddhists combined make up approximately two hundred million, which is almost twice as many as the total population of the country. How could that be explained?

First, as the statistics are based on a questionnaire answered by religious communities, each community may have declared a number slightly more than actual membership. Another explanation could be the possibility that each community counted the number of people who had simply participated in some religious events of the community or worshipped in some way or other, even though there is no such clear-cut sign of one's religious affiliation in Shinto and Buddhism as baptism is in Christianity. Many Japanese tend to participate in religious events of different religions, such as the New Year's celebrations at Shinto shrines or Buddhist temples, Saint Valentine's Day and Christmas Eve, romantic wedding ceremonies at Christian churches, and funeral ceremonies done in a Shintoist or Buddhist style.

According to a variety of public-opinion polls, however, approximately 30 percent or less of the Japanese believe in a religion. This gap between their willingness to participate in various religious events and their self-understanding regarding religious affiliation is due to the dual meaning of the word "religion." If the word "religion" implies something related to the ultimate solution of human problems, most Japanese would answer that they are not committed to a particular religion. However, most Japanese become involved in religion in some way or other by taking part in a variety of religious events, because it cannot be denied that a religious dimension still exists in those mores. Actually, few Japanese consider themselves to be atheistic or strictly non-religious. In this "secular" society, there are as many as 182,310 religious corporations, thus showing the religious ambivalence of the Japanese.

The following major religious traditions in Japan are worth mentioning: Shintoism, Buddhism, Confucianism, and Christianity.

Shintoism is the indigenous polytheistic religion of Japan. In particular, Shrine Shinto (Jinja Shinto) enjoyed a special status until the end of the Second World War as a "state religion" of pre-war Japan. After the Meiji Restoration, an event in 1867 which put an end to Tokugawa shogunate, it was called State Shinto (Kokka Shinto), which incorporated traditional local Shinto rites, nationalized certain rituals and holidays, and built on them to promote worship of the emperor and Yasukuni Shrine's cult of war dead. State Shinto (or

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1. This is an interim version of the article, prepared for the 18th International Congress of Comparative Law; relevant footnotes will be included in the final version.

Shrine Shinto) was officially regarded as non-religion by the government and it spiritually supported ultra-nationalism and militarism of pre-war Japan.

Buddhism found its way into Japan in the sixth century and proliferated in each era in some way or other with governmental support. The traditional authority enjoyed by Buddhism in Japan was lost in the sixteenth century when some feudal rulers burned down the Buddhist temples. But a mixture or synthesis of Shinto and Buddhism based on the identification of Buddhist figures as Shinto deities has been a prominent feature of Japanese religiosity throughout time in spite of Meiji government's Edict for Separation of Shinto and Buddhism just after the Restoration.

Confucianism, a political moral philosophy founded by Confucius in ancient China, is not regarded as an authentic religion. It did, however become highly influential, particularly in Tokugawa period, when it provided the shogunate with ideological support. It has since been highly influential among commoners since the Meiji era.

Christianity was introduced to Japan by a Jesuit Francisco Xavier in 1549. After harsh persecution during Tokugawa era and the Western major powers' arrival at the end of the shogunate, Japan was finally exposed to the West and religious dissemination came to be tolerated. Today, most major Christian churches or sects are found in the country. The total number of Christian followers, however, has never surpassed 1 percent of total population of Japan. The Roman Catholic Church has the largest number, but it still has about 450,000 people, less than 0.5 percent of the total population. Japan even has members who are Jehovah's Witnesses. Although superficially celebrated, Christian ceremonies and rituals include Christmas, Saint Valentine's Day, and Halloween. There are very few Muslims, Judaists, Hindus and Sikhs in Japan.

II. THEORETICAL AND SCHOLARLY CONTEXT

The present Constitution, promulgated on 3 November 1946 took effect on 3 May 1947 and replaced the first Constitution (Meiji Constitution), which was enacted in 1889. Critical reflection of the state Shinto system, accompanied by oppression of other religions under the Meiji Constitution, led to the guarantee of human rights embodied in an extensive list of fundamental rights and freedoms of the present Constitution. The list includes a provision regarding religion (Article 20), which is bolstered by Article 89 concerning prohibition of financial support for religion. The two articles provide for religious freedom and the principle of church-state separation in detail.

There are competing views among politicians, academics and activists as to how religion and the state should relate to each other, similar to the significant controversies regarding the Religion Clauses of the First Amendment to the U.S. Constitution. Two major views exist in Japan.

The conservative view, held by right-wing organizations, conservative politicians in the Liberal Democratic Party (now out of power), the Self Defense Force leadership, the Associations of War-Bereaved Families, and the Association of Shinto Shrines, have argued against strict separation, insisting on state support for Yasukuni Shrine and official visits to the shrine by public figures. The other more liberal view held by Christians, communists, socialists, and a majority of constitutional scholars argue that a strict separation of the state from religion is mandated by the two articles and that this is essential as a barrier against the revival of pre-war militarism.

The latter view can be said to be shared more widely, but academics differ on how a line of separation should be drawn in each of the concrete problem areas.

III. CONSTITUTIONAL CONTEXT

One of the important aims of the Meiji Restoration was to separate Shinto from Buddhism. The two religions had been mixed for a long time in Japanese history. The Edict for Separation of Shinto and Buddhism in 1868 by the new Meiji government officially put an end to this co-mingling. This separation of Shinto from Buddhism made it possible for the government to treat the former in a special way, both politically and

constitutionally: Shrine Shinto, or State Shinto, was to be treated as a state religion by way of the tricky logic of considering Shinto shrines and State Shinto to be "non-religious." Accordingly, Shinto priests were considered state officials, and Shinto shrines came to be supported financially by the government.

The Meiji Constitution Article 28 guaranteed religious freedom as "the subjects shall have freedom of religion to the extent that it does not interfere with the public welfare and their liability as a subject is not breached," but the wording invited an interpretation that the freedom could be restricted by a mere order. Also, the freedom of religion was only guaranteed to the extent that it could coexist with the special status of Shrine Shinto or State Shinto as a state religion. Therefore, other religions were treated coldly or even oppressed (e.g., Christianity and Ohmoto). In sum, the full realization of religious freedom was fundamentally obstructed under this regime. With the rise of ultranationalism, the "state religion" status and dogma of Shrine Shinto became a spiritual support for the nationalism and militarism of prewar Japan.

After the Second World War, in December 1945, the Shinto Directive (the Directive on the Abolition of Governmental Sponsorship, Support, Perpetuation, Control and Dissemination of State Shinto) issued by SCAP (Supreme Commander for the Allied Powers in Japan) clearly repudiated special character and constitutional status enjoyed by State Shinto. Together with the renunciation of divinity made by the late Shouwa Emperor Hirohito on New Year's Day in 1946, it brought about a total demise of the pre-war regime and demanded a new regime guaranteeing religious freedom and state separation from religion. This historical development was a backdrop of the detailed provisions concerning religion in the present Constitution. The present Constitution has two provisions concerning religion as mentioned before, namely Articles 20 and 89:

> Article 20:
> Sec.1 Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.
> Sec.2 No person shall be compelled to take part in any religious act, celebration, rite or practice.
> Sec.3 The State and its organs shall refrain from religious education or any other religious activity.
> Article 89:
> No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.

Thus, religious freedom is explicitly protected and separation of religion and state is distinctly mentioned. This scheme is modeled after the American constitutional principle found in the First Amendment, namely, strict separation of the state and religion.

The principle of state separation from religion provided for by Articles 20 and 89 is a principle of state neutrality toward religion. This understanding, commonly shared by constitutional academics, was professed by the Supreme Court of Japan as well in Tsu City Ground-Purification Ceremony Case in 1977. What actually matters is how both "non-involvement" and "impartiality," two competing elements of "(religious) neutrality" could and should be respected as it would determine the outcome of each concrete case determining which of the two elements is given more serious consideration.

Whatever the position on this question may be, it is certain that there can be no preferred or privileged religion, or group of religions, under the current Constitution. There are also specific provisions concerning the principle of equality when dealing with the individual's religion, namely, Article 14 Section 1, which provides that "all of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin," and Article 44, which provides that "the qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income."

IV. Legal Context

The Religious Corporation Law is a piece of legislation that deals with religion. The Religious Corporation Law, enacted in 1951 and significantly revised in 1995, aims to confer juristic personality on a religious organization in order to facilitate its ownership and maintenance of properties such as a place of worship, and its operation and business for achieving its goal (Article 1 Section 1). Section 2 of the Article provides that religious freedom guaranteed by the Constitution should be respected in all the administrative settings and that any provision in the Religious Corporation Law should not be interpreted in such a way that the constitutionally guaranteed religious freedom of an individual, group or organization may be restricted.

The revision in 1995 was controversial in that the administrative control of religious corporations by the Ministry of Education (and prefectural governors) was tightened through the requirement of an annual submission of administrative/financial documents and through the requirement to report (on a religious corporation's business) and answer (to the public authority's inquiry when requesting a dissolution order by a court seems necessary) (Article 81). This scheme of dissolving a delinquent religious corporation, provided for by Article 81 of Religious Corporation Law, was upheld under Article 20, Section 1 of the Constitution guaranteeing freedom of religion by the Supreme Court in the Oumu Shinrikyou Dissolution Case in 1996.

There are also specific provisions on religion in several laws. Section 1 of Article 897 of the Civil Code concerning Succession provides that "notwithstanding the provisions of the preceding Article, the ownership of genealogical records, of utensils of religious rites, and of tombs and burial grounds passes to the person who, according to custom, is to preside over the rites for the ancestors. If, however, the *de cujus* has designated a person to preside over the rites for the ancestors, such person shall succeed to that ownership." CorporateTax Law, Local Tax Law and Income Tax Law provides for tax exemption of religious corporations. The Fundamental Law of Education enacted in 2006 provides that benevolence towards religion, religious cultivation and social importance of religion is to be respected in education and that no religious activities including denominational religious education shall be permitted at public schools (Article 15). It also prohibits discrimination based on creed in education (Article 4 Section 1).

Similar provisions concerning the principle of equality when dealing with the individual's religion or creed are found in National Public Service Act Article 27 ("In the application of this Act, all citizens shall be accorded equal treatment and shall not be discriminated against by reason of race, religious faith, sex, social status, family origin, or political opinions or affiliation except as provided for in item 5 of Article 38."), Labor Standards Act Article 3 ("An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker."), and Labor Union Act Article 5 Section 2 Item 4 ("No one shall be disqualified from union membership in any case on the basis of race, religion, gender, family origin or status.). The Criminal Law makes it a crime to disrespect a place of worship and to disturb a religious ritual (Article 188).

As to specific case law on religion, there is a substantial body of case law concerning constitutional guarantees of religious freedom and state separation from religion because the system of constitutional review in the United States has been introduced (Article 81 of the present Constitution). In principle, constitutionally guaranteed freedoms and rights cannot be restricted by legislation.

The specific body in the State structure that deals with religious affairs and religious communities is the Ministry of Education, Culture, Sports, Science and Technology (the Ministry of Education until 2001), and especially its extra-ministerial bureau, the Agency for Cultural Affairs. These two bodies are responsible for religious administration. The Ministry includes the Religious Corporations Council, an independent expert advisory council, whose establishment is provided for by Article 71 of the Religious Corporation Law. The function and power of the Council is confined to enforcement of relevant provisions such as dealing with petitions for redress of a grievance. Religious Corporation

Law (Article 71 Section 4) prohibits the Council from intervening in internal religious affairs of a religious corporation. This requirement naturally follows from the constitutional principle of state separation from religion, since the Council is a part of the State government.

V. The State and Religious Autonomy

The public authorities may not restrict the autonomy of religious communities, because Article 20 Section 1 of the Constitution guarantees freedom of religion, which includes freedom of religious association. (Freedom of association in general is specifically guaranteed by Article 21 Section 1 as well). The autonomy of religious communities follows from freedom of religious association.

Thus, the public authorities are prohibited from intervening in internal affairs of religious communities (e.g., in structuring, administering and financing the religious community, in determining religious doctrine, in selection of religious personnel, in disciplining members of the community). The Religious Corporation Law Article 85 specifically provides that any provision of the law shall not be interpreted to empower the public authorities (including courts) to intervene in the internal affairs of religious communities, such as determination of religious doctrine, discipline or custom and selection of religious personnel. Article 84 of the law also requires the public authorities to avoid violating religious freedom of such corporations when they enact or amend a law affecting such corporations' finance (e.g., tax law), or when they lawfully inspect such corporations.

There is a substantial body of case law concerning secular judicial intervention in internal disputes of religious communities. It has been established judicially that a suit to obtain a declaratory judgment regarding a purely religious status within a religious community is to be dismissed without prejudice, and that an ostensibly legal dispute, the resolution of which is virtually dependent on a determination of underlying religious doctrinal matter, is not a legal controversy and dismissed without prejudice.

As for the secular law protecting or restricting the autonomy of religious communities to govern themselves and act freely in the secular sphere, see Part IV, above.

VI. Religion and the Autonomy of the State

Article 20, Section 1, in its latter part, provides that no religious organization may receive any privileges from the state, nor exercise any political authority. A good example of the proscribed privilege is the special status and preferential treatment enjoyed by State Shinto (or Shrine Shinto) until the end of the World War II. Under the present Constitution, however, no particular religion can be supported by the government nor be given any power to control other religious communities, as any preferential treatment of a particular religion of those kinds is considered a form of the proscribed privilege.

"Political authority" has been commonly understood to mean "sovereign power" currently monopolized by the state or local public entities (i.e., legislative power, taxing power, judicial power, power to appoint and to dismiss public officials). Political activity itself is not considered "political authority."

In this context, the Soka Gakkai, a religious group of the followers of certain Buddhist sect, is worth mentioning. The Soka Gakkai became an influential religious group after the war, getting many members and engaging in political activity with the intention of converting the Japanese to their particular Buddhist faith. The Soka Gakkai organized a political party named Komei-to (Clean Government Party) in 1964. The party had smoothly developed in the political arena so much so that it transformed itself from the opposition to the government together with the Jimin-to (Liberal Democratic Party) in the 2000s.

The Soka Gakkai has been a genuine "new religion" since 1991, when it was excommunicated by the authority of the Buddhist sect. The Soka Gakkai International, an international arm of the Soka Gakkai, has been internationally developing as well.

VII. Legal Regulation of Religion as a Social Phenomenon

As to the state law regulating religion specifically, see Part IV above. The religious almanac, edited by the Agency for Cultural Affairs, contains information about religious affiliation of individuals. This is, however, a result of voluntary replies submitted by religious communities. Religious freedom guaranteed by Article 20, Section 1 prohibits the state from forcing people to confess their religious affiliation.

Regarding the exemption from generally applicable laws or requirements based on religious conscientious objection, there are some lower court decisions worth noticing: the Bokkai Katsudou Case, concerning a clash between criminal law and the religious activity of a priest, Tokyo School Attendance Case, and Kobe Technical College Case, both concerning a generally applicable burden on religious activity of believers.

The new issue of whether religious exemption from public duty to serve as a lay adjudicator (named "Saiban-in") should be given is also noteworthy. This system of guaranteeing lay people's participation as lay adjudicators in certain serious criminal cases came into operation in May 2009. Catholic Bishop's Conference of Japan announced its official opinion the following month that the clergy should decline to serve as Saiban-in while the laity should be free to decide whether or not they would assume the responsibility as Saiban-in. As Japan still maintains capital punishment, some sects of Buddhism which are critical of death penalty are also concerned about the possibility of their followers serving as Saiban-in in a case where a sentence of capital punishment would be likely.

VIII. State Financial Support for Religion

State separation from religion is provided in detail in the present Constitution in Article 20, Section 1 ("No religious organization shall receive any privilege from the State.") and Article 89 proscribing public financial support of religious institutions or associations. The latter proscription is a part of the prohibition of granting a "privilege" provided in the former. In all the cases regarding the separation principle, the "purpose-effect test," a Japanese version of the *Lemon* test in the U.S., has been applied. The following is a list of important concrete issues in this field:

Public payment to a religious organization (e.g., Ehime Shrine Donation Case).

Public benefit to accommodate an individual's religious activity (e.g., Minoo War Memorial Case, and Sorachibuto Shrine Case).

Indirect public aid to religion through tax exemption.

Public subsidies for maintenance of religious structures which have historical or cultural value.

Public aid to private religious schools.

The Sorachibuto Shrine Case is important in that the purpose-effect test was not articulately applied there.

IX. Civil Legal Effects of Religious Acts

So long as there is no violation of secular law, religious acts are respected as they are. With regard to secular judicial intervention in internal religious dispute, see Part V.

X. Religious Education of the Youth

Religious communities are free to create private schools with curricula and diplomas recognized by secular law. Actually, some of the most competitive prestigious schools in Japan are both private and religious. Due to the essential requirement of the separation principle articulated in the Constitution Article 20, Section 3 ("The State and its organs shall refrain from religious education or any other religious activity.") and by the Fundamental Law of Education Article 15, Section 2 (forbidding religious education for a particular religion), the public school's curricula cannot include any denominational religious instruction on a specific subject. They can, however, include non-

denominational education about religions or beliefs as provided for by Article 15, Section 1 of the Law.

Private schools are free to give religious instruction even in a denominational way, as they are not the state or its organs.

XI. Religious Symbols in Public Places

Heated controversies concerning religious symbols in public places (e.g., the headscarf issue in France) have not yet occurred in Japan. In the context of education, however, a pupil or student of a school which officially prescribes a school uniform and a teacher wearing distinctly religious symbols may cause legal controversies. Most constitutional academics seem to agree that accommodating their religious need to wear religious symbols at school would not be held unconstitutional under the presumably established purpose-effect test concerning the separation principle articulated by Article 20 of the Constitution.

XII. Freedom of Expression and Offenses against Religion

There is no particular protection of religion in the public arena against offensive expressions such as the criminalization of a blasphemous libel. There is, however, a related provision in the Criminal Law Article 188 concerning the crime of disrespecting a place of worship or of disturbing a religious activity (see Part IV).

ROMAN PODOPRIGORA

Kazakhstan: National Report for the IACL Congress

I. SOCIAL CONTEXT

Despite the fact that Kazakhstan is considered a country of the Muslim world, its religious composition is rather complicated. There is no statistical database to help understand the real situation regarding the religious affiliation of Kazakhstani citizens.

When estimates of the numbers of believers are made, very often the national affiliation of citizens is taken to indicate their religion. Thus all Kazakhs, Tatars, Uzbeks, Uighurs, and other Asian nationalities who make up the majority of the population of Kazakhstan are often automatically considered to be Muslims. The same is true with the Slavic population: all Russians, Ukrainians, and Belarusians are often automatically considered to be members of the Russian Orthodox Church. However, most of these people do not in fact regard themselves as orthodox Muslims or members of the Russian Orthodox Church; they may take part in various religious ceremonies, but they do not go to the mosque or church regularly.[1] The general level of religiosity in Kazakhstan is rather low, to a large extent because of secularization in the Soviet period.

As for religious organizations, it is important to mention that during the Soviet period, Kazakhstan was remarkable for the great number of Protestant organizations and their influence.[2] Today, despite the fact that it is still hard to speak of the dominant role of any religion, two religious organizations are now in fact coming to the fore: Islam and the Russian Orthodox Church. Yet Protestant organizations are still powerful: although their membership and influence have diminished because of emigration, primarily of ethnic Germans,[3] a large number of Protestant missionaries, mainly from the United States and South Korea, have been active in Kazakhstan since the fall of communism.

According to data from 2008, more than 4000 registered religious associations in the country include 2337 Islamic, 281 Russian Orthodox, 82 Roman Catholic, and 1180 Protestant organizations (Baptists, Seventh-day Adventists, Lutherans, Pentecostal, and others).[4]

II. THEORETICAL AND SCHOLARLY CONTEXT

Social science research in the religious studies area could be described as lacking many serious studies regarding religious issues and relations between state and religion. One explanation is inattention to religious factors in public life for a long period of time. This inattention was displayed in political, social, and judicial areas. Most studies twenty

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1. Sociological research in Kazakhstan shows that 11.9 percent of the population consider themselves as believers and 41 percent identify themselves as believers who do not participate in religious life. See *Kazakhstanskaya pravda*, 12 September 2006.

2. In 1989 there were 671 religious associations in Kazakhstan, of which 168 were Evangelical Christian-Baptist, 171 Lutheran, 62 Russian Orthodox and only 46 Islamic. See Ivanov V. and Trofimov Ya., *Religii v Kazakhstane*, Vysshaya shkola prava 'Adilet' (Almaty, Kazakhstan, 1999), 4. Most of the Protestants in Kazakhstan during the Soviet period were Germans and Ukrainians. More than 70 percent of the religious associations active in Kazakhstan in 1990 had total or partial German membership. See Artem'yev A., *Ateizm, religiya, lichnost'*, (Almaty, Kazakhstan, 1990), 50.

3. According to the official data, 80 percent of the ethnic Germans in Kazakhstan have emigrated to Germany. Many members of all other ethnic groups deported to Kazakhstan in the 1930s are also leaving. See *Panorama* (newspaper), 11 November 2000.

4. *Kazakhstanskaya pravda*, 18 April 2008.

years ago were devoted to explanations of the negative features of religion or the disappearance of religion and how the state can help this disappearance.

Today the spectrum of opinion on church-state relations is wider. The most popular point of view advocates the separation of state and church. The general opinion is that the state must be secular. The clericalization of state and social life is considered as danger to the existing political and legal system.

At the same time, some believe that religion must be under strict state control (so called, state-controlled religion). In this approach, state interests such as national security always dominate over interests of religious organizations and believers.

Another popular but less prominent opinion presumes cooperation between state and church and the necessity of the state to respect church autonomy and vice versa.

The rarest point of view advocates more active introduction of religious elements into state and social life. First at all, it is connected with the Islamic influence. According to this point of view, the state legal system must adopt some elements of religious legal systems, including Shari'a courts in the court system. This is one of the reasons why the state keeps control of the activities of religious organizations and tries to prevent the dissemination of religious factors.

III. Constitutional Context

Like any other country, Kazakhstan has a distinctive history of relations between state and religion. The two main peculiarities of this history are the comparatively late formation of the state as political entity and the lack of developed religious communities in the geographical confines of modern Kazakhstan.

Kazakhstan does not have a long political history despite the fact that various political-state entities existed on the modern territory of the country: *Turkic Kaganat, Kipchak Khanat, Mogulistan, Ak-Horde* and a few others. One of the famous formations was called *Kazakh Khanate* (15th through the 18th centuries). Nowadays this khanate is considered as the beginning of Kazakh statehood. The nomadic style of life created peculiarities in the organization of political power in the khanate: the concentration of power in the khan's hands, especially in land, military, and judicial issues; seasonal mutability of the impact of the khan's power; the domination of customary law; and an absence of developed institutions of political power such as the tax system, regular army, officialdom, and compulsory bodies.

A nomadic style of life also explains the instability of religious organizations. This lifestyle was incompatible with the establishment of centralized religious institutions. Tribes, dynasties, and ethnic groups typically confessed various pagan religions, but at different periods of history, Buddhism and Christianity achieved temporary influence on political issues.

Largely because of its geographical location, Kazakhstan is often considered to be a Muslim country, or at least a country under strong Muslim influence. This is, however, inaccurate. Although Kazakhstan does indeed lie in the area of traditional Islamic influence, it is located far from major Muslim centers. Historically, Islam appeared and spread in the territory of Kazakhstan much later than in other Asian countries. In general, the islamization of the peoples of Central Asia was completed by the end of the eighth century, but the establishment of Islam as the main religion in Kazakhstan, especially in its northern regions, was not completed until the nineteenth century. The slow pace of this process can be explained by Kazakhstan's vast, thinly populated territory and the prevalent nomadic way of life of its population, as well as by the above-mentioned remoteness from the Muslim centers.

One of the historical events which had a strong influence on the political development of Kazakhstan was the entry of Kazakhstan into the Russian Empire in eighteenth century. The joining of the Kazakh lands to Russia was a long and complicated process. Finally, in the beginning of twentieth century, all Kazakh lands were under the state-political protectorate of Russia. Russian authorities put their own system of state administration and legislation on Kazakhstan territory. In the first two decades of the

twentieth century, the territory of Kazakhstan received a large number of Russians and Ukrainians rendered landless by tsarist agricultural policy.

State policy toward religious communities during this time period was based on the general imperial administration, with full control over religious activity. All religious organizations were under such control: the predominant religion (i.e., Russian Orthodox Church), tolerated religions (i.e., Islamic, Lutherans), and especially the persecuted religions (i.e., Baptists, Old Believers). The tsarist government appointed religious officials and sometimes paid their salaries, decided issues concerning the creation of new parishes and other religious units, and prohibited certain religious activity. It should be mentioned that the Russian Orthodox Church was the official state religion at that time.

The October Revolution (1917) signified a new stage in political development and state-church relations. In 1920, under Soviet decree, Kazakhstan for the first time received its own state system. The country was included as an autonomous national entity into the Russian Federation. In 1926, the constitution of Kazakh Autonomous Soviet Socialistic Republic was adopted. In 1936, the Kazakh Autonomy was reorganized into Kazakh Soviet Socialist Republic as one of the subjects of the USSR. In 1937, the constitution of the new Republic entered into force. All these constitutions (and the last Soviet Constitution of Kazakhstan, which was adopted in 1978) had formal democratic provisions, including those touching religious freedom, but in practice many of them were not realized. The communist party leadership and rules carried more weight than any other political-legal institution, including the constitutions. The communist ideology ran through all state-legal systems at the time.

This time period covers dissimilar periods of state-church relations: from relative religious freedom at the beginning and ending of the Soviet period, to persecution and repressions in between. Like any other republic of the former USSR, Kazakhstan was proclaimed an atheistic country where religion was considered a temporary social phenomenon. Religious doctrines were incompatible with communist ideology and the state actively assisted in the disappearance of religion.

The realization of freedom of conscience declared in Soviet constitutions encountered many obstacles in real life. The believers and their associations were under total government control. There were a large number of religious activity limitations, legal, institutional, property, and personal in, for example, the areas of labor relations, education, and charitable activity. For a long time, religious organizations had no status as legal entities. Furthermore, each action taken by religious leaders had to be approved by state bodies.

In such situations, there was no need to develop religious legislation. The Soviet regulatory acts just confirmed the oppressed status of religious organizations. These acts were administrative rather than legislative.

Despite these obstacles, religious organizations have acquired stable institutional forms. The Soviet regime did not allow the existence of unknown, secret, or informal societies; all unregistered religious groups were illegal and their activity was punished. So, to minimize the chance of persecution, religious groups had to adopt certain forms of social association with leadership, location, and other institutional features. It should be noted, however, that the number of unregistered groups was several times greater than registered groups until the early 1980s.

Thus, three important features of the religious character of post-Soviet Kazakhstan are as follows: First, religion has played an insignificant role in the country during various periods of its history, and this has resulted in the underdevelopment of religious institutions and of state-church relationships. Second, there is no one dominant religion, due to the fact that the country has been a place of migration and deportation of many peoples with a variety of different religious faiths. Third, the intensive struggle against religion during the Soviet period has produced a predominantly secularized society.

The modern stage of state-church relations began in 1990s. On 16 December 1991, Kazakhstan adopted constitutional law “On State Independence.” In this time of the collapse of the Soviet Union and the erosion of communist ideology, the new independent

country needed a new organization of state power and legal system. The old party-state system could not meet the requirements of modern political and legal developments. The first Constitution of independent Kazakhstan, adopted in 1993, established the new political and legal regime. For the first time in constitutional history, provisions about separation of powers, individual priorities in state-individual relations, and equality of state and private property appeared.

The Constitution of 1993 existed only two years. In 1995, a national referendum adopted a new constitution. The main change expressed was the strengthening of the presidential power and some democratic institutions were impaired. People justified this change by pointing to the problems of the reform period and the necessity of a strong power for a smooth transition from the old to new society.

A. Current Constitutional Provisions and Principles Governing the Relations between State and Religion: Establishing a Model of State-Church Relations

The acting Constitution mentions issues connected with religious in a few articles:

- In Article 1, point 1, the Republic of Kazakhstan proclaims itself a democratic, secular, legal, and social state whose highest values are an individual, his life, rights and freedoms.
- Article 5, point 3 prohibits the formation and functioning of public associations pursuing goals or actions directed toward inciting social, racial, national, *religious*, class, and tribal enmity.
- In accordance with Article 5, point 5, activities of foreign religious associations within the territory of the Republic, as well as appointment by foreign religious centers of heads of religious associations within the Republic, shall be carried out in coordination with the respective state institutions of the Republic.
- Article 14, point 2 states that no one shall be subject to any discrimination for reasons of origin, social or property status, occupation, sex, race, nationality, language, attitude towards *religion*, convictions, place of residence, or any other circumstances.
- Article 19, point 1 establishes that everyone shall have the right to determine and indicate or not indicate his national, party, and *religious* affiliation.
- Under Article 20, point 3, propaganda of or agitation for social, racial, national, *religious*, class, or clannish superiority as well as the cult of cruelty and violence shall not be allowed.
- Article 22 is entirely devoted to religious issues. Point 1 states that everyone shall have the right to freedom of conscience. Under point 2, the right to freedom of conscience must not specify or limit universal human and civil rights and responsibilities before the state. It should be mentioned that freedom of conscience is traditionally associated with freedom of religion or belief.

Despite the fact that the Constitution does not mention any model or principles of state-church relations (like an official state church or religion, state neutrality on religious issues, or state cooperation with or separation from religion), the model of state-religion relations in the country can be characterized as a variation of a separation model. The involvement of religious organizations in state affairs is strictly prohibited. But the state considers its intervention into the affairs of religious organizations as possible and expedient.

The model is also notable for strict government control and the necessity to receive state permission for different types of religious activity. There is no a preferred or privileged religion or group of religions in accordance with the Constitution or other legislation, despite the fact of a more privileged position of Muslim organizations and Russian Orthodox organizations in practice. There is also no reference to religion as a foundation or source of state law.

IV. Legal Context

A. Specific Legislation and Case Law on Religion and Religious Freedoms: A General Overview of the Major Features of the Legal Setting

The principles of interrelations between religions and the state, and the religious rights and freedoms of citizens, are fully formulated in the 1992 Law on Religious Freedom and Religious Associations (hereinafter "Law 1992").[5] All religious associations are stated to be equal before the law. No religion enjoys any support or protection on the part of the state. Religious associations are separate from the state and its system of education. The state does not interfere in the activity of religious associations. The functioning of non-registered associations is not allowed. The Law has provisions regarding the allowable types of religious associations (local communities, religious centers, spiritual educational institutions, and religious monasteries). It also deals with registration, liquidation, and suspension of the activities of religious associations. The Law touches issues of missionary activity as well as property, labor issues, and the competence of different state bodies in dealing with religious issues.

Believers and their associations are granted certain rights and freedoms under this law:

1. Citizens of the Republic of Kazakhstan and other countries, as well as individuals without citizenship, have the right to practice any religion of their choice, both on their own and together with others, or to practice no religion at all. Any kind of compulsion is prohibited, whether regarding choice of religious confession, participation in religious worship, rites and ceremonies, or obtaining religious education.

2. Citizens can satisfy their religious requirements both on their own or together with others, forming associations. Unlike a foreign religious association, a purely *domestic* religious association is free to choose its own leaders and appoint its own clergy.

3. Citizens and their associations are free to arrange religious ceremonies and other religious events on their own premises and on the premises of other organizations such as prisons and hospitals, at the discretion of the administration of those facilities. They may also rent buildings and premises; in such cases special permission from state officials is not necessary.

4. Citizens can raise and educate their children in accordance with their religious beliefs, both in religious educational institutions and at home.

5. Citizens are free to spread their doctrines in a variety of ways. There are some provisions in the law regarding the right of religious associations to use, publish, and disseminate religious literature and other religious items. There is no special provision regarding preaching.

6. Believers and their associations also have the right to form associations for disseminating religious literature and for cultural, educational, and charitable activities.

Despite the fact that all these freedoms are specified in legislation, however, they are very often not realized in practice. A mismatch between legislation and practice is quite common in Kazakhstan not only in the sphere of religious freedom but also in other spheres as well. This is partly due to the fact that society lacks experience and traditions of coexistence under conditions whereby both the citizen and the state have equal rights and duties.

There are no other laws which directly touch religious freedom. Some direct religious issues are solved under the administrative level (registration of missionaries, religious expertise, status of government agency on religious affairs). At the same time, religious association activity is regulated by other acts: Civil, Tax, Customs, Labor Code, etc.

Taking into account the paucity of constitutional language regarding religious issues, it is very difficult to evaluate the correspondence of the Law 1992 with applicable

5. *Vedomosti Verkhovnogo Soveta Respubliki Kazakhstan*, (January 15, 1992), no. 4.

constitutional provisions. Indirectly, some provisions of the aforementioned law violate constitutional rules. For instance, the statutory requirement about obligatory registration of religious associations and missionaries can be considered a contradiction with Article 22 of the Constitution, which guarantees everyone the right to freedom of conscience and does not connect this right with the necessity of obligatory registration. Moreover, in accordance with Article 39, point 1, of the Constitution, rights and freedoms of an individual and citizen may be limited only by laws and only to the extent necessary for protection of the constitutional system and defense of the public order, human rights, freedoms, health, and morality of the population. The unregistered religious activity cannot be considered a threat to the constitutional system, public order, human rights and freedoms, etc. Article 39, point 3, lists the right to freedom of conscience among those rights which shall not be restricted in any case.

B. Specific Bodies in the State Structure That Deal with Religious Affairs and Religious Communities: The Actual Functioning of State Agencies in Terms of the Protection of Freedom of Religion or Belief of Individuals and Communities

A Government Resolution dated 30 December 2005 establishes a special administrative agency: The Committee on Religious Affairs. The Committee is structurally part of the Ministry of Justice. On the one hand, the Committee was created for protecting citizens' rights to religious freedom, strengthening of common understanding, fostering tolerance among different religious associations, and encouraging religious associations' cooperation with the state. One the other hand, the Committee is a mechanism of governmental control similar to such state agencies as the Tax or Customs Committees. The four years of existence of this body demonstrates the domination of its control functions over the functions of protecting religious freedom. In practice, the Committee on Religious Affairs always protects state interests even when such interests contradict with constitutional or other legislative provisions.

There is one more body which deals with religious issues. This is the Council on Relations with Religious Organizations under the Government of the Republic of Kazakhstan. The Council consists of government officials, representatives of religious organizations (presently consisting of representatives of Islam and the Russian Orthodox Church), and non-governmental organizations and scholars.

The Council has the status of a consultative-advisory body those aims are preparation of proposals and recommendations regarding state policy in the field of religious freedom, the strengthening of spiritual consent in society, and the harmonization of inter-religious relations. In practice, this body approves different state steps concerning religious or state-religious issues. Similar subordinate councils are created at the local level.

C. Bilateral Formal Relations between State and Religious Communities: Religious Communities or Churches and the State as Interlocutors at the Same Level

The bilateral formal relations between the state and religious communities are not inherent in the Kazakhstani legal system. One of the reasons that is religious communities are not recognized as interlocutors at the same level that the state. The state is the dominant structure in public life. A single exception involves the Catholic Church. On September 24, 1998, the Republic of Kazakhstan and the Holy See signed an Agreement on Interrelations.

This Agreement has the status of an international treaty and describes some benefits for the Catholic Church organization and activity in Kazakhstan. As for other religious associations, there is no general agreement or even notice in legislation about the possibility for such an agreement. At the same time, state bodies and religious associations have concluded several agreements concerning specific social issues (health care, service in prisons, etc.).

V. THE STATE AND RELIGIOUS AUTONOMY

Article 4 of Law 1992 states that the state shall not intervene in a religious association's activity if the activity corresponds to law. At the same time, however, the Constitution of Kazakhstan allows such intervention. In accordance with Article 5, point 5, of the Constitution, activities of foreign religious associations on the territory of the Republic as well as the appointment of heads of religious associations in the Republic by foreign religious centers shall be carried out in coordination with the respective state institutions of the Republic. Taking into account the fact that many Kazakhstani religious organizations act under the umbrella of foreign centers, this constitutional provision can be applied to a large number of religious units.

One of the laws regulating religious associations' activity is the Law on Non-Profit Organizations (16 January 2001). This law establishes a general system of internal organization of any non-profit group, including religious groups. So the peculiarities of the managing bodies of religious organizations are not recognized under the aforementioned law. However, the state requires all religious organization charter provisions to be in accordance with the provisions of the law "On Non-profit Organizations." The explanations offered by religious associations about peculiarities founded on religious rules have not been accepted as justifications for deviating from the law governing internal structure.

The secular law does not specially protect or restrict the autonomy of religious communities to govern themselves and act freely in the secular sphere. As for religious personnel, the situation depends on type of religious association. Despite a rule that the state does not participate in the appointment of leaders of domestic religious associations, state practice has been different. The head of the Spiritual Muslim Administration (the main official Muslim organization in Kazakhstan) openly stated that before appointment to the position, he was invited to meet with government officials for discussions.[6]

The state uses different legal or political instruments, rather than individual choices of citizens, to control religious life. Administrative tools are the most popular legal instruments, and most notable among administrative tools is registration. Despite the requirement of obligatory registration, the state tries to prevent the registration of newly established religious associations by using contradictions in legislation. The same situation is seen with the registration of missionaries, the re-registration of religious associations, or the submission of amendments to a religious charter. The technical legal procedures turn into complicated administrative processes with a huge degree of discretion. From time to time the state applies different legislative acts in order to have an influence on religious activity. Examples include land legislation (when religious association must have official state confirmation for using the land plot exclusively for religious purposes) and construction and zoning legislation (when the state refuses to permit the use of certain plots of land for construction of religious buildings). The Code on Administrative Offences allows the state to terminate or prohibit religious association activity on the ground of insignificant violations.

As for political instruments, the state tries to show sympathy to traditional religious associations. The leaders of the state visit mosques and Russian Orthodox churches during significant religious holidays. Religious leaders reciprocate these overtures: As a rule, representatives of Islam, Orthodoxy, Catholicism, and Judaism attend big social or political events. They also often serve as members of different mixed (state-private) bodies. The state authorities help Muslim organizations in the construction new buildings and the organization of pilgrimages.

Peaceful coexistence and respect among religious communities is one of the hallmarks of modern Kazakhstan. The state tries to propagandize such coexistence and respect on a political, legal, cultural level. For example, the state sponsors Congresses of World Religions Leaders which are conducted every three years. On a cultural level, the

6. *Izvestia-Kazakhstan*, 28 July 2006.

state tries to organize various other events that encourage participation by different religious associations.

Peaceful coexistence and respect among religious communities also finds its basis in law. For instance, Article 4 of Law 1992 declares that the state shall provide for the fostering of relations of mutual tolerance and respect among citizens who practice religion and who do not practice religion, as well as among different religious associations.

VI. Religion and the Autonomy of the State

No religious communities in Kazakhstan have a specific role in the secular governance of the country. There is a legislative prohibition against religious associations participating in elections or in the activity of political parties. The creation of political parties on a religious basis is also not permitted. The religious leaders can participate in political life on behalf of themselves equally with all other citizens, but there are no examples of such participation.

The state tries to limit any political activity of religious associations, and most religious associations keep their distance from political life. No religion is given any power to control other religious communities under the state law. Some legislative attempts to give such powers to the Spiritual Muslim Administration (such as the power to make recommendations regarding the registration of new Muslim religious organizations or the granting of permission for mosque construction) were recognized as unconstitutional.[7]

VII. Legal Regulation of Religion as a Social Phenomenon

The Kazakhstani legal system recognizes religious associations as a type of non-profit organization. But this does not mean that these associations have the same status as other non-profit associations. In fact, this means that religious associations are subject to both general and special regulations. One example is the existence of Law 1992, the aim of which is to regulate the activity of believers and religious associations. Other evidences are expressed in special procedures for registration (different from regular procedures of non-profit entities), special rules regarding religious rites and ceremonies, regulations concerning issues of religious literature, the assignment to religious associations as a special subject of liability, and the exemption of property for religious purposes from creditors' claims. At the same time, religions are also subject to the same regulations as secular non-profit organizations.

In comparison with other social phenomena, this religious-specific regulation can be more restrictive or more liberal depending on the subject of regulation. For instance, in the case of registration as a legal entity, the regulation is more restrictive in comparison with other social associations. In the case of tax law, the regulation is more liberal, providing extra exemptions for religious organizations.

The state does not maintain any record of the religious affiliation of individuals, perhaps because one's religious affiliation has no legal consequences under state law. Moreover, in accordance with Article 19, point 1, of the Constitution, everyone shall have the right to determine and indicate or not to indicate his national, party, and *religious* affiliation. The latest population census (2009) included a voluntary question about religious affiliation.

Under Article 22, point 2, of the Constitution, the right of freedom of conscience must not limit universal human and civil rights and responsibilities before the state. Article 3 of Law 1992 stipulates that no one has the right to refuse to fulfill their civil duties out of their own religious convictions, with the exception of cases envisioned by the law. Yet there currently is no legislation devoted to substituting performance of one duty for another. The problem of alternatives to military service, in the case of Jehovah's

7. See Decision of Constitutional Council of the Republic of Kazakhstan, 4 April 2002; *Kazakhstanskaya pravda*, 16 April 2002.

Witnesses, for example, has been decided on informal basis: there is no draft for members of such religious associations.

VIII. State Financial Support for Religion

In accordance with Article 4 of Law 1992, the state does not finance religious associations. Yet a certain form of indirect financial support for them is expressed in tax benefits. Some religious services are exempted from the value-added tax (religious ceremonies and rites, realization of religious items). They do not pay land tax and property tax. Like any other non-profit organizations, the donations, gifts, membership fees, grants, and charitable aid are exempted from taxation. More directly, under Article 17 of Law 1992, the state may give material aid in restoring religious worship buildings which have historical-cultural value.

The state does not financially support secular non-profit organizations controlled by religious associations, nor does it support secular aspect of religious private schools. The general rule is that the state does not support any private organizations, including religious ones. Specifically, the state may not allocate funds from general tax revenues to support particular religious associations or activities such as clergy salaries or worship services.

Kazakhstani law gives the state power to regulate the financial activity of religious associations. The regulatory instruments are described in the Law on Non-Profit Organizations. Under Article 41, point 2, of that Law, a non-profit association which uses funds presented on a free-of-charge basis from foreign states, international and foreign organizations, foreigners and stateless persons must submit a report to tax authorities about the use of these funds. Branches and representative offices of foreign and international non-profit associations acting in the territory of Kazakhstan must publish information about their activities, including information about founders, the composition of property, and sources and uses of monetary funds (Art. 41, pt. 3). The size and structure of non-profit association incomes as well as information about property, expenses, number of employees, salaries of employees, and volunteer time cannot be subject to a commercial secret defense (Art. 41, pt. 4).

IX. Civil legal Effects of Religious Acts

The secular law does not recognize legal effects to acts performed according to religious law or within the realm of the internal autonomy of religious communities, nor does it recognize the jurisdiction of religious courts. It should be mentioned that existing religious systems in Kazakhstan have no religious courts. From time to time, proposals for the creation of Shari'a courts arise, but there are no serious attempts to create such institutions.

X. Religious Education of the Youth

Religious associations have the right to create private schools both for secular and religious education. As for secular education, it is more a theoretical possibility; no religiously run secular schools exist in Kazakhstan. Should such secular schools be created, state law will recognize diplomas only when the school receives a license from the Ministry of Education and Science.

As for religious education, only religious centers have the right to create educational institutions. And again, these institutions must have licenses from the Ministry of Education and Science. The requirements for licensing differ depending on the type of school (secular or religious). Despite the existence of numerous religious educational institutions, only a few of them have licenses because of the very strict requirements for most religious units: the group must own a building, medical and food facilities, and receive a favorable recommendation from the Committee on Religious Affairs). Despite its prevalence, unlicensed religious educational activity, as well as other forms of private religious education such as Sunday schools, is not welcomed by the state bodies.

The public system of education is wholly separated from religion. The presence of religious associations in public educational institutions is prohibited by statute and by some formal and informal orders of administrative educational agencies. The secular character of education is one of the principal tenets of state educational policy (Art. 3 of Law on Education, 27 July 2007). The Law on Education prohibits the creation and operation of religious associations in educational institutions (Art. 3). The paradox is that religious associations have the right to create such institutions.

In 2009, the Ministry of Education proposed an experiment to introduce into high-school curricula the subject "Basis of Religious Knowledge," a secular course taught by secular teachers. The university system has specialties in "Religious Studies." Various courses connected with religion (History of Religion, World Religions, Religious Legal Systems) can be proposed for university students as electives.

The Law 1992 states that parents or persons standing in their stead (i.e., guardians or trustees) have the right to bring up their children in accordance with their own beliefs, but coercive measures to recruit children to religion are not allowed. The religious upbringing of children must not hurt their physical and mental health and moral development.

XI. Religious Symbols in Public Places

There are no legislative or other limitations regarding the right of citizens to wear religious symbols in public places, neither are there any court or administrative cases dealing with such issues. The law is silent on this point.

In September 2009, the Minister of Justice explained to school directors who prohibit Muslim schoolgirls from wearing the hijab, or headscarf, that there is no such prohibition in legislation, so the pupils have a right to wear such religious symbols.[8] Yet the Minister of Education and Science responded by declaring that wearing clothes affiliated with religion violates principles of school system secularity.[9]

XII. Freedom of Expression and Offenses against Religion

The Criminal Law contains different articles concerning protection of religion in the public arena:

- Article 164 provides criminal sanction for provoking religious hostility. This article covers intentional actions aimed at provoking religious hostility; insulting the religious feelings of citizens; publicly promulgating propaganda of exclusiveness, superiority, or inferiority using mass-media or other modes of public communication.
- Article 141 provides for punishment for the direct or indirect limitation of citizens' rights and freedoms motivated by religious attitudes (among other motives such as race, sex, or place of residence).
- Article 149 punishes the prevention of a citizen's realization of the right to freedom of conscience and religion.

Religious hatred or hostility is also an aggravating factor in many *corpus delicti*. Insulting the religious feelings of citizens is also punished under the Code on Administrative Offences (Art. 375). This article also punishes for desecration of items, buildings, and places respected by the followers of certain religions. The protection is applied equally to all religions and beliefs.

8. *Izvestia-Kazakhstan*, 25 September 2009.
9. *Express-K*, 29 September 2009.

SANG YONG KIM

Religion and the Secular State in Korea

I. INTRODUCTION

Korea is a religiously heterogeneous state. The total population of Korea amounts to about 47 million, of which 22 percent are Buddhists, 18 percent are Protestants, and 10.9 percent are Catholics. Today, there is no state religion in Korea, and various religions co-exist peacefully. Historically, however, Korea has been a religious state, with the state-dominated religion changing from Buddhism to Confucianism to Christianity. Over time, the secular governments of Korea, i.e. kingdoms or dynasties, have been deeply influenced by teachings of the historically dominant religions. State philosophies, social morals, and social integrations, for example, have largely been created by and built on the teachings of these religions.

Judicially, lawsuits have never occurred between religions until now. But there have been some legal cases occurring within religions. Most of them have been concerned with conflicts of property between factions of a church. Until recent times, courts have been slightly passive in these internal conflicts, but these days the courts have changed their attitudes from passive, non-intervention into religious conflicts to active intervention. In the field of intra-religion property disputes, courts have become slightly active, but in other fields the courts have always kept a slightly passive attitude of non-intervention.

Even though Korea is a religiously heterogeneous state, peaceful coexistence between religions has continued without serious problems. Further, Korea keeps the principle of separation of politics and religion. But through the religiously biased behavior of public officials, who believe that their religions are absolute and other's religions are worthless, conflicts between religions have indirectly happened and have created social problems.

In Korea, the historically changed religions have created unique Korean cultures and social morals and have shaped the various laws of kingdoms and dynasties. Historically, Korean society and religion have intermingled. Also, these days religion supports the secular state of Korea with religious teachings and prayers for Korea, and conversely, the Korean government supports religion, even if Korea keeps the legal principle of separation between politics and religion. Formally, religion and the secular state are separated, but in reality religion and the secular state are interrelated. The Reformationist Martin Luther said that the two kingdoms of the heavenly God and the secular Crown are separate and independent of each other. But the theologian Karl Barth said that the two kingdoms are intermingled and interrelated, such that there is only one kingdom, not two kingdoms, on the earth.[1] It is more believable and valuable that there is only one kingdom on the earth, which God and His created peoples administer and cultivate together.

II. HISTORICAL DEVELOPMENT OF RELATIONS BETWEEN RELIGION AND THE SECULAR STATE IN KOREA

A. Combination of Shamanistic Religion and the Secular State in Ancient Korea

According to Korean history, ancient Korea was established in BC 2333 and lasted for about 2,000 years. In the period of the first century BC, ancient Korea was separated into three kingdoms: Ko-Ku-Ryeo (BC 37 – AD 668), Baek-Je (BC 18 - AD 660), and Shilla (BC 57 – AD 935). Before the introduction of Buddhism into Ko-Ku-Ryeo in ad

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1. Adalbert Erler, Kirchenrecht, 5.Aufl. (C. H. Beck, München, 1983), S. 165.

372, Baek-Je in ad 384, and finally Shilla after martyrdom for Buddhism in AD 527,[2] ancient Korea was dominated by shamanism. Ancient Korea was likely a theocratic state. Therefore, kings might have served at the same time as shamanistic priests. But ancient Korea gradually developed into a law-ruled state with the adoption of law from China, even though ancient Korea was administered and guided by shamanism. It is thought that shamanistic religion and the secular state in ancient Korea were not separated.

B. Development of Buddhist Secular States after the Adoption of Buddhism

After the adoption of Buddhism, the old Korean states were administered, ruled, and guided by the teachings of Buddhism. Buddhism had evolved into a state religion. Therefore, high level Buddhist monks were nominated to be teachers of the Kings. With the financial support of the state, many large Buddhist temples were built. Educated monks set up behavioral guidelines for the people, which united the people into a strong community. The behavioral guidelines evolved into customary law in the three old kingdoms.

The most important behavioral guidelines were created by the great monk Weon-Kwang-Beob-Sa in the Shilla dynasty. These guidelines were as follows: People shall respect and obey the king with loyalty. People shall serve and follow their parents with filial piety. People shall become friends with sincerity and trust. People shall not retreat in a war. People shall kill living beings selectively. These guidelines are known as the Five Commandments of people living in the secular world. The spirit of the guidelines has not disappeared, but has been transmitted vibrantly to the present day.

Buddhism was the spiritual basis for unifying the three old kingdoms into the unified Shilla dynasty (AD 676 - AD 935). In this period, Korean society was wholly covered by Buddhist culture. However, the unified Shilla Dynasty of Korea was a strong hierarchical class society. The intelligent bureaucratic officials could not ascend to even the lowest positions of the royal families. Therefore, powerful local leaders fought against the incompetence of the royal families.

Finally the unified Shilla Dynasty was replaced by Ko-Ryeo Dynasty, which had been established by one of local leaders. The Ko-Ryeo Dynasty was also dominated by Buddhism. High ranking Buddhist monks were nominated to be the teachers of kings. But in the end the Ko-Ryeo Dynasty became corrupt and was conquered by the Mongolian Empire, which had been established in China. The then state-religion of Buddhism was not able to unify the people. The teachings of Buddhism were not suitable for the politics and public administration of that period.

In the end, intelligent new scholars who had learnt the teachings of Confucianism criticized the royal family, the bureaucratic public officials and the then state-religion, Buddhism. Through the revolution of these intelligent Confucian scholars, the Buddhist Ko-Ryeo Dynasty collapsed and was replaced by the new Confucian dynasty, known as the Jo-Seon Dynasty.

C. Introduction of Confucianism and the Creation of the Confucian State

Confucianism was known to Korea at the same time Buddhism was introduced. Because Buddhism had been the state religion of the old kingdoms and the influence of Buddhism was very strong in every aspect of peoples' lives, Confucianism could not function effectively.

At the end of the Buddhist Ko-Ryeo dynasty, the Buddhist kingdom was very corrupt: Buddhist temples owned very large amounts of land. High ranking Buddhist monks had power to replace the Ko-Ryeo kings. Life was very hard for the people. The

2. Into Shilla Dynasty the Buddhism had been introduced during AD 417-457. In Ko-Ku-Ryeo and Baek-Je, high level royal families had received the Buddhism, but in Shilla, the lower class people had received the Buddhism and believed it. Therefore, there was no martyrdom for the Buddhism in the Ko-Ku-Ryeo and Baek-Je, but martyrdom had happened in Shilla.

teachings of Buddhism could not heal the miserable lives of the people and rescue the corrupt kingdom.

Some fresh-minded progressive scholars who had learnt Confucian teachings began to criticize the Buddhist kingdom of Ko-Ryeo, and became public officials in the Ko-Ryeo Dynasty. Ultimately, they committed a coup d'état against the weak and corrupt Buddhist Ko-Ryeo Dynasty and created a new Confucian dynasty known as the Jo-Seon Dynasty, which lasted from 1392 until 1910.

Confucianism was the state religion of the Jo-Seon Dynasty. The Jo-Seon Dynasty cracked down on Buddhism, and the Buddhist monks and temples were forced to move from cities to the mountains. The amount of land that the Buddhist monasteries could own was regulated, as was the number of monks living in monasteries.

The most important and highest ideals of Confucianism lie in the virtuousness of man and harmonization of the world. In order to realize the above ideals in the secular state, practical principles of Confucianism were formulated, known as the "Three Fundamental Principles and the Five Moral Disciplines" in human relations. The Three Fundamental Principles consisted of the following programs: The King shall be an exemplary person to his subjects. A father shall be an exemplary person to his sons and daughters. A husband shall be an exemplary person to his wife. Further, the Five Moral Disciplines consisted of the following: The King and His subjects shall be trustworthy and loyal to each other. A father and his sons and daughters shall respect and confide in each other. A husband and his wife shall love and be abstemious toward each other. Old persons and young persons shall be act toward each other with proper respect due to age. Friends shall be reliable for each other.

The politics were guided by the teachings and doctrines of Confucianism. People's lives were also guided by detailed regulations based on the teachings of Confucianism. Buddhism was wholly replaced by Confucianism. Many state statutes were enacted in accordance with the teachings of Confucianism. The acts were understood as a compulsive instrument or tool for implementing morals and ethics formulated from the teachings of Confucianism. Due to the effects of Confucianism, Korean society of the Jo-Seon Dynasty was stable and peaceful for a long time. But the Confucian bureaucrats became corrupt and fractioned as well. Therefore, peoples' lives became very miserable again.

Some progressive scholars, exposed to teachings of Christianity in China and refreshed with the new thoughts and ideas, presented their new plans to heal the miserable lives of the people, and to restructure the malfunctioning bureaucratic dynasty. They criticized the corrupt bureaucratic administration. The fresh criticism from the Christian scholars was met with a brutal response from the Confucian Jo-Seon Dynasty. But Christianity secretly spread to whole of the Jo-Seon Dynasty. Until Christianity was legally endorsed in the Jo-Seon Dynasty, many early Christians were killed as martyrs. Due to the sacrifices and example of the early faithful Christians and Christian martyrs, the bureaucratic Confucian state of Korea developed into a multicultural state, and the everyday lives of the people gradually improved.

D. Adoption of Christianity and Improvement of Korea into a Cultural State

Christianity was introduced into Korea from China in the early 17th century. In the early period of its introduction, the progressive Korean scholars who visited China with a mission of diplomacy brought the Bible – translated into Chinese – back to Korea. The Bible was studied in Korea among scholars who had not advanced in their careers to become high ranking public officials because of defeat in power struggles. Some French missionaries of the Society of Jesus who came for missions to China came into Korea secretly to teach Christianity. As such, Christianity was thought to be revolutionary to the Confucian Jo-Seon Dynasty. Christianity spread very rapidly among the lower class people and young scholars of the middle class who could not advance to become high ranking public officials.

The Confucian Jo-Seon Dynasty therefore decided to try to halt the spread of Christianity, and many Christians were killed as martyrs. In 1866, about 8,000 Christians were killed, and many French missionaries were also killed. But Christianity nevertheless became even more widely spread. Finally, in 1886, Christianity was legally and officially endorsed in Korea at the conclusion of a diplomatic treaty between France and the Jo-Seon Dynasty. During consultations for concluding the treaty, the French government had strongly insisted that the freedom of religion should be inserted into the treaty.[3] Because of the Treaty, Christianity was able to be practiced without danger of martyrdom. Together with Christianity, the Western concept of natural law was also introduced into Korea.

During the period of wrongful colonial occupation by Japan beginning in 1910, Christianity played a great role in resisting brutal imperialistic oppression. In a Constitution promulgated in 1919 by the provisional Korean Government during Japan's colonial occupation, it was asserted that Korea was created and protected by the Heavenly God. This defiant Korean spirit, based on the notions of natural law, were strengthened further even after Korea's emancipation from Japan and the establishment of the Korean Government.

Furthermore, 33 national leaders of the 1919 March First Independence against Japanese colonial occupation were religious – predominantly Christians and Buddhists. Resistance movements against the imperialistic colonial oppression of Japan were mainly carried out by religious peoples.

When the first National Assembly was opened for legislation of the Constitution of independent Korea in 1948, the provisional Christian Chairman of the National Assembly asked a Christian priest to pray to the Heavenly God. Every dictatorial military governments had been toppled down by the continual resistance of Korean peoples. With Christianity and the thoughts of natural law, the secular state of Korea developed into a more democratic and prosperous country.

Even though the secular state of Korea legally maintains the separation principle between politics and religion, Christian presidents and high ranking Christian public officials are likely to advocate and support Christianity. Today, conflicts among religions occasionally arise from biased administration by Christian public officials which benefits Christianity and neglects other religions.

III. PRINCIPLE OF SEPARATION OF RELIGION FROM POLITICS

The principle of separation between politics and religion is firmly prescribed in the constitution and acts of Korea. Article 20 of the Constitution of Korea provides that all citizens shall enjoy freedom of religion. No state religion shall be recognized, and religion and state shall be separated. Section 1 of article 11 of the Constitution of Korea prescribes that all citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status.

Section 2 of article 6 of the Basic Act for Education prescribes that in schools established and founded by central state or local government, religious education for a certain specific religion shall not be carried out. Therefore, general religious education is permitted in the public schools, but a certain specific religious education in the public schools is impermissible and prohibited. However, in private schools certain specific religious education is permitted.

Section 2 of article 4 of the "Service Regulation of the State Public Officials" provides that public officials shall conduct their affairs impartially without discrimination owing to their religions. The above mentioned section of article 4 of the Service Regulations of State Public Officials was prescribed after the demonstration of Buddhists

3. Kim Sang Yong, Legal History and Legal Policy: On the Focus of Korean Legal History (Korea Legislation Research Institute, Seoul, 2006), 141.

against the Government in 2008. In February 2008, a new Christian president was inaugurated. Christian public officials were appointed to important high ranking positions. National maps for public administrations were newly published and distributed to public authorities and peoples. Unfortunately, in these national maps, churches were marked and inscribed while Buddhist temples were not. Buddhists maintained that production of such a map was discrimination against Buddhism, and demonstrated against the Government for correction of such discrimination. In order to appease the angry Buddhists, section 2 of article 4 of the "Service Regulation of the State Public Officials" was promulgated.

In Korea, the separation principle of politics and religion is kept in theory, but in reality Christians are thought not to be good and fair minded to Buddhists. Despite there being no explicit conflicts between Christianity and Buddhism, uncomfortable Buddhists have spoken out against the Government. Nevertheless, the birthday of Jesus Christ – Christmas – and Buddha's birthday are designated as official national holidays.

IV. Trend of Judicial Judgments on Religious Affairs and Religious Conflicts

Courts were in the past slightly reluctant to intervene in worldly affairs related to religion and conflicts between religions. But these days the courts have changed their attitude to actively solve even conflicts between religions.

The Constitutional Court declared that it would not be unconstitutional to hold the bar examination on a Sunday.[4] A Christian bar examinee who would attend church on Sunday, however, would therefore not be able to attend the examination. The Constitutional Court ruled that Sunday is not a special holy holiday for Christians, but a common holiday for all peoples. Therefore, the Constitutional Court decided that it would not be against the freedom of religion, to hold the bar examination on a Sunday.

The Supreme Court declared that it is not against the constitutional freedom of religion for a private Christian university to not give a graduation certificate to students who have not completed a compulsory course on Christianity.[5] But a local court has decided that it is against the freedom of religion for a private Christian high school to dismiss a student from the school by reason of his protest and demonstration against specific Christian education.[6] In Korea students have no choice in selecting a high school, as middle school graduates are allotted to certain high schools by way of a lottery. Therefore, a non-Christian student might be allotted to a private Christian high school and be forced to attend a a class on Christianity.

In the above mentioned case, a non-Christian student entered a private Christian high school by lottery. The student was elected chairman of the students' committee and protested against the religious education. The Christian high school tried to persuade the student to move to another high school, but the student refused to accept the proposal and behaved haughtily. Finally, the private Christian high school dismissed the student from the school. The dismissed student sued, claiming that the dismissal by the private Christian high school was unconstitutional and the school should pay damages to him. The local court decided that the private Christian high school violated Article 20 of the Constitution, providing for freedom of religion, and should pay damages for pain and sufferings.

For a long time in the past, the courts had been very reluctant to intervene in property affairs within a religion. When a church conflict between factional groups emerged, each faction sues for a piece of church-owned property. The Supreme Court had declared that the church-owned property belongs to all baptized members of the church at the time of the division of the church.[7] Therefore, the Supreme Court did not actively decide the property conflict, but delegated the responsibility to all baptized members of

4. Judgment of the Constitutional Court(full bench decision: en banc), 2000 Heon-Ma 159, 27 September 2001.

5. Judgment of the Supreme Court, 96 Da 37268, 10 November 1998.

6. Judgment of the Seoul Central Local Court, 2005 Ka-Dan 305176, 5 October 2007.

7. Judgment of the Supreme Court (full bench decision: en banc), 91 Da 1226, 19 January 1993.

the divided church to allocate the property autonomously by agreement.

But the Supreme Court has recently changed its passive attitude into an active one. The Supreme Court intervenes in property conflicts to allocate property to divided factions of a church. The Supreme Court declared that a faction comprising of two-thirds or more baptized members of a church could own the whole property of the divided church.[8] The Supreme Court ruled that the church was a kind of incorporated association, and the church could change its present religious order with consent of two-thirds or more of its members. The incorporated association could alter its statutes with consent of two-thirds or more of its members (Article 42, Korean Civil Code). Owing to the revision of the Supreme Court, the minority members of a divided church could not get any piece of the church-owned property.

As explained above, the courts have gradually increased their intervention in religious conflicts in order to solve such problems with secular state laws. It is my opinion that the courts should respect canon law and try to solve such conflicts within a religion not with secular state laws, but with canon laws. The canon law is a self-administered statute within a church. The courts should respect the canon law and regard the canon law as the church's means of self-administration.

V. MISSIONS AND TASKS OF RELIGION IN KOREAN SOCIETY

Korea is and has been a religious society. Historically, Korea has transitioned through the great religions of the world from Buddhism to Confucianism to Christianity. Buddhism removed shamanism in ancient times and formed a great Buddhist culture for ca. 1,000 years from the three old kingdoms to the Ko-Ryeo Dynasty. During that period, Buddhism and secular kingdoms supported each other. But at the end of the Ko-Ryeo Dynasty Buddhism fell into corruption and the Buddhist dynasty collapsed. Eventually, Buddhism was weakened and forced from the cities into the mountains and replaced by Confucianism.

Confucianism supported the creation of the new Jo-Seon Dynasty. As such, Confucianism and the secular Jo-Seon Dynasty were closely tied to each other. All statutes of the Jo-Seon Dynasty were legislated on the ideological basis of the teachings of the Confucianism, which had been derived from the "Three Fundamental Principles and the Five Moral Disciplines." However, as was the case with the Buddhist dynasty, the Confucian Jo-Seon Dynasty also became corrupt, and the Confucian Jo-Seon Dynasty was colonized by the then imperialistic Japan. The weakening of these religions in Korean history lies in their failure to evolve and improve their teachings in light of social changes. For continued existence of a religion, that religion must constantly evolve and improve toward the realization of universal values which all people would like to accept and keep. Buddhism and Confucianism failed in their efforts to improve their authoritative teachings.

Today, in practice, Christianity is the main religion in Korea. Even though the separation principle between politics and religion is kept in theory, Christians occupy high ranking-public positions. Therefore, the teachings of Christianity are able to influence politics and public administration through these Christian public officials. Religion and the secular state are indirectly but keenly interrelated through religious public officials.

It can be said that the reason for the existence of religion and the secular state lies in the safety and the happiness of the people. Therefore, religion develops its teachings for making people noble and for enhancing the culture of the secular state. Even though religion and politics are separated in principle, the successful relationship between them consists of giving and taking interrelatedly other directly or indirectly.

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8. Judgment of the Supreme Court (full bench decision: en banc), 2004 Da 37775, 20 April 2006.

VI. Concluding Remarks

Historically, religion has guided and supported the secular state of Korea and the secular state of Korea has conversely protected religion. Buddhism spiritually guided and supported the ancient secular state of Korea for about 1,000 years, and Buddhism received many benefits from the secular state, especially in the form of property. Confucianism also guided and supported the secular state of Korea for about 500 years, and Confucianism was respected by the secular state of Korea and its peoples. It is true that Buddhism and Confucianism dominated the secular state of Korea and its peoples spiritually and ideologically. But the combination of religion and the secular state was the cause of corruption and the decline of both religion and the secular state. Owing to the abundant material benefits given by the secular state to these religions, these religions could not develop and progress in new philosophies to a higher and more universal level. Religion must continuously change and evolve to a higher, more advanced level. Without the evolution of religion, it becomes corrupt and weakened. Furthermore, religion must refuse to receive material benefits from the secular state. Religion must always try to make the secular state fresh and clear with new spiritual ideologies. If religion is combined with the political powers of the secular state, the life of the religion will cease. The weakening of Buddhism and Confucianism and the decline of the secular states of Korea was caused by the combination of religion and the political powers of the secular state. Buddhism and Confucianism may have a nostalgia for the respect and the material benefits from the secular state of Korea as well as in the past. Therefore, Buddhists might protest and demonstrate against the government when Christian public officials disregard them.

Today, Christianity plays a major role in changing and restructuring the secular state of Korea with its doctrines of righteousness and love. However, Christianity must not receive favoritism and material benefits from the government. Christianity must stay far from politics. Christianity must be pure and clear. Christians must not receive any benefits from the government. The leaders of Christendom must hesitate to work together with political powers. A Christian must keep himself pure and clear, condemn the corruption of the secular world, and develop and create new doctrines which will be suitable to social changes. Christianity must be continuously recreated and bettered. Furthermore, Christianity must be generous and tolerant of other religions. Religions must not combine themselves with secular states. Religion must not long for any material support from the secular state. Religions must keep and practice their doctrines and at the same time strive for social peace. Religions must continuously develop and improve their doctrines to parallel social changes. Among the religions there must be generosity and tolerance toward one another. Religion must not be tempted by secular politics.

RINGOLDS BALODIS

The Constitutional and Administrative Aspects of State and Church Regulation in the Republic of Latvia

Protection of human rights is one of the most important guarantees in a country where the rule of law prevails, and it is specifically the duty of the state to ensure effective protections for anyone whose rights have been violated. [1]

I. LATVIA AT-A-GLANCE

Latvia is a country of 2.3 million people living in an area of 64,589 km^2 near the Baltic Sea. Latvia shares borders with Lithuania, Estonia, Byelorussia, and Russia. Latvia is a unitary republic based on the rule of law and the principles of proportionality, justice, and legal certainty. It is a parliamentary democracy with a pluralist system of political parties. There is a clear separation of powers with checks and balances. Fundamental rights are guaranteed and widely respected. Religious freedom is guaranteed, and state and church are separated. Now, at the beginning of the 21st century, Latvia is a multi-confessional country, where the three largest denominations are Roman Catholic, Evangelical Lutheran, and Latvian Orthodox.[2] Currently in Latvia there are about 5,000 Jewish people (whereas before the Second World War and the Nazi Holocaust there were 100,000). Seventh-day Adventists and Baptists have been active in Latvia since the end of 19th century, and Methodists, Jehovah's Witnesses, Muslims, and Christian Scientists since the beginning of 20th century.[3]

II. INTRODUCTION

In the *Satversme* (the Constitution of the Republic of Latvia) religion/church is mentioned only in Article 99, which declares: "Everyone has the right to freedom of thought, conscience and religion. The Church shall be separate from the State." This provision was included in the Constitution in 1998, when the Constitution was supplemented with a new section on human rights. The principle of freedom of religion is a settled purpose of the "Law on Religious Organizations" of 7 September 1995.[4] In accordance with Article 2 of this Law, the inhabitants of Latvia are granted the right to freedom of religion, including the right to state freely one's attitude towards religion, to

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1. Ruling of the Constitutional Court of the Republic of Latvia on Case No. 2001-07-0103 (*Latvijas Vēstnesis*, 7 December 2001).

2. Balodis R. Latvia. *Encyclopedia of World Constitutions* Volume II Ed. G.Robbers – U.S. Facts on File, 2007 p. 513-514.

3. Balodis R. Church and State in Latvia. *Law and Religion in Post-Communist Europe* (Ed. Silvio Ferrari, W.Cole Durham). Peeters, Leuven – Paris – Dudley, MA 2003, 142-174.

4. The Law "On Religious Organizations," which was approved on 11 September 1990, was replaced with a similarly titled law on 7 September 1995. (*Latvijas Vēstnesis, No. 146, 26 September 1995*). The first law was adopted in 1992, but was found unsatisfactory. Therefore, in 1995 the Parliament of Latvia issued a new law. However, this law is also admitted to have its flaws, and since its adoption it has been amended five times already, and most likely there will be successive amendments in the future. Religious organizations in Latvia are not obliged to register with the Board of Religious Affairs, however, they obtain rights and relieves available to religious organizations only upon the receipt of a registration certificate.

adhere to some religion, individually or in community with others, or not to adhere to any religion, and to change freely one's religion in conformity with the existing legislative acts. The Law on Religious Organizations in compliance with the *Satversme*, as well as international agreements concerning human rights in the sphere of religion, regulates social relations established through exercising the right to freedom of conscience and through engaging in the activities of religious organizations. The State is to protect the legal rights of religious organizations as prescribed by the law. The State, municipalities and their institutions, and non-governmental and other organizations shall not be authorized to interfere with the religious activities of religious organizations.

In actuality, Latvia is a partial separation state, where constitutionally declared separation of church and state does not consistently work in practice. *Latvia does not associate itself with any specific religion,* and the question is not about religious tolerance but about interpretation of the article about church and state separation in the Constitution, because there is no clear opinion about where the borderline between the state and church should be strictly marked. The State and the Church are separate; however, if we speak about the primary conditions that ensure Church separation from the State, then practically none of these conditions exists in Latvia. This is understandable, taking into account that the Republic of Latvia is a new attempt. It is not possible to achieve a perfect balance of theory and practice at once. Such balance requires time, to appropriate legislative norms in a particular social environment.

III. Historical Background

Before the German expansion in the 12th century, the territory of Latvia was inhabited by many kindred Baltic tribes (*zemgali*, *kurschi*, *latgali*). The most widespread religion among these tribes was a kind of paganism, "*Dievturība."* Originating from Latvia's neighboring Orthodox Russia, there were some unsuccessful attempts to convert Latgali tribes to the Orthodox faith. According to historical records, Russian priests started to preach the Orthodox religion in Latvia in the 9th and 10th centuries. In 1180, the German Monk Meinhardt, who had a special authorization from the *Knyaz of Polozk* (since part of the Latvia fell under the Russian sphere of interest), started to preach in Latvia. When Meinhardt failed to convert the pagan tribes to Christianity, he approached the Pope with a request to open a crusade in the Baltic. The aim of this war was to introduce Christianity in the area. The request was granted, following which the German invasion of Latvia began. Despite some isolated uprisings, Latvia was under German control until the 18th century. Under the influence of German landowners the Lutheran doctrine spread, which later served as good soil for other branches of Protestantism. The year 1524 is considered as the year of the foundation of the Latvian Evangelical Lutheran Church.

In the 18th century, after Sweden lost the Nordic War, Latvia was included in the Russian Empire. Russia tried to convert the newly acquired lands to the "Tsar's faith." However, the Orthodox religion did not become popular among Latvians, though a certain number of Latvians adhered to it. In the second half of the 17th century, shortly after their split from the official Russian Orthodox Church, Old Believers had become active in Latvia. Despite Latvia's being part of the Russian Empire, the Old Orthodox believers had found a haven in Latvia due to the distinctive and more liberal religious policy implemented in this region compared to others. Latvian Old Orthodox believers are the world's largest group of the Old Believer Orthodox denomination, and in the *Grebenschikov* church in Riga (the largest worship building of this belief in the world) is to be found the largest congregation of Old Believers (5,000 adherents).

The Republic of Latvia was established on 18 November 1918 and existed till the Soviet occupation in 1940. The second period of independence for Latvia began in 1991. The proclamation of the independent democratic Republic of Latvia in 1918 became possible largely due to the promise of the founders of the State, who were representatives of the Catholic religion, to sign an agreement with the Holy See on the legal status of

Roman Catholics in the country.[5] Thus, the territorial unity of the Latvian State depended on religious tolerance towards the Catholics.

The European influence on Latvia, in field of state and church relationship, occurred very soon after the second period of independence. This period began with the *Declaration of Restoration of Independence of the Republic of Latvia* issued by the Supreme Council of the Latvian Soviet Socialist Republic on 4 May 1990,[6] after which a rapid strengthening of the human rights catalogue commenced. Shortly after adopting the Declaration of Independence, Latvia acceded to 51 international documents in human rights area. After 4 May, the authority of the Latvian Constitution was re-established, though because that document does not have a human rights chapter, the role of human rights in the Latvian State became effective through constitutional law. On 10 December 1991 the Latvian Parliament approved a law called "Human and Civil Rights and Obligations." Though this was an important law from the perspective of human rights, it was also somewhat questionable from the perspective of constitutional law. The situation was clarified in October 1998 when the *Satversme* was supplemented with a new section on human rights, Section 8, "Fundamental Rights of the Individual." In this section, religion/church is mentioned only in Article 99, which declares: *"Everyone has the right to freedom of thought, conscience and religion. The Church shall be separate from the State."*

The new State lacked clarity in this particular area,[7] apart from the adoption of several legal norms of the first independence period[8] and the influence of the main traditional Churches in the lawmaking process.[9] Activity of the pro-church First Party (*Pirmā partija*) in the Parliament and competition amongst traditional Churches gave parity with secular forces. Very important in this regard is the impact of the agreement concluded in 2000 between the Republic of Latvia and the Holy See. Though the agreement is not directly related to separation of the Church and the State or to religious freedom and other churches, it forced the Latvian government to solve issues regarding equality for traditional Churches. Consequently, as of 2009 Latvian Lutherans, Orthodox, Old Believers, Methodists, Baptists, Seventh-day Adventists, and Jews have their agreements with the government and are protected by specific laws.[10]

Of course, these denominations were also protected during the time of the first independence. All of them were included in Article 51 of the Civil Law (1937), which gave them the right to solemnize the marriages of their members. The legal framework for these denominations means that we may speak not only of issues concerning their registration but also of special recognition of particular religious organizations by the State, which is not related to registration institutions. Of course Latvia is among those states which seems to have a model of partial separation of the church and the state,[11] but

5. Balodis R. Evolution of Constitutionality of the Republic of Latvia from 1918-2006. Grām. *Jahrbuch des Öffentlichen Rechts der Gegenwart*//Neue Folge-Band 56 Ed. P.Häberle – Mohr Siebeck 2008. s. 269.-278.

6. Declaration of independence: Par Latvijas Republikas neatkarības atjaunošanu: LPSR AP deklarācija. LR Saeimas un MK Ziņotājs. 17 May 1990.

7. It is true that there was no plan in any sphere under supervision of the State, and due to the above reason it cannot be considered that churches are somehow especially unfairly treated. Being aware that these relations started to form in the restored Republic of Latvia it can be asserted that it was neither formal nor substantive continuation of the practice of the relations between the state and church during the first independence period.

8. When drafting new legal acts the reception of the provisions of law of the first independence period happened mainly not due to well-considered idea of continuity or nationalism, but because of lack of foreign language.

9. The principle "one denomination – one Church" can be added to the merits of lobbies (see art. 7 Part 3 of the LROL – "Congregations of one denomination may establish only one religious association (Church) in the country).

10. Balodis R. Lygiateisiškumo principas ir religijos laisvė Baltijos valstybėse/Jurisprudencija *Mokslo Darbai* Mykolo Romerio Universitetas 2006 12 (90), 103-106.

11. On the grounds of degree of state cooperation with religious organizations the states may be divided in six groups: (1) **States excluding the church** (e.g., former USSR); (2) **States having a model of full separation of the church and the State**, e.g., USA, France. Those are states where a distinction between the state and the church is drawn. Both are separated. The state identifies itself with none of religions. (3) **States having a model**

it is also a state of the type which Professor W. Cole Durham has called a cooperationist Regime.[12] Although lawmakers have included in the church laws some of the issues which need to be regulated, actually Latvia has been shaped according to and more resembles the model of Italy or Spain, and has its own distinctive constitutional structure. In my opinion, depending on the form of recognition by the State, the religious organizations in Latvia may be divided into two types: 1) traditional religious organizations and 2) others.

Traditional religious organizations are divided into the Roman Catholic Church, as its status is based on an international agreement, and the other traditional religious organizations, which by adoption of special laws in respect of them have gained special recognition by the State.[13] Other religious organizations are registered pursuant to the Law on Religious Organizations.[14]

IV. Legal Status of Religious Bodies and Supervisory (Registration) Institutions

The legal status of legal entities in Latvia is defined by the Civil Law, but the status and the registration of religious organizations are regulated by the Law on Religious Organizations. Other public organizations (except trade unions and businesses, which are subject to a different law) are regulated by the Law "On Public Organizations and their Associations." Although the Latvian government does not require the registration of religious groups, the Law accords religious organizations certain rights and privileges when they register, such as status as a separate legal entity for owning property or other financial transactions, as well as tax benefits for donors. Registration also eases the rules for public gatherings.

According to the Law on Religious Organizations, twenty persons of full age registered in Latvian Citizens Register and sharing one confessional affiliation may establish a religious organization. Ten or more congregations of the same denomination with permanent registration status may form a religious association. As provided by the Law on Religious Organizations, religious organizations (church congregations, religious communities and dioceses), seminaries, monasteries and diaconal institutions are to be registered. Only churches with religious association status may establish theological schools or monasteries.

A decision to register a church is made by the notaries of the Register of Enterprises (till 2008 Head of Board of Religious Affairs).[15] The functions of registering religious organizations are separated between the Register of Enterprises (hereinafter – Register Office), which registers religious organizations, and the Ministry of Justice, which prepares statements for Register Office.

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of partial separation of the church and the state (e.g., Germany). In such a State a constitutionally declared separation of Church and the State may exist. (4) **Church states (theocracies)**. Such model of the State and Church is mostly common in Islamic countries and some other Third World countries. In such country there is a religious dictate and the state identifies itself with one religion. (5) **State church countries** (e.g., Denmark, Greenland, England). These are countries wherein the State religion is proclaimed or the State Church is set. (6) **Formal separation countries** where Church can be formally separated from the State, but actually is not (Latvia, Israel).

12. Durham W.C. Perspectives on Religious Liberty: A Comparative Framework/ Religious Human Rights in Global Perspective/ Ed.by J. D. van der Vyver and J. Witte, Jr. .Printed in the Netherlands Published by Kluwer Law International. – 1996, 20-21.

13. Balodis R. Das Recht der Religionsgemeinschaften in Letland/ Wolfgang Lienemann.Hans-Richard Reuter (Hrsg.) Das Recht der Religionsgemeinschaften in Mittel-, Ost – und Südosteuropa/ Nomos Verlagsgesellschaft, Baden – Baden 2005. s. 235-259.

14. Religious organizations which are registered as unions or commercial structures, or are not registered at all cannot be construed as religious organizations that would have rights to appeal for religious freedom.

15. From 2000-2008 the Board of Religious Affairs dealt with issues connected with mutual relations between the State and religious organizations, it monitored the effectiveness of State's legal regulation on practicing religion.

The Law on Religious Organizations Section 5, clause 5

(5) *The Ministry of Justice shall be in charge of handling relations between the State and religious organizations, within the competence set by laws and other normative acts it ensures elaboration, co-ordination and implementation of State's policy on religious affairs, it deals with issues connected with mutual relations between the State and religious organizations. The structural unit under authority of the Ministry of Justice, which deals with religious affairs, on the request of religious organizations provides them with the necessary consultation and assistance.*

The Law on Religious Organizations Section 5, clause 6

(6) *Law enforcement institutions shall supervise the compliance of activities of religious organizations with the laws and other normative acts and shall inform the Ministry of Justice on the breach of law by religious organizations."*[16]

The Register of Enterprises is a governmental institution under supervision authority of the Ministry of Justice. It should be explained that a very important reorganization was realized on the end of 2008. In accordance with the Amendments to the Law on Religious Organizations adopted by the Latvian Parliament on 18 December 2008, the Religious Affairs board no longer exits. From 1 January 2009, religious organizations and their institutions are entered into the Register of Religious Organizations and their Institutions. The Register of Enterprises of the Republic of Latvia maintains this Register. The Ministry of Justice is in charge of handling relations between the State and religious organizations, within the competence set by laws and other normative acts. The Ministry ensures elaboration, co-ordination, and implementation of the State's policy on religious affairs and deals with issues connected with mutual relations between the State and religious organizations. The structural unit which deals with religious affairs under authority of the Ministry of Justice provides religious organizations, on their request, with any necessary consultation and assistance. Before registration of a religious organization or its institution, the Register Office must request the opinion of the Ministry of Justice on whether the goals and objectives stated in the Charter (Constitution, Regulations) of a religious organization or its institution are in compliance with the State's laws and other normative acts, or whether the activities (teaching) of a religious organization might endanger human rights, the democratic structure of the State, or the public safety, welfare, and morals.

Having been registered at the Register Office, religious organizations are given the status of legal persons. It is not provided by legislation of the Republic of Latvia that registration is obligatory for the expression of freedom of belief. Therefore, every unregistered religious group has right to conduct services, religious rituals, and ceremonies and to carry out charitable work, unless such activities break the law.

In accordance with Article 14 of the LROL the activities of the religious organizations are based on their canons and statutes. In conformity with LROL Article 1, religious activities include the manifestation of a religion, faith, or cult, the performance of religious ceremonies or rituals, and the providing religious instruction by preaching. After it has obtained the status of a legal entity, the religious organization can:

1) Organize public services;

2) Create monasteries and educational establishments for its clergy (only registered religious communities have this right);

3) Perform religious activities in hospitals, residential homes, penal institutions and the National Armed Forces;

4) The use religious symbols, the regulations providing that "only religious organizations or institutions established by such have the right to use the name and symbols of religious organizations in their official forms and seals."

The activity of religious organizations is restricted in accordance with Article 116 of the

16. Amendments to the Law on Religious Organizations of 2009.

Satversme. Activities of religious organizations promoting religious intolerance and hatred, breaking the law and inciting others to do so, violating or failing to observe the statutes of religious organizations, or threatening state security, public order and peace or the health or morals of other persons, can be ordered to cease by court injunction. Article 14 of the Law on Religious Organizations also provides that the State has the right to restrict the activities of religious organizations and their followers on those grounds. The government must ensure that citizens can freely practice their religion; however, religious freedom does not release anybody from the obligation to observe the law. If necessary, the State has the legal power to restrict manifestations of religion in order to protect the rights of other people, the democratic nature of the State, public security, public order, public welfare, and the morals and health of other people.

Section 18 of the Law adopted by the *Saeima* on 18 December 2008 (amendments of the Law on Religious Organizations) provides the following "Grounds for Termination of Activities of Religious Organizations and their Institutions":

1. The activities of a religious organization or its institution shall be terminated:
    a. by decision adopted according to the Charter (Constitution, Regulations) of a religious organization;
    b. if the number of congregations of a religious association (Church) is less than set by Section 7, Clause 2 of this Law and is not increased to the number set by this Law within a period of one year;
    c. by the adjudication of a court; or
    d. in other cases as specified by law or the Charter (Constitution, Regulations).

2. Termination of Activities of a religious organization by Adjudication of a Court:
    a. if a religious organization violates the *Satversme*, the laws of the Republic of Latvia or its own Charter (Constitution, Regulations);
    b. if a religious organization urges others to violate the law;
    c. if a religious organization endangers democratic structure of the State, public peace and order, as well as health and morals of other persons by its activities (teaching); or
    d. in other cases as specified by law.

3. The right to bring an action to court shall be vested in Prosecutor General.

4. If a religious organization has not submitted documents by the term according to Section 8, Clause 6 of this Law or the opinion of the Ministry of Justice states that the activities of a religious organization are not in compliance with the laws and other normative acts in the previous period, a decision regarding exclusion of the religious organization from the Register shall be taken on the first day after the term of registration by the Register Office. Claims arising from the economic activities of the excluded religious organization shall be laid against the members of the governing body of the religious organization.

5. Court, taking into account seriousness and consequences of violation by a religious organization, as well as considering goals and activities of the religious organization in the entirety, may issue a warning to the religious organization without the termination of its activities.

6. Court considering violation by an institution of a religious organization, takes into account goals of the institution of the religious organization and appraises the compliance of the activities of the religious organization, which founded the institution of the religious organization, with the laws and other normative acts.

To supplement Transitional Provisions with Paragraph 8 and 9 in the following wording:

1. Until the day when the Cabinet regulations issued pursuant to Section 9, Clause 9

of this Law come into force, but not later than 30 March 2009 Cabinet Regulation No. 57 of 15 February 2000, Regulations Regarding State Fee for Religious Organizations and their Institutions, shall be applied.

9. Taking over the functions of the Board of Religious Affairs (except maintaining the Register of Religious Organizations and their Institutions) shall be determined by the Cabinet of Ministers by 30 December 2011.

V. Models of Religious Organization in Latvia

According to the Law on Religious Organizations Article 7,[17] religions in Latvia can be registered according to only three models of organization: Congregation, Religious Association (Church), Diocese.

(1) A **Congregation** (*draudze*) can be established by a minimum of twenty legal-aged individuals registered in the Latvian Citizens Register and having one confessional affiliation. The Latvian Population Register registers every person who legally crosses the Latvian border, so that it is no problem for foreigners to constitute any religious entity.[18] Effectively, every person who resides in Latvia legally, whether citizen or foreigner, can be the founder of a religious organization. Every inhabitant of Latvia has the right to join a congregation and to be its active member. Young persons under 18 may become congregation members only with the written consent of their parents or guardians. One and the same person is entitled to be the founder of only one congregation.

(2) A **Church** (*Baznīca*) or religious associate can be established by ten or more congregations of the same denomination with permanent registration. Congregations of the same denomination may establish only one religious association (Church) in the country.

(3) **Dioceses** may be established by Catholics.

The Law on Religious Organizations also makes provision for a fourth model for the establishment of a religious organization (*reliģisko organizāciju iestādes*) – that for theological schools, educational institutions for ecclesiastics, monasteries, missions, deaconate institutions, and similar organizations. Such organizations can be registered only by the decisions of Churches and Dioceses. Only they may create, reorganize or dissolve their institutions, according to the decision of the founder and in accordance with the Charter (Constitution, Regulations) of the Church or Diocese.

VI. Model for "New Religious Organizations": Re-registration in Latvia

Re-registration of religious organizations is stipulated by the Law on Religious Organizations Article 8, part 4. Under the law, re-registration is related only to congregations of denominations which began their activity in the Republic of Latvia for the first time and not to religious communities (Churches) already registered in Latvian State. These organizations are so-called "new religious organizations."[19]

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17. 1995.gada 7.septembra Reliģisko organizāciju likums (*Lav of Reigous Organizationl of 7th September 1995*) //Latvijas Vēstnesis, 26.09.1995., Nr.146

18. Balodis R. The Constitution of Latvia/ Rechtspolitisches Forum Legal Policy Forum Institut für Rechtspolitik an der Universität Trier, 2004. Nr.26. 47.

19. Speaking about new religious organizations, it should be mentioned that the U.S.State Department Report of 1997 on Religious Freedom criticizes Latvia for violation based on its refusal to register Jehovah's Witnesses. This problem has now been resolved, as in the fall of 1998 the two first Jehovah's Witnesses congregations were registered. At present there are 12 congregations of this movement registered in Latvia, and Latvian law enforcement agencies have no information on violations with respect to the freedom of this movement. Before the Christian Science congregation was registered in 2002, the Ministry of Justice had six times declined the application of this congregation, since, according to the opinion of the Latvian Medics Association, the main activity of this organization, i.e., treatment of sick or injured people with non-medical means, contradicted the Latvian law and the Medical Ethics Code.

The aim of re-registration is to ascertain the loyalty of a certain congregation towards the Latvian State and compliance of its activity with legislation. After the 10th re-registration, a religious organization obtains the status of permanently registered. At the present 1200 religious organizations and their establishments are registered at the Register. More than 90 congregations of those must be re-registered annually.[20]

If we speak about the real advantages of registrations (from an anti-cultist point of view), it should be noticed that the achievements are rather doubtful. Some of the most active and dangerous religious sects and worship groups operating in Latvia have either failed to register at all (e.g., Satanists) or are acting under the veil of nongovernmental organizations and even commercial structures. In the spring of 2003 several persons submitted applications to the Security Police of Latvia, asking for screening of activities by the Satan worship adherents – the Satanists – in Latvia. Information providers have mentioned use of drugs, use of human blood in rites, desecration of cemeteries and graveyards, and even unauthorized wire-tapping. The police have carried out inspections but have not confirmed these assertions.

VII. FINANCES OF THE CHURCHES

There is no single law in Latvia dealing with taxation as it affects the churches. The financial and tax issues of the churches are dealt with in many laws and regulations. The development of the financing system of religious organizations began in 1998 after the adoption of amendments in Article 6 (Religious organizations and education) of the Law on Religious Organizations, where section 5 was added: "(5) The teaching of Christian religion and ethics shall be financed out of the state budget." Religious organizations also came to have a certain amount of financing at their disposal after the Parliamentary elections in 2002, when the "First Party" (*Pirmā partija*) was entered into the Parliament, becoming a partner of the government coalition. The First Party is doing its utmost to support traditional and other religious organizations. In 2004 the First Party ensured that 1,481,176 *lats* from the state budget would be allocated to the development of the infrastructure of sacral tourism. Under the aegis of the Party, the churches from the state and regional budgets have received almost 2 million euros. Larger or smaller sums have been allocated to more than 160 religious organizations (mostly to Lutheran, Catholic, Orthodox, Adventist, and Old-Believer parishes). The allocated funds have been mostly spent for the renovation and painting of, as well as for installation of sewage and heating systems in, churches.

Latvia has a type of indirect financing through tax-exemption, without preference to any specific religious organization. According to the tax legislation of the Republic of Latvia religious organizations registered in Latvia in conformity with the applicable legislation have tax allowances when paying real property, value-added, and company income taxes. The main condition is the registration of the religious organization with the Register and the statement of the Ministry of Justice of the Republic of Latvia.

The real estate of religious organizations (land plots, buildings, and structures) is real property tax-exempt, provided it is not used by the religious organization for economic activities (item 4, section 2, chapter 1 of the law "On Real Estate Property Tax"). The use of the real property for charity purposes and for social care is not considered to be an economic activity; the same refers to the functioning of registered educational institutions preparing theological staff. According to Regulation No. 131, item 7, of the Cabinet of Ministers, dated 4 April 2000 ("Application instructions of norms specified in the law 'On Real Property Tax'"), the tax relief is applied only to the estates of those religious organizations that are registered in accordance with the Law on Religious

20. *Religious Organizations in the Latvia: Its Rights and Obligations, Religion in Eastern Europe , Christians Associated for Relations within Eastern Europe* Vol. XIX, 1999, No.4.

Organizations.[21]

Religious organizations are not company income tax payers, as specified in the law "On Company Income Tax," chapter 2, section 2, item 7. In accordance with the law "On Value-Added Tax," charitable contribution payments and gratis goods and services (donated) are exempted from the value-added tax. When receiving goods or services that have been paid from foreign financial aid funds, religious organizations are entitled to the preference of the value-added tax in accordance with Regulation No. 651 of the Cabinet of Ministers, dated 30 August 2005, "The Procedure of application of the value-added tax to the import of goods, delivery of goods, and procurement of goods in the territory of the European Union and to the services paid from the foreign financial aid funds."

Religious organizations are required to account for their taxable transactions, and relief from the value-added tax is not applicable in cases when a religious organization is performing any kind of economic activity: for example leasing out premises and receiving payment, providing public catering services for charge, or executing commercial trade or performing other taxable transactions. When the total value of taxable goods and services delivered or provided within a 12-month period reaches or exceeds 10,000 *lats*, the religious organizations at the latest within 30 days after reaching or exceeding this amount must register with the State Revenue Service Registry of the value-added tax payers in accordance with the Section 5 of Chapter 3 of the Law. The value-added tax related to the economic activities of the religious organization is applied starting from the registration date, and is to be collected and deposited in the state budget according to the applicable legislation. At the same time, the organization is entitled to receive the deduction of pre-tax as is stipulated in Chapter 10 of the Law.

Religious organizations registered in Latvia are released from value-added tax related to the provision of religious and ritual services (weddings, wedding jubilees, baptisms, funerals, and other rites). In accordance with Item 19.12 of the Regulations No. 534 of the Cabinet of Ministers dated July 2005, "The Procedures of application of the norms of the law 'On Value-added Tax,'" the norms of the law "On Value-added Tax" are not applied to the Religious organizations, though in cases when religious organizations procure goods for provision of religious services (candles, ornamental ribbons, etc.) the full price of such goods (including value-added tax that has been already included in the price) shall be paid to the seller, or the value-added tax shall be paid to the state budget after the importation of such goods and putting them into free circulation. The law does not envision refunding this tax to religious organizations that are not registered with the State Revenue Service (SRS) Registry of value-added tax payers.

In accordance with chapter 4 of the law "On Public Beneficiary Organizations," public beneficiary organizations (PBO) are entitled to receive tax relief specified by the applicable legislation. According to Chapter 3 of the aforesaid Law, PBOs are associations and foundations having the goal of public beneficiary activities, as specified either in their articles of association, constitution, or regulations, provided that the religious organizations and their institutions that are performing these activities have been granted the status of PBO by the Ministry of Finance, based on the statement of the Public Beneficiary Commission. According to the information provided at the official website of the Ministry of Finance in 2005, PBO status had been granted to 47 religious organizations.

At the same time, by the end of 2005, 1171 religious organizations had been registered with the Registry of Religious Organizations of the Board of Religious Affairs. The religious organizations that have been granted the status of PBO, in compliance with the chapter 20 of the law "On Company's Income Tax," can receive donations allowing the donators to be entitled to apply the reduction in the company's income tax. Under the provisions of the Law the tax payer is entitled to a tax reduction of 85 percent of the sum

21.Item 8 of the aforesaid regulations specifies that the real estate used for charity and social care is deemed to be the real estate used for free public catering and night shelters as well as for other charitable activities free of charge.

donated to PBO, though the deduction for the donator cannot exceed 20 percent of the total sum of the company's income tax. The payers of the company's income tax that have tax debts for previous taxation periods cannot apply the tax deduction relating to the donators having donated to organizations that have obtained the status of PBO.

Since joining the European Union the Republic of Latvia has harmonized its national legislation with European legislative acts. Accordingly, the 1 May 2004 "Law on Humanitarian Aid Consignments" and Regulation No. 64 of the Cabinet of Ministers dated 23 February 1999, "Procedures of issuing and voiding the permissions granted to religious and public organizations (funds) to receive humanitarian aid consignments," have become invalid. In their place, the new Regulations of Cabinet of Ministers No. 957, dated 20 December 2005, "Procedures of release from customs duty on imports of goods performed by the state budget institutions and public beneficiary organizations," became effective.

These regulations specify the procedures on how goods imported by the public beneficiary organizations are released from the customs duty on imports. In accordance with the Item 4 of these regulations, in order to receive such release the religious organization submits to the customs supervision institution the application related to the particular consignment, along with copies of regulatory documents of the organization (presenting the originals). Item 7 then prescribes that the customs supervision institution adopts the resolution on permission to import goods for charitable purposes or for philanthropic reasons by applying the release from the customs duty on imports. In accordance with chapter 10, item 3, section 1 of the law "On Residents' Income Tax," the value of in-kind donations or charitable contributions to religious organizations with the status of PBO are justified as deductions from the annual taxable income, provided these amounts do exceed 20 percent of the taxable income. Donations for the purpose of this Law are considered to be cash or other items that the individual – the tax payer – delivers gratis to the PBO, provided that the receiver has no counter-obligation to perform activities that are deemed to be remuneration.

VIII. Religious Education and Theological Faculties at State Universities

Under Article 6 of the Law on Religious Organizations, the Christian religion may be taught in State and municipal schools to persons who have requested it in a written application. Applications by minors must be approved by parents or guardians. If the minor is under 14 years of age, the minor's parents or guardians submit the application. The concept of Christian religious instruction does not include and cannot include instruction in the Jewish Faith or in Islam. Christian religion, in accordance with the curriculum approved by the Ministry of Education and Science, may be taught by teachers of the Evangelical Lutheran, Roman Catholic, Orthodox, Old Believers or Baptist denominations, if no fewer than ten students of the same school have expressed their wish to study the religious teaching of the relevant denomination. The teachers must be selected by the denomination leaders and be approved by the Ministry of Education and Science. Since 1998 the Law has been supplemented by Article 6(5), which provides that religious teaching and ethics classes are financed from the state budget. In 1998 the Government provided funds for this education.

Ethics is offered as an alternative to religious instruction. Students at State-supported national minority schools may also receive education in the religion "characteristic of the national minority" on a voluntary basis. Other denominations may provide religious education in private schools only.

In accordance with Article 15 of the agreement between the Republic of Latvia and the Holy See, the teaching of the Catholic religion shall be conducted exclusively on the Ministry of Education and Science, and must be undertaken only by qualified teachers who possess a certificate of competence issued by the Bishops' Conference of Latvia; the revocation of the certificate carries with it the immediate loss of the right to teach the Catholic religion.

According to the Law, everyone, individually or in groups, has the right to religious

instruction in the educational establishments of religious organizations. In national minority schools supervised by the State or municipalities, if such is the wish of the students and their parents or guardians, the religion appropriate to the particular national minority may be taught in compliance with procedures prescribed by the Ministry of Education and Science. Thus, for example, the Orthodox, whose religion is not mentioned in the Law on Religious Organizations, can ensure religious classes for their children.

The University of Latvia's Theological Faculty is nondenominational. The Faculty of Theology was established in 1920. In 1940, in consequence of occupation by the Soviet Union, it was abolished. On the collapse of the Soviet regime at the end of the 1980s, the Faculty was restored. Now the Faculty of Theology, pursuant to the Faculty Regulations approved in 1998 by the University Senate, is an ecumenical Christian academic and research department of the University of Latvia, grooming theologians, academic researchers in religious studies, lecturers and professional teachers of religion and ethics, as well as specialists in ethical issues. The Faculty is subordinate to no church; it co-operates with all churches. Students and lecturers are from various denominations. This non-denominational stance has rather specific consequences: the separation of state and church here manifests itself as separation of Theology and the Church. The work of the Faculty reflects the direction of Theology more towards social issues, which really should be within the sphere of church activities under the classical model, rather than part of ministerial training.

IX. Shrines Officially Recognized by the Republic of Latvia

In Latvia more than eight hundred temples and cult buildings are owned by religious organizations, including 300 by Lutherans, 216 by Catholics, 122 by Orthodox, 66 by Old Believer Orthodox, 66 by Baptists, 79 by Seventh-day Adventists, 24 by Pentecosts, and 8 by the Salvation Army. A large number of the churches are listed as historic monuments of national importance. The most famous and best-known churches are Riga Dome owned by the Lutherans, the Aglona Basilica of the Roman Catholics, and the Orthodox Church's monastery Valgunde.

The Aglona Basilica of the Roman Catholics is currently the only officially recognized shrine of the Republic of Latvia. The Basilica was built in 1800 by the Dominican monks. The Aglona Basilica was visited and consecrated by Pope John Paul II in 1993, and it attracts many pilgrims. Every year on 14 and 15 August there are celebrations to mark the Catholic Feast of the Assumption of the Blessed Virgin Mary. Large numbers take part; for example, on 15 August 2003 about 100,000 pilgrims participated in the Aglona celebration.

The Shrine has a particular legal regulation. According to Article 1 of the Law of 1995 "On the International Shrine in Aglona," Aglona is an international shrine as well as being a part of the cultural and historical heritage of Latvia, a cultural monument and a place for religious pilgrimages. The Shrine of Aglona must be used exclusively for religious and spiritual observances under the auspices of the Latvian Catholic Church. On the basis of this Law, the government of Latvia promulgated in 1999 regulations "Concerning the Activities of Natural and Legal Persons in the Protected Area of Aglona Shrine."

The regulations provided that timber felling and any work affecting the river or lake, any construction or installation of premises and buildings, hotels, or places of entertainment may be carried out only with the written permission of the congregation. In the Shrine area, no one may, without the congregation's permission, sell or advertise alcoholic drinks and amusement products. Without the same permission, hunting and fishing in the area are also prohibited.

In accordance to the Article 11 of the Agreement with the Holy See, the Shrine of Aglona is part of the cultural and historical heritage of the Republic of Latvia, and as such is protected under Latvian law. Besides the building of the Basilica itself, the sacred square in front of the Basilica and the cemetery and the spring area, the protected area of the Shrine includes all other buildings, structures, and lands belonging to the Catholic

Church.

X. Freedom of Religion at Places of Incarceration

A detailed look at Latvian law insofar as religious practices in places of incarceration are concerned is in order here. The law that is related to the goal stated in Section 1 of the Law on Criminal Procedure,[22] is in effect now, but it was not in force at the time when violations determined by the European Court of Human Rights were in place.[23]
First of all, we may review those legal subjects to whom legal regulations apply. People who are in places of incarceration are either *detained* (i.e., people who have been ordered to be under detention by a judge or a court during pre-trial proceedings) or *convicted* (those who have been sentenced to incarceration as the result of having been found guilty of a crime). The coordinator of the religious needs of both kinds of people is the chaplain. The chaplain represents people in relations with administrators insofar as issues such as religious diet or religious festivals are concerned. The chaplain also helps when the incarcerated individual needs to contact a clergyperson of his or her religion. The chaplain must ensure that detained and convicted people enjoy the full right of freedom of religion, offering them moral support and consultations on issues of a religious and ethic nature, also helping them to improve themselves in the moral sense.[24] Chaplains provide spiritual care for detained and convicted people, coordinating religious processes in places of incarceration. To be sure, detained and convicted people have different status and regimens, and there are differences in the way they are regulated. The chaplains who work at places of incarceration are regulated by the Prisons Board of the Ministry of Justice.[25]

Detained persons can satisfy their religious needs in accordance with the law on procedures related to incarceration.[26]

> **Section 27. Spiritual care for incarcerated persons**
>
> (1) Spiritual care of incarcerated persons shall be the responsibility of the chaplains' service of the Prisons Board.
>
> (2) The chaplain's service of the Prisons Board shall organize and co-ordinate the activities of religious organizations in the investigatory prison.
>
> (3) An incarcerated person shall have the right to ask the chaplain to bring in a clergyperson from the faith of the said incarcerated person.
>
> (4) The procedure whereby an incarcerated person is permitted to meet with a clergyperson and/or to take part in the religious activities of religious organizations shall be determined in the internal rules of procedure of the investigatory prison.

Regulations set forth in the law define the internal procedures of the investigatory prison, addressing such issues as health examinations, sanitation, and the way in which incarcerated persons have the right to take part in educational events:[27]

> **VII. Educational events and the spiritual care of incarcerated persons**
>
> 53. Educational and religious events at the investigatory prison shall take place at specified times of the day and in the presence of representatives of the investigatory prison's administration. Incarcerated persons shall take part in educational and religious events

22. *Latvijas Vēstnesis*, No. 74, 11 May 2005.
23. Ed.: See *Finbergs and Others v. Latvia*, 43352/02, lodged 29 November 2002, communicated April 2009, and *Gubenko v. Latvia*, 6674/06, lodged 8 December 2006, communicated 20 November 2009.
24. Regulations concerning this can be found in *Latvijas Vēstnesis*, No. 101, 5 July 2002.
25. There are also chaplains for the National Armed Forces and for other institutions at which ordinary contacts with clergymen are not possible.
26. *Latvijas Vēstnesis*, No. 103 (3471), 4 July 2006.
27. *Latvijas Vēstnesis*, No. 193(3769), 30 November 2007.

on a voluntary basis.
54. The administration of the investigatory prison shall inform incarcerated persons about opportunities to take part in educational and religious events.
55. An incarcerated person shall inform the administration of the investigatory prison of his or her desire to take part in educational and religious events or to meet individually with a clergyperson.
56. The director of the investigatory prison or an official authorized by the said director may permit an incarcerated person to attend educational and religious events or to meet individually with a clergymen whilst taking into account all limitations specified by the procedural institution, all requirements vis-à-vis isolation, instructions from medical personnel, and other considerations related to the security of the institution. Where necessary, the request may be refused.

The regulations also speak to the types of objects and food products which incarcerated persons may keep. These include a plate, a cup, a spoon, and clothing that is appropriate for the season. Incarcerated persons also have the right to have newspapers, magazines, and seven books. This means that they can possess and read legal literature.[28] Convicted persons can pursue their religious needs on the basis of legal regulations comparable to those which apply to detained persons (see Section 46^1 of the Punitive Code).[29] The only difference is that the procedure whereby convicted persons are permitted to meet with clergypersons and attend events aimed at moral improvement is regulated by Cabinet of Ministers Regulation No. 423, 30 May 2006, "Regulations on the Internal Procedures of Institutions of Incarceration."[30] Sections 35 to 39 of these regulations are dedicated specifically to spiritual care:

VII. Spiritual care of convicted persons

35. In order to provide for the spiritual care of convicted persons, chaplains shall organize the religious activities of religious organizations at institutions of incarceration or conduct same in accordance with norms related to the chaplain's service.

36. All religious activities of religious organizations except for confession shall take place in the presence of an employee of the relevant institution of incarceration.

37. Convicted persons shall meet with clergypersons in accordance with the agenda and rules of the institution of incarceration, as specified by the director of the Prisons Board.

38. Convicted persons who are in punitive confinement shall be visited by a clergyperson only with the express approval of the director of the relevant institution of incarceration. A representative of the administration shall always be present during any such visit.

39. Religious literature shall be distributed at an institution of incarceration by religious organizations referred to in normative acts related to the chaplain's service.[31]

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28. Appendix 4 to Cabinet of Ministers Regulation No. 800, 27 November 2007.

29. The code was approved in 1970 and has been in effect since 1971. Section 46.1 speaks to spiritual care in institutions of incarceration, noting that there are chaplains' services at such institutions. These are subordinated to the Prisons Board, and chaplains are appointed with the agreement of the Board of Religious Affairs. Legally registered religious, charitable and welfare organizations are allowed to provide services aimed at moral improvement at places of incarceration. The procedure whereby convicted persons are allowed to meet with clergy and take part in moral improvement procedures is regulated in the internal procedures of the relevant places of incarceration.

30. *Latvijas Vēstnesis*, No. 32(2607), 27 February 2002.

31. Basic regulations concerning institutions of incarceration include the isolation and supervision of convicted persons with the aim of keeping them from committing additional criminal offenses. Convicted

XI. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

Section 151 of the Criminal Law sets forth sanctions for anyone who disrupts a religious event. The punishment is either community service or a fine of no more than the equivalent of 10 times the minimum monthly wage.[32] Note that Section 151 speaks only to "religious rituals" and specifies that the proscribed disruption must be intentional. Specifically, punishment is to be applied to "a person who commits intentional interference with religious rituals, if same are not in violation of the law and are not associated with a violation of personal rights." Commentary attached to the Criminal Law explains that disruption of religious rituals can involve "an unlawful closing of a house of worship; a ban on cult ceremonies or on religious rituals such as marriages, baptisms and funerals; or violence against an individual who takes part in such a ritual or a servant of the cult."[33] The makeup of the criminal offense is formal and applies to the moment when steps are taken to disrupt a religious ritual. In any event it is believed that the subjective aspects of this offense are characterized by direct intent. As far as this section of the Criminal Law is concerned, a guilty party can interfere with religious rituals by acting against an officially registered religious organization, its members, or individual people of faith.[34]

In 2007, criminal proceedings were launched just once on the basis of Section 151 of the Criminal Law.[35] At issue was an incident in which members and employees of the Grebenschikov Old Believer congregation of Rīga were barred from entering their house of worship. The author has no further information about the development of this criminal case, although it is known that it has not yet been submitted to the courts. Section 149^1 of the Criminal Law specifies a fine equal to 30 times the minimum monthly for violations of the ban against discrimination if such an offense has been committed more than once in a single year's time. The section speaks to "discrimination related to race or ethnicity," and it does not specifically speak to religion. The key phrase in this section is this: "or for the violation of discrimination prohibitions specified in other regulatory enactments."

Such enactments include the Law on Religious Organizations, which states, in Section 4.1, that "any direct or indirect limitation on the rights of residents, direct or indirect creation of advantages for residents, offense against religious sensibilities or fomenting of hatred vis-à-vis the attitude toward religion of residents shall be banned." This suggests that the norms of Section 149^1 of the Criminal Law apply in this regard, too. Section 149^1 specifies a prison sentence of up to two years, mandatory community service, or a fine equal to no more than 50 times the minimum monthly wage if the violation against the ban on discrimination has caused substantial harm, if it has involved violence, fraud or threats, if it has been committed by a group of individuals, if it has been committed by a government official or a senior representative of a company, enterprise or organization, or if it has been committed with the use of an automated data processing system. Here we are dealing with general offenses such as assault or coercion. The Criminal Law does not speak specifically to attacks against someone's freedom of religion or conscience, but the fact is that if an offense is sufficiently serious, such crimes can end up in court not because of their religious nature, but because they represent a

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persons face various regimes and conditions, depending on the criminal offense that they have committed, as well as their personal nature and behavior. Section 50^4.9.8 of the Punitive Code, for instance, states that those prisoners who are at the lowest level of the prison regime have the right to attend worship services in the prison chapel and to meet with clergypersons without the presence of any other person.

32. In July 2008 the minimum monthly wage in Latvia was LVL 160 (EUR 112).

33. Krastiņš, U., Liholaja, V. and A. Niedre. Krimināllikuma zinātniski praktiskas komentārs. Nr. 2. Sevišķā daļa (Scientific and Practical Commentary on the Criminal Law. No. 2: Special Regulations). Rīga: AFS (2007), 313.

34. Krastiņš, U. (ed.). Kriminālties ības. Vispārīgā un sevišķā daļa (Criminal Law: General and Special Regulations). Rīga: Tiesu namu aģentūra (1999), 195.

35. A letter from the state secretary of the Interior Ministry of the Republic of Latvia, Aivars Straume, to Associate Professor Ringolds Balodis, chair of the Department of Constitutional Law of the Faculty of Law, University of Latvia, 29 May 2008.

general offense against an individual's private rights.

When it comes to offending a person's religious sensibilities or fomenting hostility with respect to someone's attitude vis-à-vis religion or atheism, Section 150 of the Criminal Law specifies a prison sentence of up to two years, community service, or a fine of as much as the equivalent of 40 minimum monthly wages.[36] Here it must once again be noted that if the offense causes significant harm, involves violence, fraud, or threats, is committed by a group of individuals, a government official, a senior representative of a company, enterprise or organization, or involves automated data systems, the punishment can be a prison sentence of as much as four years. Commentary on Section 150 notes that, in objective terms, this refers to activities which are manifested as a direct or indirect limitation on an individual's right, the creation of advantages for individuals, offense against the religious sensibilities of an individual, or fomenting of hatred. These activities relate to the victim's attitude vis-à-vis religion or atheism.[37]

The criminal offense that is addressed in Section 150 threatens the right of freedom of religion of an individual, because Section 99 of the *Satversme* declares that this is a universal right. The makeup of the criminal offense that is addressed in Section 150 is formal and applies to the moment when the activities spoken to in the sections have occurred. From the subjective perspective, the offense can be committed only with direct intent, because the guilty party would have to perform the aforementioned acts in terms of attacking the victim's religious or atheistic beliefs. In other words, there has to be direct intent.[38] In 2008, criminal proceedings were launched only once with respect to Section 150 of the Criminal Law (fomenting religious hatred).[39] The proceedings were eventually cancelled on the basis of Section 377.2 of the Law on Criminal Procedure – investigators did not determine that a criminal offense had been committed. The issue concerned an Internet portal, www.draugiem.lv (www.friends.lv),where someone had posted statements which were offensive to Roman Catholics.[40]

In the 1990s, there were several cases related to offenses against people's religious sensibilities. An organization calling itself "Congregations of God" made statements which offended traditional religious denominations and were aimed at attracting attention.[41] One might note that some of Latvia's leading researchers in the field of religion (*Valdis Tēraudkalns* and *Solveiga Krūmiņa-Koņkova*) have argued[42] that the concept of "hate speech" should be used instead of the concept of "religious sensibilities." By this, they refer to spoken or written calls for violence, to the unjustified limitation of the rights of individuals or groups, as well as to offensive or humiliating speech which foments hatred. The experts feel that these are offenses which affect not just the area of religion, but also such factors as ethnic origin, skin color and sexual orientation.

A. The Confidentiality of Confessions

The confidential nature of confessions and pastoral discussions is protected in special

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36. Balodis, R. Church and State in Latvia. In Ferrari, S. and W.C. Durham (eds.). Law and Religion in Post-Communist Europe. Leuven, Paris, Dudley, MA: Peeters Publishers (2003), 152.

37. Krastiņš, U., Liholaja, V. and A. Niedre. Krimināllikuma zinātniski…, supra n. 33 at 311-312.

38. Religious sensibilities can be offended by humiliating an individual, by making rude statements about the individual, by denigrating the individual's attitude vis-à-vis religion or atheism, etc. This can be done in spoken, written or another form. Fomenting of hostility refers to the dissemination of spoken or written ideas, theories or views via the mass media or otherwise so as to encourage a broader or narrower range of individuals to develop hostile attitudes vis-à-vis the representatives of another religious group or atheists. See Krastiņš, U., Liholaja, V. and A. Niedre. Krimināllikuma zinātniski…, supra n. 33 at 311-312.

39. A letter from the state secretary of the Interior Ministry of the Republic of Latvia, Aivars Straume, to Associate Professor Ringolds Balodis, chair of the Department of Constitutional Law of the Faculty of Law, University of Latvia, 29 May 2008.

40. Id.

41. Balodis, R. Valsts un Baznīca (State and Church). Rīga: Nordik (2000), 284.

42. Krūmiņa-Koņkova, S. and V. Tēraudkalns. "Reliģiskā dažādība Latvijā" (Religious Diversity in Latvia). Rīga: Klints (2007), 89.

laws related to religious denominations,[43] as well as in the Law on Civil Procedure (Section 106), the Law on Criminal Procedure (Section 121), and the Law on Administrative Procedure (Section 163). The procedural laws state that clergypersons may decline to provide evidence in administrative, criminal, and civil cases about things that they have heard in confession. People who are in prison have the right to attend confession without the presence of any prison representative.[44] In 2007, the Parliament of Latvia adopted five of seven proposed special laws on religious denominations. At this writing it is expected that the two other laws – one on the Orthodox and one on the Lutheran church – will be approved in the autumn of 2008. The legislature has covered some issues in church-related laws which should be regulated,[45] and it can be said that at this time the model in Latvia is similar to that which prevails in Italy or Spain.

B. Offenses against the Public Peace at a Place of Worship or during a Religious Procedure

The Criminal Law of the Republic of Latvia speaks to the establishment or management of destructive religious groups. This is known as the "anti-sect" section of the law (Section 207), and in fact it could be applied against any organization which engages in religious activities.[46] This is true irrespective of whether the organization has been registered as a religious organization, as well as of whether it is a traditional or untraditional organization.

Section 227 is titled "Causing Danger to Public Safety, Order and the Health of Individuals While Performing Religious Activities." Offenses related to Section 227 can lead to imprisonment for up to five years, community service, or a fine of no more than the equivalent of 100 times the minimum monthly wage. In commentary about the Criminal Law, Professor V. Liholaja from the University of Latvia Faculty of Law notes[47] that the criminal offense that is addressed in Section 227 involves activities which lead to the organization of a group which harms public safety and order, the health of individuals, or the legally protected rights and interests of individuals through religious instruction, evangelization or rituals. It also applies to running such a group or taking part in these types of activities. Professor Liholaja also writes that the organization and management of activities which are referred to in Section 227 means bringing people into such groups (sects), creating the circumstances that are needed for such groups to operate (facilities, equipment, objects for rituals, various kinds of informational materials), dividing duties among participants in the group, proclaiming the relevant religious instructions, or engaging in religious rituals. Criminal liability is also faced by people who take part in such activities.[48] When it comes to harming the health of individuals,[49] this involves physical processes vis-à-vis the victim in the context of which the victim is beaten or tortured, he or she feels physical pain, suffers physical harm at various levels of seriousness, or faces psychological pressures which create mental or spiritual traumas. The commentary also says that offenses against the legally protected rights and interests

43. A law on the Latvian congregations of the Church of Seventh-day Adventists, *Latvijas Vēstnesis*, No. 93 (3669), 12 June 2007. Also a law on the Latvian Union of Baptist Congregations, *Latvijas Vēstnesis*, No. 86 (3662), 30 May 2007. Also a law on the Jewish congregation in Rīga, *Latvijas Vēstnesis*, No. 98 (3674), 20 June 1998. Also a law on the Latvian Unified Methodist Church, *Latvijas Vēstnesis*, No. 91 (3667), 6 July 2007. Also a law on the Latvian Pomora Church of Old Believers, *Latvijas Vēstnesis*, No. 89 (3674), 20 June 2007.

44. Cabinet of Ministers regulations on the internal procedures of places of incarceration, *Latvijas Vēstnesis*, No. 32 (2607), 27 February 2002.

45. Unresolved issues at this writing include taxation, organizations of public benefit, religious holidays, etc. See Balodis, R. Baznīcu tiesības (The Rights of Churches). Rīga: Religious Freedom Association (2002), 699.

46. Religious activities include worship services, worship ceremonies, rituals, meditation, and missionary activities (evangelisation). See Likumdošanas aktu terminu vārdnīca (Dictionary of Legislative Terms). Rīga: Senders (1999), p. 359.

47. Krastiņš, U., Liholaja, V. and A. Niedre. Krimināllikuma zinātniski…, supra n. 33 at 201-203.

48. Krastiņš, U. (ed.). Krimināltiesības…, supra n. 34 at 259.

49. Krastiņš, U., Liholaja, V. and A. Niedre. Krimināllikuma zinātniski…, supra n. 33 at 201-203

of individuals,[50] can involve such acts as a ban against working, studying or attending theatrical performances, encouragement to halt public activities, voting in elections, and engaging in military service.

XII. CHAPLAINCY

According to Article 1(8) of the Law on Religious Organizations, chaplains are the spiritual personnel who perform their duties at penal institutions, units of the National Armed Forces, and elsewhere where ordinary pastoral care is not available. In accordance with Article 14(5) of the LROL, chaplains in Latvia function according to the Regulations of the Council of Ministers on the Chaplain Service. The Council of Ministers issued the Chaplain Service Regulations on 2 July 2002. Chaplains' activity is financed and given material and technical support by the appropriate state or self governmental institution within its regular budget, or by the relevant religious organization. The Regulations govern the work of the chaplaincy service in the Republic of Latvia and provide that in Latvia exist Chaplains of custody institutions, National Armed Forces Chaplains, Chaplains of institutions of medical and social services and Chaplains of airports, sea-ports and land transport terminals.

XIII. RELIGION AND THE PROCESS OF GRANTING OF ASYLUM

Registration of citizens of Latvia, non-citizens of Latvia, as well as persons who have received the residence permit, registration certificate, or permanent residence certificate, is managed by the Office of Citizenship and Migration Affairs of the Ministry of the Interior of the Republic of Latvia, which also summarizes statistical data regarding illegal immigrants and asylum seekers.

In Latvia the procedure of asylum-seeking started in 1998. Since that time, 254 persons have requested asylum and 17 persons have been granted refugee status. The number of those seeking asylum has tended to grow. In 2007 asylum in Latvia was requested by 34 persons; in 2008, there were 51 requests.[51]

In reference to the connection between religion and asylum-seeking, none of the Churches has made reference to the paragraphs of the aforementioned laws to favor the staying of asylum seekers in Latvia. Religious dimensions for family unification have not been observed. Polygamous or marriages contracted by force have not been observed.

From the seven special laws about churches, the cooperation of the State and churches, the process of granting of asylum is defined in five of them: in the 12th paragraph in the respective laws of Lutherans, Seventh-day Adventists, and Baptists, in the 11th paragraph in the respective law of Hebrews, and in the 13th paragraph in the respective law of Orthodox Believers. Old Believers and Methodists did not want such legal regulation in their laws, and in the agreement with the Holy See this matter was not spoken of. It is prescribed in the mentioned special laws that an asylum seeker who is afraid of pursuance because of his religious beliefs has the rights of having a representative from the Church during the negotiations in the process of acquisition of asylum. If necessary, government institutions request a judgment from the Church regarding the possible pursuance of the asylum seeker because of his Adventist beliefs.

The number of foreigners who have illegally crossed the state border in Latvia doubled from 2008 to 2009. In the first five months of 2009, the state border guards arrested 56 residents of third-world countries for illegal crossing of the state border, which is twice as much as in the whole year of 2008. Thirty-four percent of the illegal border crossers are the residents of Moldova; the rest are mainly from Congo, Togo, Ghana, Syria, Côte d'Ivoire, Egypt, the Republic of China, and Byelorussia. Residents of the

50. Id.

51. Home page of the Office of Citizenship and Migration Affairs, http://www.pmlp.gov.lv/lv/statistika/patveruma.html.

third-world countries arrested at the border control checkpoints used faked residence permits, visas and traveling documents of Schengen Zone countries to illegally cross the state border.

ANDREA BETTETINI

Religion and the Secular State in Malta

I. SOCIAL CONTEXT[1]

According to tradition, and as recorded in the Acts of the Apostles, St. Paul founded the Church in Malta before 65 AD, following his shipwreck on those Islands. Malta is to this day one of the most Catholic countries in the world: about 95 percent of the population (more than 400,000 people living in an area of over 300 km²) is Roman Catholic, and about the 53 percent attend Sunday services regularly. Almost all of the country's political leaders are practicing Roman Catholics. The Maltese Church is frequently referred to today as the only extant Apostolic See, other than Rome itself (making allowances for a possible break in the appointment of Bishops to Malta during the period of Arab rule – 869 to 1127 AD).

On the three islands of the Maltese archipelago (Malta, Gozo, and Comino) there are 365 Catholic churches; the parish church is the architectural and geographic focal point of every Maltese town and village. Various Roman Catholic religious orders are present.

The Constitution of Malta establishes Roman Catholicism as the State religion, but at the same time provides for freedom of religion. Full liberty of conscience and freedom of worship are guaranteed, so other faiths have been imported to Malta and some of them have been embraced by various Maltese people.[2] A number of Christian and non-Christian faiths have places of worship on the islands. In the congregations of the local Protestant Churches most members are not Maltese; they are British retirees living in the country and vacationers from many other nations. Jehovah's Witnesses are approximately 500; the Church of Jesus Christ of Latter-day Saints (Mormons), the Bible Baptist Church, and the Fellowship of Evangelical Churches have about 60 affiliates. There are also some Churches of other denominations, such as St. Andrew's Scots Church in Valletta (a joint Presbyterian and Methodist congregation) and St. Paul's Anglican Cathedral, as well as a Seventh-day Adventist Church in Birkirkara. A union of 16 groups of Evangelical Churches comprising Pentecostal and other nondenominational Churches are also present.

The Jewish population of Malta reached its peak in the Middle Ages under Norman rule. In 1479, Malta and Sicily came under Aragonese rule; in 1492, the Alhambra Decree forced all Jews to leave the country, permitting them to take away only a few of their belongings. Many Maltese Jews may have converted to Christianity in order to remain in the country. Today, there is one Jewish congregation. Members of Zen Buddhism and of the Bahá'í Faith are about 40. Muslims in Malta are approximately 3,000 (about 2,250 of which are foreigners, about 600 are naturalized citizens, and about 150 are native-born Maltese). There is one Muslim mosque. A Muslim primary school recently opened; its existence remains a point of some controversy. An estimated 2 percent of the population does not formally practice any religion. There are respectful and cooperative relations between the Catholic Church and non-Catholic religious groups. Practitioners of non-Catholic religious groups proselytize freely and openly.

II. CONSTITUTIONAL AND LEGAL CONTEXT - RELIGION AND THE AUTONOMY OF THE STATE

In 1964, Malta achieved full independence from the British Empire (of which it had been part since 1814, after the French were defeated), becoming a member of the British

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1. Some information taken from the United States Department of State, 2008 *Report on International Religious Freedom - Malta*, 19 September 2008, available at http://www.unhcr.org/refworld/docid/48d5cbdf5c.html. See also http://en.wikipedia.org/ wiki/Malta.

2. VV.AA., *Religion (in Malta)*, available at http://www.aboutmalta.com/RELIGION/index.shtml.

Commonwealth, the Council of Europe and the United Nations. In 1970, it signed an Association Agreement with the European Union and in 1974 became a constitutional Republic, whilst retaining membership in the Commonwealth of Nations. In 1990 it applied for full membership in the European Union. As a member of the EU since 2004, Malta is a party to the Schengen Agreement (since 2007) and is a member of the Eurozone (since 2008).

Article 2 of the Constitution of Malta[3] states the following:

> (1) The religion of Malta is the Roman Catholic Apostolic Religion.
> (2) The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong.
> (3) Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.

At the same time, Article 32 recognizes to every person in Malta (whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest), amongst the other fundamental rights and freedoms of the individual, the right to freedom of conscience.

More specifically, Article 40 provides for freedom of religion, prescribing that "All persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship."

A corollary to the right of religious freedom is the principle of equality at law (Article 45 of the Constitution): no law shall make any discriminatory provision, where "the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex."

The Government at all levels[4], being strongly committed to human rights, seeks to protect the right of religious freedom in full and do not tolerate its abuse, either by governmental or private actors. An independent judiciary upholds the Constitution's protections for individual rights and freedoms.[5]

The presence and the influence of the Catholic Church in everyday life is very strong; however, non-Catholics, including converts from Catholicism, do not face legal or societal discrimination. All religious organizations have similar legal rights. Religious organizations can own property including buildings, and their ministers can perform marriages and other functions.

Some important Agreements have been reached between the Church and the State:

(1) *Agreement between the Holy See and the Government of the Republic of Malta regarding the incorporation of the Faculty of Theology in the University of Malta* (signed on 26 September, 1988).[6]

Such incorporation and the functions of the Faculty of Theology are also regulated by the Laws of Malta and by the Statutes of the same University. It is interesting to note that Article 2 of the Agreement states that "Academic degrees and diplomas conferred by the Faculty of Theology shall have canonical and civil value." On the same date was signed a *Financial Agreement between the Government of Malta and the Archdiocese of Malta for the financing of the Faculty of Theology in the University of Malta*[7], on the basis of whose Article 1 the "Government of Malta shall finance the Faculty of Theology according to the same criteria which it applies for the financing of the other Faculties."

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3. CONSTITUTION OF MALTA (*The Malta Independence Order* issued in 1964, as amended by several Acts, from XLI of 1965 to XIV and XXI of 2007), available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt0.pdf (consulted 6 July 2010).

4. Political parties in Malta, referring to March 2009, are the following: Nationalist Party, Labor Party, Alternative Demokratika (Green Party), Azzjoni Nazzjonali (National Action).

5. VV.AA., *Government And Politics (in Malta)*, available at http ://www.aboutmalta.com/GOVERNMENT _and_POLITICS/.

6. See http ://www.cepes.ro/hed/policy/legislation/pdf/malta.pdf (consulted 6 July 2010).

7. Id.

(2) *Agreement between the Holy See and the Republic of Malta on the temporal goods of the Church* (signed on 28 November 1991)[8], whereby the Church transferred to the State such immovable ecclesiastical property as was not required for pastoral purposes and whereby certain issues pertaining to the relations between the Church and the State as regards matters of patrimony were determined.

The Agreement was implemented by the Government by means of the *Ecclesiastical Entities (Properties) Act (Act 358 of 1992[9]).* The properties transferred to the State were listed in a number of Annexes attached to the Agreement.

This Act also provides for the establishment of the Joint Office to administer the properties transferred to the State.

(3) *Agreement between the Holy See and the Republic of Malta on Church Schools* (signed on 28 November 1991).[10]

(4) *Agreement between the Holy See and the Republic of Malta on the recognition of civil effects to canonical marriages and to the decisions of the ecclesiastical Authorities and tribunals about the same marriages* (3 February 1993).[11]

The last two themes shall be more deeply examined in Section IV and V.

These Agreements, the products of a long but constructive dialogue, strengthened the relations between the Church and the State and permitted the Church - especially following the Agreement on Church property - to concentrate better on its pastoral mission.[12]

III. THEORETICAL AND SCHOLARLY CONTEXT

As already mentioned, Article 2 - sub-Article (1) - of the Constitution of Malta declares that the Roman Catholic Apostolic Religion is the religion of Malta. Sub-Article (2) establishes that the authorities of the Catholic Church have "the duty and the right to teach which principles are right and which are wrong," giving to the Roman Catholic Church unfettered constitutional authority in matters of ethics and morality, and making its values an evaluative basis of legal order.[13] A significant consequence of this is the prohibition of divorce; however, the State generally recognizes divorces of individuals domiciled abroad who have undergone divorce proceedings in a competent court.[14]

Sub-Article (3) involving teaching of the Roman Catholic faith is self-explanatory.

This raises the very important question as to whether Malta is truly secular, or is a confessional State instead. One might insinuate that Article 2 is incompatible with the nature of a lay State. But it is important to reflect on the fact that "confessionality" is to be understood not only in the formal sense, nor only in its material meaning, but also according to its sociological dimension. So, although in principle a State is a lay and autonomous institution, its non-confessionality may be subtly tempered owing to a sociological factor.

From the sociological point of view, the granting of a special juridical position to the Roman Catholic Religion in Malta can be considered a simple acknowledgement of the fact that the majority of Maltese citizens belong to that religion. Recent sociological

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8. See http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19930218_s-sede-rep- malta-beni_en.html.

9. Chapter 358, *Ecclesiastical Entities (Properties) Act*, 28 November, 1991, available at http://docs.justice.gov.mt/lom/legislation/english/leg/vol_9/CHAPT358.pdf

10. See http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19930218_santa-sede-rep-malta-scuole_en.html.

11. See http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19930203_s-sede- malta_en.html.

12. G. Falzon, *The Catholic Church in contemporary Malta*, available at http ://www.aboutmalta.com/grazio/church.html.

13. *Encyclopedia of religious freedom*, Catharine Cookson Editor, 2003, available at http://books.google.it/books?id=R0PrjC1Ar7gC&pg=PA56&lpg=PA56&dq=Church-State+relations+malta&source=bl&ots=8wMK-E5tcF&sig=Ub5B6juIR9m6q16Wd7QkyK5iYc&hl=it&ei=SpHUSumRNciNsAbp8PTYCw&sa=X&oi=book_result&ct=result&resnum=6&ved=0CCQQ6AEwBQ#v=onepage&q=ChurchState%20relations%20malta&f=tru

14. United States Department of State, supra n. 1.

findings confirm the ubiquity of the Catholic Church in the Maltese islands[15] and, although the process of secularization did not spare them, adherence of the Maltese to the Catholic Church is still very strong.

Without expecting that the State become confessional in the formal and material meaning of the word, it is only fair that in this sort of sociological reality the State and the Catholic Church cooperate on an institutional level.

The establishing of the Roman Catholicism as the State religion apparently runs counter to Article 45 of the Constitution, in which is embodied the principle of equality at law. But in enacting laws, the legislator can make legitimate distinctions between its subjects, which in practice amount to "differentiation"; equal treatment does not necessarily exclude different legislative treatment, justified and reasonable, of the concerned subjects. Impartiality forbids illegitimate distinctions which devolve into "discriminations," but it does not preclude normative differentiation.

Specifically about religion, we realize that "religious equality" implies that each and every individual, including confessional groups who have a juridical personality, enjoy full religious freedom and have the right to free exercise their respective mode of religious worship (as prescribed by Article 40 (1) of the Constitution of Malta). In fact, though the Constitution of Malta reflects the social reality of the country, this can never justify the limitation of the right to religious freedom exercised within the bounds of a just public order. Nevertheless, this does not signify that there should be uniformity in the way the law deals with the religious factor.

Thus, it seems to be incorrect to conclude that the mentioning of the particular religion in the Constitution discriminates against other religions.[16] Neither the Catholic Church nor the Republic of Malta acknowledge this strict interpretation of confessionalism. John Paul II, in his message for 1991 World Day of Peace, warned against the abuse of confessionalism, remarking that "even in cases where the State grants a special juridical position to a particular religion, there is a duty to ensure that the right to freedom of conscience is legally recognised and effectively respected to all citizens."[17]

Ugo Mifsud Bonnici, President of the Republic of Malta from 1994 to 1999, during a State visit to the Pope, gave a qualified, perhaps even authentic, interpretation of the Maltese confessionality, explaining that "the State exists in Malta as in other nations with all its structures for the benefit of the citizens. But without doubt, a primary end of these structures is the guaranteeing of the liberty of conscience and the free expression of religious faith, but not the imposition of any creed"[18]; furthermore, referring to the different Agreements concluded between the Republic of Malta and the Holy See, Bonnici indicated that:

> the Maltese Authorities have been guided by the Constitution which in an explicit way recognizes the Catholic Religion as the religion of Malta, but also guarantees liberty of conscience and of cult with equal right to all citizens of whatever religious creed and also to those who do not profess any at all. In fact, the Constitution incorporates the principles of natural law, and so in essence it is never in conflict with the doctrine of the Church.[19]

But we must mention a competing theoretical view about this theme.

Many people in Malta (in philosophical, legal and political milieus), though they respect and would also defend the Church's right to participate in social discourse as well

15. C. Tabone, *Maltese families in transition*, Malta 1995.

16. M. Grech, *The Harmonization of the Religious and Civil Dimensions of Canonical Marriages in Malta (An Exegetical Study of the Agreement between the Holy See and the Republic of Malta on the Recognition of Civil Effects to Canonical Marriages)*, Malta, 2001.

17. John Paul II, "*Message for World Day of Peace 1991*," in Osservatore Romano (English Edition), 24.12.1990.

18. U. Mifsud Bonnici, *Discorso in occasione della sua visita ufficiale al Santo Padre* (04.02.1995), in Bullettin ta'l-Arcidjocesi u Liturgija tal-Kelma, Malta 85, 1995.

19. Id.

as its right to publicly preach its values through its institutions, believe that the Roman Catholic faith, despite the fact that it is the most popular religion, should not be singled out by a secular State, that has to take decisions without recourse to religious doctrine.[20] It is considered "categorically improper to legislate any one Church as the State religion."[21]

Some arguments for a secular Malta contend that the involvement of the Church in Malta's public life is harmful as far as human rights are concerned, pointing especially to the issues of the crucifix appearing in all the offices and in the Schools, the refusing of divorce even for those who are not Catholic and married by civil law, and the rejection of abortion and of single sex marriages.

Some people consider it truly difficult not to be Catholic in Malta, to have another religion or no religion at all, so they frequently use the word "discrimination."[22] While no one wishes to deny the Church its rightful place in Maltese society, or to require the country to abandon her religious allegiance to the Catholic Church, the desire is to separate the Church from the affairs of State. The argument is that the Church should be mandated to exercise its spiritual rights in a diminished capacity, on a par with but not as an integral part of Malta's constitutional government. This view sees contemporary Malta as a liberal parliamentary democracy which should maintain a rigid line of demarcation between clergy and laymen.

According to this opinion, the way of the future calls for a lessening of ecclesiastical involvement in government affairs. A very important step required to turn Malta into a secular State (or to empower secularization) would be to change the Constitution[23], deleting the formal affiliation with the Church.

IV. RELIGIOUS EDUCATION OF THE YOUTH - STATE FINANCIAL SUPPORT FOR RELIGION

As stated in Article 2 (1) of the above-mentioned *Agreement between the Holy See and the Republic of Malta on Church Schools*, signed in 1991, "the State recognizes the right of the Church to establish and direct its own schools according to their specific nature and with autonomy of organization and operation." The general regulations envisaged by the State's educational policy regarding the "National Minimum Curriculum" and the "National Minimum Conditions" put into effect in State Schools must be observed.

The Church in Malta offers to the community a major service through her schools, which cater to about one-third of the primary/secondary student population in the Maltese Islands. One of the premises of the Agreement is just "the public character of the service offered by Church Schools to Maltese society."

The State recognizes as "Church Schools" those which are recognized as such in writing by the competent diocesan Bishop, and are subject to him according to Canon Law, even though belonging to or directed by various canonical legal persons (Art. 1). Church Schools are to provide fee-free tuition: teaching and non-teaching staff salaries are provided for jointly by Church and State, while other expenses are to be met by Church collections. In particular, the Church bound herself to use part of her income accruing from the transfer of her property to the State.

The Church also contributes through the services of her religious and priests in these Schools who receive a much reduced salary from that which they are entitled to and which they would have earned as lay employees. The Church is also responsible for the maintenance of her Schools. It is to collect the necessary funds to be able to meet these

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20. A. Sciberras, Poll: Secular State or Subtle Theocracy? Art. 2 of the CONSTITUTION OF MALTA, Monday, 31 August 2009, available at http://progressivemalta.blogspot.com/2009/08/poll-secular-state-or-subtle-theocracy. html.

21.J. Vella, *The emergence of secularism In Malta*, available at http://www.searchmalta.com/ezine/mouse/secularism.shtml.

22. The Malta Independent, 21 April 2003, They fight for a secular Malta, "*Malta is a fundamentalist Catholic country*," interview to John Zammit, President of the "Association for Men's Rights," available at http://www. emmybezzina.org/pdfs/secular_malta.pdf.

23. Id.

financial burdens. These include donations from parents and others, an annual collection in the Archdiocese of Malta and the Diocese of Gozo, and any other available source of income.[24]

Article 20 of the Education Act[25]states that the Minister has the duty to establish the curricula for State Schools, to provide for the education and teaching of the Catholic Religion in those Schools, and to establish the curriculum for the education and teaching of that religion according to the dispositions of the Bishops in Ordinary of the Maltese Islands.[26]

So, in accordance with Article 2 (3) of the Constitution, religious instruction in Catholicism is compulsory in all State Schools, though both the Constitution and the Education Act establish the right not to receive this instruction if the student, parent, or guardian objects. To promote tolerance, School curricula include studies in human rights, ethnic relations, and cultural diversity as part of values education.[27]

V. Civil Legal Effects of Religious Acts

A. The Maltese Matrimonial Legal System[28]

1. The Obligatory Religious Marriage System (until 1975)

Until the Marriage Act of 1975 *w*as promulgated, all marriages celebrated in Malta were regulated by Canon Law. No form of civil marriage was possible. This obligatory religious marriage system severely restrained the exercise of the right to religious freedom, with a strong discrimination against those Catholics who lapsed from their faith, against those individuals who wished to celebrate a religious but a non-Catholic marriage and also against those who did not profess any religious belief. Such persons did not have the possibility of contracting marriage in any form other than that of the Catholic Faith.

The Church continued to resist the introduction of any form of civil marriage in Malta; this extreme position not only was in contrast with the decree of the Second Vatican Ecumenical Council, *Dignitatis humanae* on religious liberty,[29] but also was completely out of tune with the emphasis on fundamental freedoms of individual, pervading all facets of social life in the country under the strong influence of international fora.

2. The Obligatory Civil Marriage System (introduced by Marriage Act of 1975[30])

The Marriage Question in Malta had been simmering for decades, coming to a head after Independence in 1964. Sociopolitical forces strongly aimed to develop the country into a modern democratic State, necessarily pluralistic, and with a growing awareness of fundamental human rights and freedoms. This strengthened the voice of a minority that clamoured for the introduction of civil marriage.

The Church's authority in various spheres of its pastoral activity, including education

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24. G. Falzon, *The Catholic Church in contemporary Malta*, supra n. 12.

25. Chapter 327, *Education Act* (Act XXIV of 1988. Last amendments: by Acts VI of 2001 and XVIII of 2002), available at http ://www.cepes.ro/hed/policy/legislation/pdf/malta.pdf (consulted 6 July 2010).

26. See also *Agreement between the Republic of Malta and the Holy See on catholic education in public schools* (16 November 1989), available at http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/ rc_seg-st_19891116_s-sede-malta-educazione_it.html (consulted 6 July 2010).

27. United States Department of State, *2008 Report on International Religious Freedom -Malta* (see above).

28. M. Grech, *The Harmonization*… supra n. 16; M. Grech, *Marriage Legislation in Malta*, in Forum, A Review of the Maltese Ecclesiastical Tribunal, No. 1, Vol. 2, Malta, 1991; A.S. Pullicino, *The Church-State Agreement on the Recognition of Civil Effects of Marriage and Declaration of Nullity Delivered by Ecclesiastical Tribunals*, in Forum, A Review of the Maltese Ecclesiastical Tribunal, No. 1, Vol. 6, Malta, 1995.

29. A. Bettetini, *L'Accordo 3 febbraio 1993 tra la Santa Sede e la Repubblica di Malta sul matrimonio: brevi annotazioni*, in Il diritto ecclesiastico, CVIII, Parte prima, Milano, 1997.

30. Chapter 255, *Marriage Act* (Act XXXVII of 1975. Last amendment: by Act XXXI of 2002 and IX of 2004), available at http ://www.maltachurchtribunals.org/docs/chapt255.pdf (consulted 6 July 2010).

and religious teaching, as well as the issue of marriage, was contested by the Socialist Government, elected in 1971. In these last thirty-five years, enormous changes were made in the Maltese marriage law.

The Marriage Act of 1975 introduced the civil marriage, bringing a transition from obligatory religious marriage to a facultative system on the Anglo-Saxon model, which in practice amounted to an obligatory civil marriage.

The previous position was thus somewhat corrected.[31] But the new system, denying any legal recognition to canonical marriage, remained discriminatory against the majority of the population who still professed the Catholic faith with regards to marriage and the family.

Considering the fact that the Marriage Act of 1975 was introduced unilaterally by the Government as a reaction to what it perceived to be the Church's intransigence, it was foreseeable that it went to the other extreme with the introduction of compulsory civil marriage, denying recognition to all other forms of marriage except those contracted according to the formalities of that law. The Act also denied recognition of the decisions given by the Ecclesiastical Tribunals regarding declarations of nullity of marriage. It moreover declared that Canon Law, in so far as marriage was concerned, was not to have any effect for civil purposes.

Marriage held by Catholic citizens was subject to two different legal orders, the canonical and the civil matrimonial systems. Catholics practically had to celebrate two marriages, one in Church and the other in the presence of the Marriage Registrar. When doubt cropped up about the validity of their marriage, they had to file two marriage suits, one at the Civil Courts and another at the Ecclesiastical Tribunal. Catholics' right for religious freedom was not fully recognized by the State. It is not enough that Civil Law does not prohibit religious marriage for purely religious purposes. The right of religious freedom is wholly satisfied and safeguarded when a marriage contracted in a religious form is recognized in all effects of law.

Moreover, the discrimination was more keenly highlighted considering that the law allowed marriage to be contracted either by civil or religious formalities. By means of this provision, non-Catholics who did not have a proper religious matrimonial law, could contract a civil marriage in a religious form and it would be valid from both the religious and the civil viewpoint. Only the Catholics could not benefit from this provision, for Canon Law regulates not only the formalities but also the substance of marriage.

Furthermore, there is in the law another type of discrimination against Catholics, that has been described as "the greatest anomaly of this Act"[32]: while it did not give any juridical value to decisions of the Ecclesiastical Tribunals, decisions of a foreign Court on the status of a married person or affecting such status were recognized for all purposes at Civil Law.

3. The "Concordatarian Marriage" (introduced in 1993)

The examined situation leads to the logical conclusion that once the political community and the Church are autonomous and independent of each other in their own field, and once they both have the authority, the interest and the right to regulate the marriages of their citizens and their members respectively, they both had to strive for healthy cooperation and consensus in this field for the common good. This theological and philosophical motivation encouraged both the Church and the State to persist in their efforts, against considerable odds, until the *Agreement between the Holy See and the Republic of Malta on the recognition of civil effects to canonical marriages and to the decisions of the ecclesiastical Authorities and tribunals about the same marriages* was finally reached (it was signed on the 3 February 1993, was sealed and approved on 25 March 1995 and came into force on the 15 May of the same year).

Under terms of this Agreement, the Republic of Malta recognizes for all civil effects

31. A. S. Pullicino, *The Church-State Agreement…* supra n. 27.
32. G. Frendo, *Is-sacerdot quddiem il-ligi l-gdida dwar iz-zwieg*, (03.02.1976), Malta (unpublished lecture).

marriages celebrated in Malta according to the canonical norms of the Catholic Church (Article 1), the judgments of nullity and the decrees of ratification of nullity of marriage given by the Ecclesiastical Tribunals and which have become executive (Article 3) and the decrees of the Roman Pontiff *super matrimonio rato et non consummato* (Article 7).

The principles enshrined in the Agreement were transposed into domestic law with the promulgation of Marriage Amendment Act 1995 (*Act I* of 3 March 1995) by the Maltese Parliament. This Act is the applicative law of the Agreement and incorporates the entire legislation on civil marriage.

With these modifications, marriage legislation in Malta has become a pluralistic one, now embodying two classes of marriages, the Anglo-Saxon system and the Latin system.[33]

The Agreement, considered a landmark in the history of Maltese matrimonial legislation, has long been expected by the Catholic community to amend what might be described as anomalous situation. It is the result of collaboration between Church and State, an expression of loyalty to their mission of service to man, a legal instrument aimed at fostering marriage and the family.

The Agreement and the amended Marriage Act 1995 redressed the discriminatory situation against Catholic citizens with regards to the freedom of religion and the right for equal treatment. The benefits that citizens reap from this type of Agreement are quite significant. Any Catholic wishing to enter marriage has a real choice. If he wishes to be faithful to his Catholic doctrine, he can celebrate the sacrament of marriage in Church. This marriage will be valid to all effects at civil law. But the law also provides that any citizen may choose to contract marriage in a civil or religious form, apart from the canonical form.

Although Catholic marriage and civil marriage in substance are regulated by two different types of regulations, they both result in the same civil status before Civil Law.

The laws regulating jurisdiction over matrimonial matters also respect the principle of religious freedom. A canonically married couple can make recourse to the Ecclesiastical Tribunal in order to resolve doubts about the validity of their marriage. The decisions taken by this Tribunal may then be recognized to all effects and purposes at civil law by the Civil Court.

If the same couple chooses instead to have their case judged by a Civil Court, even if this constitutes a breach of Catholic doctrine, the State, honouring the principle of the *ius poenitendi*, upholds the right of the couple to do so. However, the Agreement stipulates that in case one party chooses to have recourse to a Civil Court and the other insists on having the case considered by an Ecclesiastical Tribunal, the right of the latter party prevails. In such a case the Ecclesiastical Tribunal is deemed fully competent to consider the case. This is one of the points that is peculiar to this Agreement, and which is not found in any other marriage concordats the Church has with several States.

One may easily conclude that this measure in favour of the Catholic party is an infringement of the right of religious freedom of the other party. But the logic of this principle lies in the fact that in marriage it is the couple as a "single unit," not the individual spouses, who holds the right of freedom of religion. It was by the conjoined will of the two spouses that marriage was celebrated according to the norms and formalities of Canon law. Hence, the conjoined will of both spouses is necessary to change the juridical system which had regulated the canonical marriage recognized for all civil effects. Only such consent would allow passing from a confessional system to a secular one. In this case the *ius poenitendi* belongs to the couple and not to the parties individually.

By introducing the "concordatarian marriage" (the canonical marriage recognized to all effects at Civil Law), the Agreement has harmonized the civil and canonical dimensions of marriages celebrated before the Church, in the respect of freedom of choice of the individual as a reflection of the fundamental freedom of conscience and respect for

33. A. Bettetini, *L'Accordo 3 febbraio 1993*… supra n. 28.

the dignity of the human person. The sovereignty of the will is the pivot of the entire Agreement. This harmonization was the result of fruitful collaboration between Church and State, of long and laborious discussion, conducted in the full awareness of the principle that both State and Church, within their respective competencies, have the right and the duty to regulate the marriages of their citizens and members respectively. In fact, while both the State and the Church understandably adhered to their declared positions, solutions were sought in the recognition of the basic principle that the spouses had the right to choose not only the regime under which the marriage was to be celebrated, but also which jurisdiction should be competent to deliberate and decide on the validity or otherwise of the marriage.

4. Critiques about the Agreement and the Marriage Act

The Agreement will obviously have to withstand the test of time. Like all compromise solutions it is not a perfect agreement and neither side is completely happy with the final outcome. The State did not agree to recognize the exclusive competence of the Church in all judicial matters relating to canonical marriages. The Civil Tribunals retained the jurisdiction to determine questions relating to the validity of canonical marriages when both spouses submit themselves to their jurisdiction and in other cases.

Moreover, all marriages remain subject to the Civil Law regime on marriage regarding civil effects. It is only with respect to decisions of the Ecclesiastical Tribunals and in those cases when at least one of the spouses in a canonical marriage opts to have recourse before them that the Agreement recognized the exclusive jurisdiction of the Ecclesiastical Tribunals over concordatarian marriages and the State bound itself to recognize and register those decisions as binding for all civil effects on the parties.

So the Agreement and the Marriage Act inevitably came under criticism. But it must be said that most of the critique was either politically motivated or else had an antireligious and an anticlerical bias: the Agreement had been described as "anti-constitutional," "anti-European," "a breach of fundamental human rights," "a setback in the country's intellectual, cultural and democratic development," "a fundamentalist religious structure," and as "confused intermingling of Church and State roles and functions."

Behind these accusations seems to lie an erroneous interpretation and application of fundamental juridical principles sustaining the whole Agreement. About the allegation that the Agreement is an imposition of some form of confessionalism of the State it has to be remembered that during the Parliamentary debates on the amendments to the marriage law, the Government repeatedly stressed that this law was being promulgated so as to satisfy by means of a juridical reality the social and religious needs of a society with a Catholic majority; it is purposely enacted by an autonomous and lay State to give civil recognition to the externalization of the religious sentiments of the citizens.

To some extent, it may be said that the State is not strictly speaking interested in whether its citizens are members of one Church or another. What really matters for the State is that whichever citizen wants to have a religious marriage – in our case in point a Catholic marriage – his or her rights are safeguarded according to Constitutional precepts.[34]

5. Civil Law and Other Religious Marriages

It cannot be alleged that Marriage Act gives preferential treatment to the Catholic Church and discriminates against the other confessions. According to the law, the relation of the State with other religions and other non-Catholic Churches can be regulated by two principles.

1. Regarding civil marriages with a religious form, Section 17 lays down the following two criteria for the acceptance of the rites and religious usage:

34. M. Grech, *The Harmonization*… supra n. 16.

a) if a church or religion is generally accepted as a church or religion; or

b) if this church or religion is recognized for the purpose of this section by the State Minister.

Looking at the second criterion, it seems that the law attributes wide discretionary powers to the Minister, since it fails to establish an objective gauge for the evaluation.

2. Another very important element must be considered. Section 17 assumes the religious form of marriage, and Section 11 (3) clearly states that "the non-observance of any formality or any other similar requirement relating to the celebration of the marriage or preparation thereto" will give rise to a case of annullability limited by time. The church or religion are therefore required to provide the utmost guarantee of certainty demanded by the same law when they obtain recognition to all intents and purposes of this law.

The Marriage Act also stipulates that the State can have an Agreement with other Churches, religions, and denominations regarding the recognition of marriages celebrated in accordance with their rules and norms. These Agreements should conform substantially to the provisions of the Agreement between the Holy See and Malta (Section 37).

VI. Religious Symbols in Public Places

The presence of the crucifix in the classrooms of Maltese State Schools has been the subject of some polemic. It has been suggested that the presence of the crucifix to the exclusion of any other religious symbol is discriminatory.

To what extent a religious symbol offends the sentiments of other religions is debatable. It is however true that the presence of a religious crucifix in State Schools classrooms is evidence of the predominance and importance of Catholicism over any other religion in this country.

On the other hand, the presence or otherwise of the crucifix does not hinder the student of a different faith from practising his religion. It would be another matter when religious festivals recognized as public holidays interfere with important appointments in the calendar of other religious denominations.[35]

The European Parliament, on the basis of an issue concerning crucifixes in most of Malta's public places, recently approved a regulation for the removal of religious symbols from public places that people may find offensive.[36] As we write, we are awaiting the outcome of the European Court of Human Rights Grand Chamber hearing of *Lautsi v. Italy*, the controversial "Italian Crucifix case, which was decided against Italy by the Court's Second Section in Novemer 2009.[37]

VII. Freedom of Expression and Offenses against Religion[38]

Article 163 of the Maltese Criminal Code[39], expressly provides that:

> Whosoever by words, gestures, written matter, whether printed or not, or pictures or by some, other visible means, publicly vilifies the Roman Catholic Apostolic Religion which is the religion of Malta, or gives offence to the Roman Catholic Apostolic Religion by vilifying those who profess such religion or its ministers, or anything which forms the object of, or is consecrated to, or is necessarily destined to Roman Catholic worship, shall, on conviction, be liable to imprisonment for a term from one to six months.

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35. A. Grech, *Religion, tolerance and discrimination in Malta*, available at http://aei.pitt.edu/6034/01/2.pdf

36. European Parliament Information Office in Valletta, *Daily Press Review*, Sunday, 5 April 2009, about "*religious symbols*," available at http://www.europarlmt.eu/ressource/static/files/MT_Press_Review_ 050409. doc.

37. *Lautsi v. Italy*, app. no. 30814/06, see http://www.strasbourgconsortium.org/cases.php?page_id=10# portal.case.php?tribunal_case_id=2.

38. A. Grech, *Religion, tolerance and discrimination in Malta* (see above).

39. Chapter 9, *Criminal Code* (Order-in-Council of 30 January, 1854. Last amendments: by Acts VIII of 2008 and XI of 2009), available at http ://docs.justice.gov.mt/lom/legislation/english/leg/vol_1/chapt9.pdf.

This had been considered a fundamentalist approach towards the Roman Catholic Apostolic Religion, arguing that the influence of a State Church could also be seen in the ease of prosecution and Laws forbidding blasphemy against only one religion. To be objective, it is important to note that the following Section punishes vilification of any *cult* tolerated by law, but the punishment in this case is reduced to half of that mentioned in the previous Section.

But one can ask what is to be meant by "*cult tolerated by law.*" Section 165 provides against the disturbance of the performance of any function, ceremony or religious service of the Roman Catholic Apostolic Religion or of any other *religion* tolerated by law, which is carried out with the assistance of a minister of religion or in any place of worship or in any public place.

What is the criterion to distinguish a "cult" or religion "accepted" by the law from those that are not? Is this a distinction between a religion and a sect or are we referring to something more fundamental than that, such as those cults or small communities practicing deviant, sinister, and eccentric rites that are also detrimental to the members of the community?

Indeed "cult" means something less than established religion, and very often the term includes sects within the same or established religion. A cult that is not tolerated by the law should therefore be one that violates fundamental social values both as a matter of belief as well as a matter of actual practice. It would appear that persons of different religious denominations are allowed to practice their faith freely so long as the religious practice and manifestation does not infringe upon the public order.

VIII. The Issue of Conscientious Objection

Conscription has never existed in Malta.[40] According to Article 3 of the Armed Forces Act, the Armed Forces of Malta can only be raised "by voluntary enlistment"[41]; they consist of professional soldiers only. Thus, as the Government stated in 1988, the question of "conscientious objection" does not arise.[42] Malta does not recognize the right to conscientious objection for professional soldiers. But it has to be considered that, according to the Malta Armed Forces Act of 1970, the service of voluntary soldiers can be extended in an emergency or war (Article 9), or in case a war is imminent (Article 10) for up to twelve months. In fact, in this case any discharge is automatically postponed. Should conscription be introduced (in the cases of war or emergency), Article 35 (2) (c) of the Constitution would require substitute service for those refusing to perform military duties.[43] In fact, this Article states that no person shall be required to perform forced labour," and excludes from the latter expression "any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service.

However, this does not guarantee a right to conscientious objection for conscripts, it only excludes a substitute service for conscientious objectors from the definition of forced labour. Article 14 of the Armed Forces Act allows for the purchase of discharge before the end of a contract, but this is not possible in case service has been extended according to Article 10. In any event, it is believed that soldiers may request discharge if they develop a conscientious objection to any further service in the Armed Forces.[44]

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40. War Resisters' International: Refusing to bear arms. 1998, available at http ://wriirg.org/co/rtba/archive /malta.htm.

41. Chapter 220, *Malta Armed Forces Act* (Act XXVII of 1970. Last amendments: by Acts X and XII of 2000, and Legal Notice 411 of 2007), available at http://docs.justice.gov.mt/lom/legislation/english/ leg/vol_5/ chapt220.pdf.

42. UN Commission on Human Rights. *Report by the Secretary-General*. United Nations, Geneva, 1988.

43. E. Evans, *Conscientious objection to military service in Europe, a study submitted by the Quaker Council for European Affairs*. Council of Europe, Strasbourg, 1984.

44. G.Schmid, *Wehr- und Zivildienst in Europäischen Ländern, Informationen, Analysen, Unterrichtbausteine*. Wochenschau Verlag, Schwalbach, 1994.

ALBERTO PATIÑO REYES

Religion and the Secular State in Mexico

I. SOCIAL CONTEXT

In recent decades there have been important transformations in the religious panorama of Mexico. The series of census data obtained from 1895 to 2000 show a clear predominance of Catholicism in the national scene. As a matter of fact, at the dawn of the last century, Catholicism represented 99.5 percent of the population[1] of a country inhabited almost entirely by people settled in rural communities.

Nowadays, most Mexican people consider themselves religious. Religiosity among Mexicans is not a fad or a recent invention; it is a constitutive dimension of the personal and historical identity of the Mexican people. Religiosity not only means the set of expressions and external activities that we conventionally associate with "religion"; it is a reference to the anthropological dimension that undertakes the search for the ultimate meaning of existence. One of the expressions of this religiosity -though not the only one- entails a steady decline in the percentage of the Catholic population in the country.

For instance, in the General Population Census of 2000, 96.48 percent of the population stated that they professed a religion, and only 87.99 percent said that they professed the Catholic religion.[2] This proportional decline reflects the increase in other Christian religions, especially evangelical religions, as well as the growing number of people who profess no religion.

In the last General Population Census, the total population who chose the Protestant Christian religion was 2.07 percent (including historical religions, Pentecostals, neo-Pentecostals, Church of the Living God, the Light of the World and other evangelical denominations); non-evangelical Biblical religion, 2.07 percent (including the Seventh Day Adventists, Church of Jesus Christ of Latter-day Saints and Jehovah's Witnesses); Jewish religion, 0.05 percent. Other unspecified, 0.31 percent. No religion, 3.52 percent.[3]

Naturally, religious diversity is not homogeneous across the country. It reaches different percentages at a regional, state and local level. For example, in the state of Chiapas – on the border with Guatemala – the percentage of the Catholic population is 63.8 percent, while in northern states of the Republic, such as Baja California, the percentage dropped from 86.15 percent in 1990 to 81.46 percent in 2000, a difference of 4.74 percent in a span of ten years.[4] Indeed, the tendency in the Mexican border states is characterized by a decrease in Catholic population in favor of evangelical groups of American origin, predominantly Pentecostal and neo-Pentecostal.

Today, the Catholic Church works to maintain its majority, while Christian minorities strive to increase their population base. As an essential part of its social context, the Catholic Church focuses on topics such as education, population policy, culture, social assistance, access to media, and the defense of human rights. These are topics where the Catholic Church already has had a historical presence (in some more than in others) and through these means and activities it intends to strengthen its majority status.

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1. Thus, the percentage of the Catholic population in Mexico from 1895 to 2000 is the following: 1895: 99.1%; 1900: 99.5%; 1910: 99.2%; 1921: 97.1%; 1930: 97.7%; 1940: 96.6%; 1950: 98.2%; 1960: 96.5%; 1970: 96.2%; 1980: 92.6%; 1990: 89.7%; 2000: 87.9%. Vid. R. González, *Derecho eclesiástico mexicano* (*Mexican Ecclesiastical Law*), in J. G. Navarro (coord.), "Estado, Derecho y Religión en América Latina" ("State, Law and Religion in Latin America"), Marcial Pons, Madrid, 2009, 162.

2. Vid. A. R. de la Torre. and C. Gutiérrez, *Reflexión metodológica sobre las categorías censales* (*Methodological Reflection on Census Categories*), in M. C. Medina (coord.), "Una puerta abierta a la Libertad Religiosa" ("An Open Door to Religious Freedom"), SEGOB, Mexico, 2007, 378.

3. Id. at 389-92.

4. Id. at 378.

The Christian minorities, formed mainly by evangelical churches, must counteract religious intolerance (present in some indigenous regions) and ensure that the State provides fair treatment to all non-Catholic churches, as a fundamental requirement for their existence, since their population base increases by the natural and social growth of the population. That is, the conversion of believers of other faiths requires respect for plurality, the free will of citizens, and the equitable participation of churches in society.[5] This does not imply a disregard for other social issues; rather, they intend to engage in those issues based on equity, while ensuring that the Catholic Church does not receive any preferential treatment by government agencies.

A significant fact provides an overview of religious plurality in Mexico in the early twenty-first century. As of September 2009, there were 7,174 religious associations registered at the General Directorate of Religious Associations of the Interior Ministry. Christian associations including Catholic, Evangelical and Protestant associations constitute 7,148, while seventeen are Oriental and nine are Jewish. These data show that Mexico is and will increasingly become a religiously plural country. Knowledge of their geographic distribution allows for the identification of the areas where these changes are occurring. In regions of west-central Mexico, the Catholic religion retains a substantial majority of parishioners, while in the Northern and Southern border states there is a declining trend.

Along with the existence of pluralism, some expressions of religious change have been accompanied by local conflicts and episodes of religious intolerance, especially in indigenous communities governed by a system of cultural customs that date back to colonial times. Awareness of religious diversity is essential to acknowledge plurality and to understand its cultural wealth, especially in the case of religious groups that enter the domain of indigenous communities deeply rooted in a long Catholic cultural tradition. Additionally, it is a fact that anti-Semitism is virtually non-existent and there is usually a peaceful coexistence between religions.

II. Scholarly and Theoretical Context

Secularism in Mexico has been seen as an opposition to Catholicism for historical reasons. The defenders of the secular State and the liberal principles inherited from the Enlightenment have sought to ensure that governments proceed without recourse to religious elements. In Mexico, these ideas have been championed by liberal intellectuals, Freemasonry, the Institutional Revolutionary Party (PRI) – which ruled the country from 1929 to 2000, the Democratic Revolution Party (PRD) – left-wing tendency – and somewhat by the Evangelical churches. The paladin of them all is President Benito Juarez Garcia, who proclaimed the separation between the State and the Catholic Church.

Some politicians with an enormous amount of influence in the legislative chambers and certain academic sectors of public universities with a liberal ideological position still hold extreme position, intending to confine and subdue the Catholic Church – and by extension other Churches – so that religion is limited to a purely private activity within the spiritual domain. Their reason would be to prevent the Catholic Church from enjoying the privileges it has held for much of the nineteenth century. As a result of the efforts of these groups, a constitutional reform initiative was presented at the House of Representatives on 22 November 2007, in order to establish a lay republic and punish public servants if they do not observe this principle.[6] Other moderate liberal views acknowledge the existence of a public dimension of religion, and therefore, accept a small participation of religious institutions in public life. However, they also acknowledge that religious ministers may not participate in political propaganda and religious education may not be taught in public schools in accordance with Mexican law.

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5. Vid. R. Casillas, *Avances y Pendientes en materia de Iglesias y Política Social en Mexico* (*Progress and Unresolved Topics Regarding Churches and Social Policy in Mexico*), in M.C. Medina (coord.), Una puerta abierta… supra n. 2 at 353.

6.http://www.senado.gob.mx/comisiones/LX/cenca/content/grupos_trabajo/garantias/garantias 22.pdf.

In the academic sphere, the contemporary discussion of religion-State relations does not entail the rigorous analysis offered by the science of law. Rather, it is anchored in the old discussion of the famous "secular State," which denies the existence of absolute values because their existence would automatically presuppose a lack of secularism.[7] On this basis, the main interest of academicians is to impose their particular concept of State secularism, even if this means having to renounce to a rigorous analysis of other legal topics that would contribute to a better understanding of religious phenomena in Mexico, instead of a sterile confrontation that is not useful at all. This analysis must be done from a scientific, critical and constructive perspective, not from a dogmatic or an ideological-confessional view, as some political and academic groups have done.

III. Constitutional Context

A. Brief History of State-Religion Relations

Religion is a central topic in the history of Mexico. Before, during and after independence from Spain, religion has been strongly present in all spheres of national life. It is not irrelevant to remember that there were two conquests: the military and the spiritual. The first was achieved by Spanish soldiers, and the second was made by the Franciscans, Dominicans and Jesuits.

The independence movement was initiated by Miguel Hidalgo y Costilla, a parish priest of Dolores, in the state of Guanajuato, in 1810, while upholding the banner of the Virgin of Guadalupe as the symbol of the struggle that would end eleven years later. However, the author of the political emancipation of New Spain was Agustin de Iturbide.[8] Through the Iguala Plan, signed on 24 February 1821, the separation of the largest Spanish colony in North America was achieved. Its success was due to the inclusion of three fundamental guarantees: 1) the union of *mestizos*, natives, creoles and the Spanish population; 2) independence from any foreign power; and 3) a commitment to maintain and protect the Catholic religion without tolerance for any other religion, while ensuring both the regular clergy and the secular clergy that their privileges and property would be respected. Once the Independence of New Spain was consummated, the first Federal Constitution of the United Mexican States was enacted on 4 October 1824 and remained in force until 23 October 1835. The Constitutional preamble began: "In the name of Almighty God, author and supreme legislator of society." Also, a State of Catholic affiliation was approved, not allowing the practice of any other religion in the territory. The defense of Catholicism was so strong that the first president of Mexico changed his original name, José Miguel Ramon Fernandez Felix, to Guadalupe Victoria, in honor of the Virgin of Guadalupe.

In Mexico, the secular State was established in the Constitution of 1857, along with recognition of religious freedom, then understood as religious tolerance. The secular State arose where there was no conflict between religions. Its purpose was to assert the independence and the political sovereignty of the State in regards to the Catholic Church, which then had excessive economic power.[9] So the Mexican secular State, following the regalist trend inherited from colonial rule, sought to dominate and politically subdue the Catholic Church, while recognizing that it was the majority church and practically the only Church of the Mexican people.

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7. Vid. M. Gómez Granados, "Alternancia política, cambios y resistencias en el tema de la laicidad en Mexico" ("Political Alternation, Changes and Resistance Regarding the Topic of Secularism in Mexico"), in *La Cuestión Social* (*The Social Aspect*), year 17, number 3 (2009), 260.

8. On September 27, 1821 the Army of the Three Guarantees, led by Iturbide, made its triumphant entrance into Mexico City to celebrate the signing of the Iguala Plan, signed by Juan de O Donoju, the last representative of Ferdinand VII in New Spain, and Agustin de Iturbide, head of the Army. To celebrate that event, a *Te Deum* was sung at the Metropolitan Cathedral. Vid. T. E. Anna, *El Imperio de Iturbide* (*Iturbide's Empire*), Conaculta and Alianza Editorial, Mexico, 1991, *passim*.

9. Vid. J. Adame Goddard, *Estado laico y libertad religiosa (Secular State and Religious Freedom)*, "Documentos de Trabajo", number 128, Institute of Legal Research, UNAM, Mexico, 2009, *passim*.

The emergence of the Mexican secular State did not occur, as in some European countries, upon the creation of a system of legal protection for religious liberty so that populations with different religions could coexist. At the time, the objective was to define the rules of the relationship between the State and the majority church. Since the Mexican State was an organization bestowed with a sovereign political power, i.e. not subordinate to other powers, it needed to assert its sovereignty. As a result, the Mexican State eliminated the economic power of the Catholic Church through the process of confiscation of property in mortmain and nationalization of property, and managed to subdue the Church legally and politically, albeit with varying results.[10] As most of the Mexican population was Catholic, the Mexican secular State needed to assert itself more as a sovereign State than as a State that respected religious freedom.

The promulgation of the Constitution of 1857, whose preamble began: "In the name of God and with the authority of the Mexican People," led to an armed struggle between the Liberal and Conservative parties. The first was in favor of religious tolerance and the latter sought to maintain the Catholic affiliation of the Mexican State.[11] While the conflict was in progress, Benito Juarez wrote the famous *Reform Laws* in Veracruz in 1859, which marked a significant moment in the complex history of State-Church relations. The following are some of these laws:

— The *Act of Nationalization of Church Property* (12 July1859) establishes that all goods of any kind previously owned by the secular and regular clergy shall be owned by the State and determines the independence between the Church and the State. Consequently, it suppresses the religious orders, as well as the archconfraternities, confraternities, brotherhoods or congregations related to religious communities, cathedrals, parish churches or any other churches; those who oppose directly or indirectly or in any way hinder the enforcement of this law shall be imprisoned or banished from the country.[12]

— The *Act of secularization of hospitals and charitable institutions of the Catholic Church.* From this moment onward, the government shall be in charge of these institutions[13] (2 February 1863).

— The *Act abolishing women's religious communities throughout the Republic* (26/02/1863) established a period of eight days for the nuns to leave their convents.[14]

— The *Religious Freedom Act* (4 December 1860) stated: "The protection to profess the Catholic religion and any other religion established in the country, shall be ensured as an expression and consequence of religious freedom"; it forbade the celebration of "solemn acts of worship without permission granted by the authority in each case" and regulated the use of church bells; this act prohibited public officials and members of the Armed Forces "to formally attend religious events,"[15] a legal relic that still exists in Mexican law.

— The *Civil Marriage Act* (23 July 1859) equated marriage to a mere civil contract, signed in the presence of the competent administrative authorities. It did not grant legal effects to religious marriages,[16] a situation that currently prevails for all religious marriages. This act considered marriage as indissoluble and only the natural death of one of the spouses was the natural cause of dissolution, although it recognized some causes of temporary separation.

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10. Id.

11. Vid. E. Martínez Albesa, *Catolicismo y liberalismo en Mexico* (*Catholicism and Liberalism in Mexico*), Volume II. "De la paz con Estados Unidos a la caída del Segundo Imperio, 1848-1867" ("From the Peace Agreement with the United States to the Fall of the Second Empire, 1848-1867"), Porrua, Mexico, 2007, 1777 and ss.

12.Vid. J. Saldaña Serrano, "Derecho Eclesiástico Mexicano" ("Mexican Ecclesiastical Law"), in *Enciclopedia Jurídica Mexicana* (*Encyclopedia of Mexican Law*), UNAM-Porrúa, Mexico, 2005, 827 and ss.

13. Id.

14. Id.

15. Id.

16. Id.

The *Reform Laws* were added to the 1857 Constitution through the *Additions and Amendments Act* dated *25* September 1873. At this date, the Constitution was also amended to include the principle of "separation between the Church and the State." To complete the amendment, on 14 December 1874, the Decree of Congress on the *Regulatory Law of Constitutional Norms* dated 25 September 1873 was published in the Official Gazette. This was the legal justification to officially implement secular education in public schools, and to establish other limitations to religious freedom, such as the celebration of religious events at temples, as well as to prohibit the use of cassocks, habits and religious badges in the streets, and to begin the process of nationalization of temples devoted to public worship.

The 1917 Constitution, which is still in force, was promulgated on 5 February 1917 in the city of Queretaro, the capital of the homonymous state. This constitution established social rights for the first time and was undoubtedly one of the achievements of the revolutionary movement that began in 1910. However, in religious terms, this Constitution was characterized by being anticlerical and antireligious. At that time, it guaranteed individual freedom of belief and worship only in churches and under the surveillance of the competent authorities, but it did not recognize churches as legal entities. Therefore, churches could not acquire, own, or manage real estate, nor participate in public or private charities devoted to social assistance, scientific research, dissemination of education, mutual aid, or any other lawful purpose.

Religious ministers were not considered as citizens and were forbidden to criticize the fundamental laws of the country or the authorities; their active and passive vote was deemed void. Local authorities were granted the power to determine the number of religious ministers to be accepted in their towns, and said ministers were also barred from teaching religion in both public and private schools. Contradictorily, the principle of supremacy of the State over the Church prevailed.[17]

The constitutional rules contained various provisions contrary to religious freedom. Moreover, the regulatory laws were even more radical.[18] Thus, the laws enacted by the governments of the states intensified the dispute between the State and the Catholic Church, expressed in the denial of the most basic expressions of religious freedom.

In light of these circumstances, on 31 July 1926, the Mexican Episcopate ordered the suspension of worship throughout the Republic. The legislative chambers of Congress did not agree to repeal the anti-religious laws, a request supported by more than two million signatures. As a result, some groups of Catholics turned to armed resistance, initiating the so-called Cristero War or *The Cristiada*,[19] which took place mainly in the states of Aguascalientes, Colima, Jalisco, Guanajuato, Durango, Michoacan and Zacatecas.

The religious conflict ended in 1929, as the government and the hierarchy of the Catholic Church reached "agreements" outside the law. Without repealing the articles contrary to religious freedom, the government agreed to their relative non-application, and

17. Vid. M. R. González, "Relaciones entre Estado e Iglesia" ("Relations between the State and the Church), in *Derecho Fundamental de Libertad Religiosa* (*Fundamental Law of Religious Freedom*), UNAM, Mexico, 199, 127-130.

18. For instance, the Regulatory Law of article 130 was published on 18 January 1927. Some of its provisions included: "The Federal Executive Power, through the Interior Ministry, shall be in charge of the following activities in matters of religious worship and external discipline (art.1°); marriage as a civil contract (art. 2°); notices to celebrate public religious events (art.3°); Churches shall have no legal personality (art. 5°); the Religious Associations called Churches shall have no capacity to acquire, own or manage property, nor capitals related to property (art.6°); religious ministers shall be considered as persons who practice a professional activity (art. 7°); conditions to be a religious minister in Mexico: be of Mexican nationality by birth (art. 8°); permit granted by the Interior Ministry to open an establishment devoted to religious activities (art. 9°); within the temples, donations may be accepted in cash and goods. Donations that are not in cash shall be notified to the Interior Ministry in the Federal District, or to the State Governorns (art. 14); the names of political groups shall not contain any word or indication related to any religion (art. 17); religious ministers may not inherit any goods or property (art. 18)."

19. Vid. J. M. Romero de Solís, *El Aguijón del Espíritu. Historia contemporánea de la Iglesia en Mexico* (*1892-1992*) (*The Sting of the Spirit. Contemporary History of the Church in Mexico, 1892-1992*), IMDOSOC-El Colegio de Michoacan-Universidad de Colima, Mexico, 2006, 335 and ss.

thus the stage known as *modus vivendi*[20] began. Once the religious conflict reached an end, the Mexican State had to accept a *de facto* coexistence with the Catholic Church and non-Catholic religious groups.

It took more than six decades to reform all five constitutional articles (3, 5, 24, 27 and 130) referring to the issue of religion, and to convince legislators to openly accept the right to religious freedom and establish new regulations governing the relations between the State and the Churches. However, certain provisions were not eliminated, such as mandatory secular education in public schools, non-intervention of religious ministers in political affairs, and prohibition for churches or religious groups to own real property or communication media. On January 28, 1992, the contents of the constitutional reforms were published in the Official Gazette, and the regulatory law of the aforementioned constitutional provisions was published on July 15, 1992, under the title of *Religious and Public Worship Associations Act*. The corresponding regulations were issued on November 6, 2003.[21] The contents of this legal statute will be discussed in the section devoted to legal context.

B. Constitutional Principles

The regulatory principles governing the relations between the State and the Church arise from the Mexican constitutional system. Said principles are the following:

1. Freedom of Belief and Worship
2. State Secularism
3. Equality of Churches before the Law
4. Principle of Separation between the State and the Church

1. Freedom of Belief and Worship

The first paragraph of Article 24[22] does not contain the term "religious freedom"; instead, it uses the term "freedom of belief" to refer to one of the individual Constitutional guarantees granted by the Guarantees of Freedom stated in the Mexican Constitution. On this basis, the Mexican State ensures that: individuals may have or adopt the religious belief of their choice and practice, individually or collectively, the acts of worship or rites of their choice; individuals may refrain from professing any religion, refrain from practicing religious activities and rites, and refrain from belonging to any religious association; individuals shall not be subject to discrimination, coercion or hostility because of their religious beliefs and shall not be required to declare said beliefs; religious motives shall not be claimed to prevent anyone from exercising any work or activity, except in the cases envisaged by law; and individuals shall not be forced to render personal services nor contribute in cash or in kind to support any religious association or Church, nor to participate or contribute in rituals, ceremonies, festivals, services or events related to religious worship.

2. State Secularism

The principle of secularism is not specified in the Constitution. However, Article 3[23]

20. Vid. J. L. Soberanes, *Los bienes eclesiásticos en la historia constitucional de Mexico* (*Ecclesiastical Property in the Constitutional History of Mexico*), UNAM, Mexico, 2000, 98.

21. Vid. A. Patiño Reyes, "Algunas consideraciones del Reglamento de la Ley de Asociaciones Religiosas y Culto Público de Mexico" ("Some Considerations on the Religious and Public Worship Associations Act"), in J. Saldaña (coord.), *El Reglamento de la Religious and Public Worship Associations Act* (*Regulations of the Religious and Public Worship Associations Act*), UNAM, Mexico, 2005, 107-135.

22."All individuals are free to profess the religious belief of their choice and to perform all the respective ceremonies, prayers or acts of worship, provided that they do not constitute an offense or crime punishable by law. Congress may not enact laws that establish or prohibit any religion. Public religious events shall be ordinarily held in temples. Those extraordinary events held outside temples shall be subject to the pertinent regulatory law."

23. CONSTITUTION OF MEXICO, art. 3: "Public Education . . . guaranteed by article 24, shall be secular and therefore shall be completely free from any religious doctrine . . . ."

establishes the secular nature of the formal education system. The second paragraph of Article 24 of the Constitution prohibits Congress to enact any legislation to establish or prevent any religion. Thus, it is possible to affirm that currently the Mexican State is secular, because it has no religious affiliation. Although the explicit basis for State secularism in Mexico does not appear in the Constitution, its contents are expressed in Article 3[24] of the *Religious and Public Worship Associations Act.* Therefore, it is a principle assumed by the Mexican State, without being contained in its Political Constitution. It is evident that before the 1992 constitutional reforms, the Mexican State was a secular anticlerical state, with anti-religious traits.[25]

The Catholic Church and other religions were very vocal against a 2008 law permitting abortions in Mexico City, and against a 2009 law in Mexico City regarding same-sex marriages. Certain legislators took umbrage at religious associations expressing their views, and called for sanctions against religious ministers. A constitutional amendment was adopted at the House of Representatives on 11 February 2010, calling for a clear expression that Mexico is a lay Republic. The first paragraph of Article 40 would add the word "laica" or "lay" to the description of the Mexican Republic.[26] The proposed amendment is as of this writing [July 2010] pending approval in the Chamber of Senators.

Religious laws are ripe for review and being challenged by various seculars groups and legislators who wish to use the concept of a "lay Republic" as a way to exclude, once and for all, religions from opining on issues the general public defines as political.

3. Equality of Churches before the Law

Article 1° of the Constitution discrimination based on one´s religion is strictly prohibited.

Article 24[27] of the Constitution states that the prohibition on Congress to enact laws that establish or prohibit any religion entails the obligation to refrain from giving preferential treatment to any religion. That is, Congress shall give equal treatment to all different religious communities. Herein lies the principle of equality of the churches before the law.

4. Principle of Separation between the State and the Church

The status of the State with regard to religion is based on Article 130[28] of the Constitution. At the outset, emphasis is placed on the government's decision to separate the Church and the State as a result of the confrontation between the Mexican State and the Catholic Church during the 19th century and the first four decades of the 20th century. Consequently, the model for relations between the State and the Church in Mexico is the separation of the two institutions - like the French model. This model of exclusion denies any possibility of reaching agreements with churches aimed at obtaining direct funding or preferential treatment. However, this separation is not absolute. For example, Mexican law acknowledges a tax exemption system for religious associations. In the case of federal property used by a Church, the federal government contributes financially to the conservation and maintenance of temples considered as historic or artistic heritage. In the field of promoting religious freedom, the state may provide spiritual care in prisons, hospitals, care centers, and migrant centers.Furthermore, in accordance with the principles

24. The first part of the article states: "The Mexican State is secular. The State shall exercise its authority on every individual or collective expression only in terms of observance of the law, preservation of public order and morality, and safeguard of the rights of third parties . . . Official identification documents shall not contain any mention of the individuals' religious beliefs."

25. Vid. R. Gonzalez Schmal, *Derecho Eclesiástico Mexicano, Un marco para la libertad religiosa* (*Mexican Ecclesiastical Law, A Framework for Religious Freedom*), Porrua, Mexico, 1997, 265.

26. Constitutional amendment: "It is the Mexican people will become a Republic representative, democratic, lay, federal…." *Gaceta Parlamentaria*, 11 February 2010, http://gaceta.diputados.gob.mx.

27. "Congress may not enact laws that establish or prohibit any religion . . . ."

28. "The historical principle of the separation between the State and the Church guides the rules contained in this article. The churches and other religious groups shall be subject to the law . . . ."

of Public International Law, Mexico maintains diplomatic relations with the Vatican.[29]

This does not mean that the State gives priority to any particular Church. From a sociological perspective, the Catholic Church is the majority church in Mexico and still retains considerable influence on Mexican society, most notably in the fields of education at all levels and social welfare for disadvantaged groups, from indigenous people to terminally ill patients in hospitals. But the efforts of other churches for the benefit of the Mexican population are not neglected.

According to the *Regulations of the Religious and Public Worship Associations Act*, the federal, state, and municipal authorities, as well as the authorities of the Federal District, shall conduct activities to promote religious dialogue and coexistence among individuals and groups (Article 32). Today, there is no official representation of Churches before the Mexican government; however, Interfaith Councils have prospered at a local level. Such councils consist of leaders of the main religions. One of the most important is the Interfaith Council of Mexico City, which consists of the Catholic Church, the Anglican Church, the Presbyterian Church, the *Sikh Dharma* Community, the Buddhist Community, the Church of Jesus Christ of Latter-day Saints, the Lutheran Church, the Jewish, and the Muslim Community.

In short, the contribution of Churches to the social development of the country is represented by more than one hundred thousand people of various religions, who are dedicated full time to social assistance, community development in indigenous areas, education, health, and training.[30] In addition, there are thousands of volunteers who generously devote some of their free time to these tasks.

C. The Protection of Religious Freedom

Freedom of belief and religion (fundamental right to religious freedom) and the other individual rights stated in the Mexican Constitution are protected by the amparo proceedings in federal courts.[31] The Constitution establishes this instrument to ensure the judicial protection of human rights, but also to safeguard the dogmatic part of the Constitution. In an unprecedented event, on January 7, 2009, by decree ST-JRC-15/2008 issued by the Electoral Tribunal of the Judiciary Power of the Federation, an election held in Zimapan, Hidalgo, was declared invalid due to the intervention of the local priests in favor of one candidate for mayor, as said behavior violated the principle of the separation between the Church and the State.

In Mexico, there is a non-jurisdictional system of protection of Human Rights. First, it is represented by the National Commission on Human Rights ("NCHR"), whose mission is to protect human rights and monitor their observance by state authorities. For example, on June 9, 2003, the NHRC issued the general recommendation number 5, aimed at state governors and the Secretary of Public Education, to refrain from disciplining students who, due to their religious beliefs, refused to honor the flag and sing the Mexican national anthem at civic ceremonies conducted in education centers across the country.[32]

Additionally, the non-jurisdictional system of protection and defense of human rights extends to state commissions for the protection of human rights, present in the thirty-two states of the country. On the other hand, in recent years the State has granted legal powers to the government agency called the *National Council to Prevent Discrimination*

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29. Vid. AA.VV., *15 años de Relaciones Santa Sede-Mexico* (*15 Years of Relations Between the Vatican and Mexico*), Ediciones CEM AR, Mexico, 2007, 11-15.

30. Vid. M. Gómez Granados, "La Libertad religiosa como fundamento de las relaciones entre las iglesias y el Estado" ("Religious Freedom as the Basis for State-Church Relations" in *La Cuestión Social* (*The Social Aspect*), num. 2, 2005, 170.

31. Vid. *La Suprema Corte de Justicia y la Cuestión Religiosa 1917-1940 (The Supreme Court of Justice and the Issue of Religion 1917-1940)*, 2d ed., vol. I-II. SCJN, Mexico, 2006.

32. Vid. "Congregación Cristiana de los Testigos de Jehová, A.R" ("Christian Congregation of Jehova's Witnesses, AR"), in M. C. Medina (coord.), *Una puerta abierta a la libertad religiosa…* (*An Open Door to Religious Freedom*), supra n. 2 at 288-289.

("CONAPRED") to deal with behaviors that limit the free expression of ideas or hinder the freedom of thought, conscience or religion, or religious practices or customs that are not illegal.

In the field of Administrative Law, the General Directorate of Religious Associations, with the aid of state and municipal authorities, has the power to resolve religious disputes. This power extends to disputes either within the churches, while respecting the legal principle of non-intervention in internal affairs of the Church, or in disagreements between two or more churches, between an individual and any church, or between traditional authorities of indigenous communities and any religious group established in their territory. For this reason, it has its own administrative proceedings.

IV. LEGAL CONTEXT

In accordance with the pertinent laws, the Interior Ministry, which is an agency of the Federal Executive Power, shall monitor compliance with the constitutional provisions and laws on public worship, churches, religious groups and associations. This legal mandate is implemented by the Secretary of the Interior through the General Directorate of Religious Associations.

The Mexican regulatory system makes a distinction between religious groups or churches not registered at the Interior Ministry, governed by the common law and without legal personality, and religious groups or churches that are registered as a "Religious Association" at the Interior Ministry; these have legal personality, which results in obtaining a legal status that grants them the rights and obligations of a religious association.

"Religious Association" is a legal concept established by the constitutional reforms of 1992. It belongs to the category of associations that must be adopted by religious groups intending to acquire a legal personality. This status is usually obtained by a unilateral act of the State, acting through the competent authority (General Directorate of Religious Associations). Its character is not declaratory, but rather constitutive. The State does not "recognize" said legal personality, but –even worse- "grants" it.[33]

The *Religious and Public Worship Associations Act* and its *Regulations* have already been mentioned. Their importance lies in the fact that they develop the constitutional provisions contained in Articles 24 and 130 of the Federal Constitution in regards to the following topics: registration of Religious Associations, legal status of religious ministers, and origin and purpose of property belonging to Religious Associations.

A. Registration of Religious Associations

To obtain registration as a Religious Association at the General Directorate of Religious Associations, the Regulations of the *Religious and Public Worship Associations Act* state that the Churches or religious groups shall provide the following:

> a) Proposed name that in no case shall be equal to that of any other Religious Association registered in accordance with the law.[34]
> b) The domicile shall be located within the national territory.[35]
> c*)* List of the property used, owned or managed by the association, as well as the property intended to integrate its heritage as a Religious Association. In the case of property of the nation, the following information shall be provided: name, location, intended use, name of the person responsible for the property, as well as a document stating under oath whether there is any conflict regarding its use or possession.[36]

33. Vid. R. González, *Derecho eclesiástico mexicano*… (*Mexican Ecclesiastical Law*), supra n. 1 at 169.
34. Art. 8, fraction 1 of the *Religious and Public Worship Associations Act.*
35. Art. 8, fraction 2 of the *Religious and Public Worship Associations Act.*
36. Art. 8, fraction 3 of the *Religious and Public Worship Associations Act.*

d) The statutes.[37]
e) The evidence supporting that the church or religious group has *evident acceptance* among the population, such as testimonials, documentaries, among others.

B. Legal Status of Religious Ministers

In accordance with Article 12 of the *Religious Associations Act*,[38] there is no definition of religious ministers; the provision merely mentions them. However, Article 130 of the Constitution and the *Religious and Public Worship Associations Act* and its *Regulations* establish a number of limitations to religious ministers.

They shall not hold public office positions. As citizens they shall be entitled to vote, but not to be voted for. Those who have ceased to be religious ministers with anticipation and in the manner stated by law, may be voted for in a public office election.

Ministers shall not associate for political purposes nor proselytize for or against any political candidate, party or association. They shall not oppose the laws of the country or its institutions in public meetings, acts of worship, events of religious propaganda, nor religious publications, nor offend in any way the national symbols.

Religious ministers, their ascendants, descendants, siblings and spouses, as well as the religious associations to which they belong, shall not inherit any property under the will of people whom the ministers have directed or aided spiritually and have no kinship within the fourth degree.

C. Property

The Constitutional reform of Article 27, fraction II, acknowledged the legal capacity of religious associations to acquire, own or administer real property, provided that this is indispensable for the purpose of the associations and with the limitations established by law. After 28 January 1992, religious associations shall own the properties acquired by them, subject to prior authorization by the General Directorate of Religious Associations through the declaration of origin.[39]

In regards to the buildings used for public worship before the 1992 reform, the Mexican State retains their ownership on behalf of the Federation, but grants a legal permit of use to the Religious Association that has previously expressed interest in using them for a religious purpose. In return, the State may collaborate financially with the Religious Association for the conservation, maintenance and restoration of those buildings considered as historical or artistic heritage.

D. Funding

Articles 17[40] and 19[41] of the *Religious and Public Worship Associations Act* are the basis for the taxes payable by Religious Associations, which clearly state that they are considered as nonprofit organizations.

In this regard, the Ministry of the Treasury and Public Credit, since April 25, 1994 and pursuant to its powers, has announced the fiscal criteria applicable to churches through annual general resolutions.

The following are the contributions to be paid:

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37. Art. 8, fraction 4 of the *Religious and Public Worship Associations Act*.

38. "Religious ministers are all adults considered as such by the religious associations to which they belong. Religious associations shall notify the Interior Ministry of their decision thereabout. If religious associations fail to notify the Ministry, or in the case of churches or religious groups, it shall be considered that religious ministers are those whose main occupation is directing, representing or organizing said associations, churches or groups."

39. Art. 20 of the *Regulations of the Religious and Public Worship Associations Act*.

40. The last paragraph indicates that the property owned by religious associations shall comply with "all other applicable obligations contained in other regulations."

41. "Tax regulations shall be applicable to individuals and organizations, as well as the property regulated under this act, according to the law on the subject."

1. Tax-Exempt Income

Religious Associations shall not pay the income tax (ISR) for the income that they obtain in the achievement of the objectives laid down in their statutes, if such income is not distributed among its members. Considering that one of the objectives set out in their statutes is to cover the living expenses of religious ministers and other members as established in the statutes, Religious Associations shall not pay the income tax for amounts received for this concept, provided that the amounts do not exceed three times the general minimum wage in force in the geographical area of the taxpayer during the corresponding year. Those who exceed this amount shall pay the income tax for the surplus. Single Rate Business Tax (IETU): Religious Associations are exempt from this tax.

2. Own Income

Such as the offerings, tithes, gifts and donations received from their members, congregants, visitors and supporters for any reason related to the development of their activities, provided that such income is applied to religious purposes. The income from the sale of books or religious objects obtained by a non-profit religious association shall also be considered as own income.

3. Taxable Income

The income earned from transfer of property, interests and prizes, shall be taxable under the terms of the applicable legal provisions.

E. Value Added Tax ("VAT")

1. Tax-Exempt Income from Acts or Activities

The income obtained by Religious Associations for any reason related to the religious services provided to their members or parishioners shall be considered as tax-exempt income from acts or activities. This tax shall not arise from the transfer of real property intended solely for housing. For these purposes, housing shall comprise ordination houses, monasteries, convents, seminaries, retirement homes, government homes, prayer houses, abbeys and juniorates.

2. Taxable Acts or Activities

As Religious Associations are not taxpayers allowed to receive income-tax deductible donations, the VAT will be applicable to donations received by Religious Associations, if these are made by companies, in the understanding that said donations are considered as transfers and shall not be deductible for the person making the donation.

F. Tax Applicable to Deposits in Cash

1. Exempted Subjects

Given that religious associations are non-profit organizations, pursuant to Title III of the Income Tax Act, they shall not pay this tax.

V. USE OF RELIGIOUS CLOTHES AND SYMBOLS

Due to a custom inherited from the *Reform Laws*, the use of religious clothes is limited to inside the temples or houses inhabited by religious ministers. It should be noted that there is no regulation regarding the use of images and religious symbols. However, in the sphere of politics, the Electoral Tribunal of the Judiciary Power of the Federation ordered the annulment of the elections in Yurecuaro, Michoacan state in December 2007, due to the use of religious images in the campaign of the candidate for mayor.[42]

42.SentenceSUP-JRC-0604-2007,http://148.207.17.195/siscon/gateway.dll?f=templates&fn= default. htm.

In public buildings, normally it is not allowed to place religious images or symbols that could affect the constitutional principle of church-state separation. In recent years, evangelical groups have challenged the popular celebration of the *Day of the Dead* in public schools, considering it as contrary to their religious beliefs. So far this has not resulted in any legal reform. Celebrations in honor of the Virgin of Guadalupe are held in factories, sports clubs, labor unions, among others. It is customary to make pilgrimages or processions to a place of worship of some religious image. In light of these circumstances, the authorities of the three tiers of government (federal, state and municipal) have to be coordinated to safeguard the integrity of the parishioners and the respect for the rights of others.

VI. Sentences by Religious Tribunals

According to the *Religious and Public Worship Associations Act*, the civil acts of persons are the sole responsibility of the authorities under the terms established by law and with the force and validity attributed by law. The simple promise to tell the truth and to fulfill the respective obligations, force the person who made the promise, in case of failure to do so, to undertake the penalties established by law (Article 4). For this reason, religious court judgments are not valid for the purposes of Mexican Positive Law.

VII. Crimes against Religious Freedom

In regards to the system of crimes against religious freedom or "crimes against religion," the Mexican criminal justice system basically follows a system of strict church-state separation. Thus, there is no acknowledgement of any type of crime linked to religion, as in the case of offenses against religious beliefs, religious hatred, disruption of the free exercise of religion, etc. However, the Federal Criminal Code provides some assumptions that refer -albeit indirectly- to the protection of religion. For example, Article 397, fraction IV, concerning damage to property, refers to temples,[43] in case of fire, flood or explosion. Also, Article 149 of the Code, punishes genocide,[44] in regards to the total or partial destruction of religious groups.

As a first step towards the definition of offenses against religious freedom, on August 20, 2009, the Federal District Legislative Assembly approved amendments to Fraction VI, Article 138 of the Federal District Penal Code,[45] in order to add to the common rules applicable to the crimes of homicide and injury the so-called hate crimes due to discrimination. For this reason, in the Federal Capital of the country, all attacks on people because of their physical appearance, sexual orientation, physical disability and religion shall be punishable as crimes.

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43. "Those who cause a fire, flood or explosion damaging or endangering: IV. . . temples. . . shall be punished with imprisonment from five to ten years and a fine from one hundred to five thousand pesos."

44. "A person shall be considered as committing the crime of genocide when, with the purpose of destroying totally or partially one or more national, ethnic, racial or religious groups, said person commits crimes against the life of the members of said groups or uses massive sterilization to prevent the reproduction of the group. Such crime shall be punished with imprisonment of twenty to forty years and a fine from fifteen to twenty thousand pesos. . . ."

45. "Homicide and injury shall be considered as first degree when committed with: malice, treachery, premeditation, viciousness, or in a state of voluntary alteration. . . VI. There is viciousness when the agent acts with cruelty or hate. The latter shall be considered as occurring when the agent commits the crime due to social or economic condition, links, membership o relation with a defined social group, ethnic or social origin, nationality or birthplace, skin color or any other generic characteristic, sex, language, gender, religion, age, opinions, disability, health conditions, physical appearance, sexual orientation, gender identity, marital status, occupation or activity."

KANAK BIKRAM THAPA

Religion and Law in Nepal

I. INTRODUCTION

Nepal is a multi-racial, multi-lingual, multi-cultural and multi-religious country. The population of Nepal is estimated at 27 million. Hinduism is the dominant religion in Nepal. The census of 1981 puts Hindu membership at 89.5 % of the total population; in 1991 shows the percentage was 86.5%. In the census of 2001, Hindu percentage was 80.62%. The decline in number may have several reasons. First, the percentage counted in 1981 may have been inflated, or since the dawn of democracy, which guaranteed freedom in religion, the fear of revealing one's religious identity was past, and a true picture has emerged.

A second reason may be that some people are frustrated with the Hindu caste system, and that a large- scale conversion of Hindus (specially the people belonging to the lower caste) into some other religion is underway. Although change in religion is not permitted by law, some people (especially non-Hindus) say that everyone should have the freedom to choose what religion he or she wants to practice.

The Constitution of Nepal says that every person shall have the freedom to profess and practice his own religion which has come down to him from time immemorial according to the traditional custom, but no person shall be entitled to forcibly change the religion of any other person. Many non-Hindus consider this statement on religion in the constitution to be unnecessary as it is well-accepted that religion has always been a subject of enquiry owing to various factors.

II. RELIGION IN THE NEPALESE LAWS BEFORE THE UNIFICATION OF NEPAL

Nepalese laws since the ancient period until the establishment of democracy in 1951 were based on religion, local customs, and royal edicts. Law is considered to be a branch of religion. Prior to the codification of the Country Code (Mulki Ain) of 1854, the legal system of Nepal was very much influenced by religion. In ancient times, there was no differentiation between law and religion, between law and native religion.

Customary law and royal edicts were also sources of law. The Legal and Justice System of Kirat period can be understood from the Kirat Veda viz "Kirata Mundum." Mundum was just like four Vedas of Aryans. The early 6th century B.C. has been accepted as the initial period of Kirat reign in Nepal. In early Kirat society, the Mundum was the only law of the state.

Many of the rules were based on the social customs, traditions, culture values, and religion during the reign of Lichhivis as well. Traditional concepts of fairness and impartiality under the laws of religion were basic rules of justice. The kings of subsequent dynasties began to promulgate laws with the advice of Dharmadhikara (the owner of justice) and pundits. Laws during Malla period were Sruties, Smirities, Manab Nyaya Shastra. The practice of ordeal (trial) was legalized in the administration of Justice. Prior to the unification of Nepal (1768), the whole system was governed by the Hindu religious text book and the local customs.

III. RELIGION IN THE NEPALESE LAWS AFTER THE UNIFICATION OF NEPAL

Nepal as the viable political entity that exists today came into existence during the third quarter of the 18th century. Before unification, Nepal was divided into several

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principalities and petty kingdoms. King Prithivi Narayan Shah of Gorkha laid the foundation of unified modern Nepal in 1768.

Before the unification of Nepal, the common feature among the principalities was the recognition of law based on the dharmashasthra viz Veda smirities, puranas, commentaries. Nibandha usage customes sanads were issued where dharmashasthras customs usage were silent in particular needful situation

.King Prithivi Narayan Shah assigned the responsibility of justice to Dharmaadhikara. King was the foundation of law and justice. He established both the trial and appellate courts in all provincial and district level courts. Pundits of Brahmin caste were appointed as representatives of dharmadhikari, who were responsible for the application of law and religion in all cases. Principles of equality were ignored; the caste system was prevalent, and criminals were treated in accordance with their caste status. The king and his descendants ruled the country with the help of the royal edicts (panjapatra), customs, conventions, and moral law, local custom, and religious instruments. The laws before the codification (country code) were based on Hindu religious texts and practice, and disputes were settled by the village chieftains, pundits, and local land lords. There were many other legal charters in the form of sanads, sawal, lalmohar, and so on.

Jung Bahadur Rana, an ambitious and shrewd courtier, installed the Rana regime in 1846, and made the position of prime minister hereditary to the Rana family and maintained the status quo in every field. Jung Bahadur visited England and France in 1849 to observe their legal structure. The English and French court structure, the Code Napoleon and Civil Code of France, influenced him. During his visit, he was impressed by the governmental institution of their mode of functioning as well. After his return from Europe, he started to review the laws of Nepal, and in 1851 he appointed a Law Council (Ain Kausal). The Ain Kaushal worked diligently for almost three years, and finally on 5th January 1854, the Country Code (Muluki Ain) was promulgated. The code has 163 chapters and covers about 1400 pages. It deals with criminal and civil law, as well as provisions relating to administrative law, land law, regulation for the management of revenues administration, land survey, and so forth.

The Code (Muliki Ain1854) embodied the various Nepali customs, laws, uses, social norms, and royal proclamations, including untouchability and punitive action for breaking of the caste hierarchy, making legal the traditional rules of the caste-based discrimination in Nepal. The country code of 1854, the first code of modern Nepal, was thus based on Hindu jurisprudence and incorporated the diverse castes and ethnic groups of Nepal into the framework of national caste hierarchy.

The preamble of Muluki Ain of 1854 mentioned that the code came into existence to bring uniformity in legal administration into the country. The Code of 1854 was modified and redrafted from time to time, and underwent up to thirteen minor and major amendments. It continued as the main source of law in the country until 1963, for about 110 years, until it was replaced by the Country Code (Muliki Ain) of 1963.

IV. Religion in Nepalese Law after 1951

The revolution in 1951 overthrew the Rana regime and introduced multiparty democracy into the country for the first time. With this political change, the Nepalese legal system has replaced the traditional lawmaking procedure and system of adjudication with a Western system. In the Nepalese constitution, the legislative, executive, and the judicial bodies are organized in appropriate Western fashion. The Country Code of 1963 was based on the principle of equality before the law and doing away with caste and religious considerations. It has been serving as the common criminal code and civil code, and is equally applicable to Hindus, Buddhists, Muslims and others in matters such as marriage, adoption, inheritance, and succession. After 1951, changes in the legal system influenced private law, public law, criminal law, constitutional law, administrative law, contract law, commercial law, and private property. Changes also occurred in the areas of the investigative system, prosecution system, legal system, and the system of adjudication.

The Nepalese legal structure has begun to address socio-economic justice, fair society, fair justice, equality, rules of law, just law, and fraternity. The Country Code of 1963 codified all the laws of Nepal – civil, criminal, religious, and customary laws. The code abolished all forms of discrimination and untouchability. The Code also recognized customary rules and practices of certain indigenous communities. It prohibits converting another person from one religion to another. An attempt to convert another is punished with three years imprisonment, a successful conversion of another is punished with six years strict punishment. If the person is a foreign national, after serving six years he/she will be expelled from the country.

V. Religion in the Constitutions of Nepal

The constitution is the supreme and fundamental law of the land. The term "constitution" describes a document having a special legal sanctity, and sets out the framework and the principal functions of the bodies of the state and declares the principles governing the operation of these bodies. The constitution is legally binding on the state and all subjects within it. In Nepal, since 1048, six constitutions have been promulgated, and the constitutional assembly is working on a seventh.

The first three constitutions of Nepal, namely The Government Act 1948, Interim Government of Nepal Act 1951, and The Constitution of Kingdom of Nepal 1959, guaranteed fundamental rights which were protected by the due process of law. They contained directive principles of state policy, and the rule of law was assured. They provided to the citizen of Nepal freedom of person, speech assembly, and worship, but they did not mention anything about the right to freedom of religion or in fact anything regarding any religion.

In 1962, the king dismissed the parliamentary system and introduced the so-called party-less democracy known as the "panchyat system." Ultimately, on 16 December 1962, a new constitution was promulgated, which laid the foundation of the panchyat democracy in the country. It was said that this was a constitutional innovation and that the system was essentially Nepali in character and spirit. While introducing the system, King Mahendra claimed the panchyat system has its roots in the soil of our country, and is capable of growth and development in the climate prevailing in the country. Some claimed that the constitution was nationalist in the background and democratic in tendency. Basic fundamental rights and due to process of law, except the right to form political organization, were granted to the people.

The 1962 Constitution of Nepal for the first time declared that Nepal is an independent, indivisible, sovereign, monarchial Hindu kingdom. Religious freedom has been granted, though but conversion of religion was prohibited. The Constitution of Nepal 1962 had mentioned that the word "His Majesty "means His Majesty the King currently reigning, being descendant of the Great King Prithivi Narayan Shah and adherent of Aryan culture and the Hindu religion. The constitution also gave fundamental rights to religion, according to which every person should have the freedom to profess and practice his own religion as handed down to him from ancient times having due regard to traditional practices, providing, however, that no person should be entitled to attempt to convert another person to a different religion.

The 1962 Constitution of Nepal was replaced when the Constitution of the Kingdom of Nepal 1990 was introduced. The 1990 Constitution of The Kingdom of Nepal introduced the multi-party parliamentary system in the country, but the provision of the Hindu Kingdom and prohibition of conversion of one religion remained intact.

After the success of the People's Movement of 2006, the 1990 Constitution of Kingdom of Nepal was repealed and the 2007 Interim Constitution was introduced. The Interim Constitution of Nepal declares the nation in Article 3 as "having common aspiration united by bonds of allegiance to national independence, integrity, national interest, and prosperity of Nepal; all the Nepalese people collectively constitute the nation having multi-ethnic, multi-lingual, multi-religious, and multi-cultural characters."

Article 4 of the Interim Constitution declares that the state of Nepal is "an independent, indivisible, sovereign, secular, inclusive and fully democratic state." Article 23 provides that the right to religion as a fundamental right means that every person has the right to profess, practice, and protect his or her own religion as handed down to him or her from ancient time, having due regard to the existing social and cultural practices. Provided that no person shall be permitted to convert another person from one religion to another, and that no act or action shall be done in such a manner as to jeopardize the religion of another, every religious denomination shall have the right to maintain its independent existence and to operate and protect its religious site and religious trust in accordance with law.

VI. CONCLUSIONS

The 2007 Interim Constitution declares that Nepal is a secular state, and guarantees the rights of citizens to profess, practice, and preserve their religion, social order, or cultural tradition. It also prohibits the right to convert religion. Thus the Interim Constitution guarantees only the right to profess and practice one's own religion insofar as it is done without infringement upon the religion of another, and it completely prohibits the conversion of one religion to another religion. It is apparent that the constitution prevents the right to practice the religion of choice because of the prohibition of conversion.

Besides these constitutional and other statutory provisions, Nepal is a party to various binding International Human Rights instruments. The Nepal Treaty Act of 1991 explicitly provides the primacy of International Treaties over national laws. In pursuance of this, the government may be required to analyze some of the provisions of international instruments such as the Universal Declaration of Human Rights and International Covenants on Civil and Political Rights. Article 27 of the International Covenant on Civil and Political Rights of 1966 states that in those states in which ethnic, religious, linguistic minorities exists, persons belonging to such minorities shall not be denied community rights to enjoy their own culture, to progress in and practice their own religion, or to use their own language.

Article 18 of the Universal Declaration of Human Rights has declared that every one has rights to freedom of thought, conscience, and religion or belief in teaching, practice worship, and observance, either alone or within a community in public or private. This provision, which ensures freedom to change one's religion, contradicts the provision of Article 23 (1) of the Nepal Interim Constitution and the chapter on etiquette (Adal) of the Country Code of 1963, which prohibits converting from one religion to another.

Although, constitutionally, Nepal is a multi-cultural, multi-religious, secular country, the philosophy of the separation of religion from the state philosophy of secularism is not observed. Nepalese social structure is still based and guided by the old values, norms, customs, and practices of the Hindu religion and rituals. The overwhelming majority (80 percent) people in Nepal identify themselves as Hindu. The Interim Constitution of Nepal does not setup a wall or partition between religion and the state. Therefore, Nepal is not a secular state (separating religion from the state) as understood in the West.

But neither is Nepal a theocratic country, because none of the essential characteristics of theocracy are found in Nepal. Democracy in Nepal, as structured by the Interim Constitution, incorporates the philosophy of secularism. It will not be an exaggeration to say that Nepal has envisioned in the construction of the Constitution the idea of the secular state. The ideology of secularism or the secular state is reflected in the Constitution in light of the Nepalese historical and social background, which is different from the Western World. The Interim Constitution is not anti-god or anti-religious. It recognizes that religion has relevance and validity in the lives of many, though not necessarily all citizens. It emphasizes that while religion may be relevant in life, it cannot hamper or frustrate the progress of Nepalese democracy in its allotted task of creating a new secular order. If we are looking for the doctrine of secularism, dedicated to the certain cause of creating a new social order, founded on justice, and a socio-political and

economic base, we will have to emphasize the limitations imposed upon the exercise of the right to freedom of religion.

The idea of secularism has been thought important in the social and political development of Nepal ever since People's Movement for democracy in 2006. Since the success of People's Movement it has, however, acquired a new emphasis and poses many difficult problems, because it now needs to be transformed into practical principles and formulated in a manner capable of implementation through the choice of community values.

It is through the constitutional drafting process that the law and legal theory in Nepal should make an effort to forge out new approaches, using an approach which supports the development of a general moral consciousness irrespective of religious consideration, and at the same time accepting all religions and upholding that state which will support and treat all religious communities equally.

SOPHIE VAN BIJSTERVELD

Religion and the Secular State in the Netherlands

I. INTRODUCTION: THE CURRENT SOCIAL CONTEXT

The relationship between religion and the secular state has again become a hotly debated topic, not only in academia, but also in politics, in the mass media, on the Internet, and in the workplace. An obvious reason for the renewed interest in the relationship between religion and the secular state in the Netherlands is the strongly perceived presence of Islam, and, in the slipstream thereof, what is often referred to as the 're-emergence" of religion in general.

However, the notion of "re-emergence" ignores the fact that religion has never been away. Perhaps taken for granted by many, the presence of Christian and Jewish denominations has always been a strong undercurrent in Dutch society. Also, the presence of Islam in the Netherlands dates back some forty years, and its entry into the Netherlands did not go unnoticed. In the early days, the interest in Islam manifested itself mainly through concern for issues such as the availability of houses of worship, possibilities for taking a day off on religious holidays, or enabling Islamic burial rites.

No doubt, important changes have taken place in the domain of religion. However, the revival of interest in religion and the relationship between religion and the secular state is the result of a combination of changes, rather than just the presence of Islam or the increased visibility of religion in general. Apart from developments in the religious domain, such as Islam and a renewed self-consciousness and vitality in the Christian world – including those of immigrant churches, and the sprawl of new forms of religious consciousness and practice, which are not linked to a church – other factors are as relevant.

In the domains of society and the state changes are taking place as well. For one, the belief that Dutch society was on a linear track of secularization is defeated. Once again, it is realized that religion is not an isolated area of life, but that it is intrinsically connected with views on the human being, on society, and on the state, and, therefore, with values and cultural patterns. Furthermore, religion has become entwined with huge societal and political issues such as integration and cannot be ignored in any debate on pluralism or social cohesion. The classic social welfare state itself is in a process of transformation, a process which directly affects the relationship between state and society, and, by extension, religion.

Though these developments do not always lead to changes in laws relating directly to religion, they have re-introduced religion to the political realm, influenced the practice of church and state relationships, impacted popular perceptions, and given rise to public debate. This essay deals with the constitutional and legal expression of religion and the secular state against the background of these broader developments.

Two specific characteristics of the organization of Dutch societal and political life deserve to be mentioned. First, a characteristic of Dutch society is "pillarization."[1] Traditionally, churches or church affiliated organizations in the Netherlands have been

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1. This term is a translation of the Dutch word *Verzuiling*, first used by the political scientist J. P. Kruyt to describe the peculiar nature of the social structure and political institutions in the Netherlands, although it has since been applied elsewhere (for example with reference to Belgium). For much of the twentieth century, Dutch society was divided by cross-cutting class-based and religious cleavages into four dominant interest groups or blocs–Catholics, Protestants, Socialists, and Liberals–around which formed 'virtually all politically and socially relevant organizations and group affiliations' (A. Lijphart, *The Politics of Accommodation*, 1968.) http://www.encyclopedia.com/doc/1O88-pillarization.html [consulted 6 July 2010].

active in the social and cultural domain, e.g., schooling, youth activities, health care institutions, social support, and mass media. With the expansion of the state in these domains from the 19th century and particularly in the 20th century, the state accommodated these initiatives. This resulted in a system of state facilities in these domains, i.e., religiously neutral entities, and confessional facilities. Quality requirements and the financing system are usually the same for these religious and non-religious facilities.

A second characteristic of Dutch society is the organization of political activities along confessional lines. A strong Christian Democratic Party (CDA) exists as a result of the fusion of the former Roman Catholic Party and two Reformed Parties. Apart from two government periods in the 1980s, this party and its predecessors have been part of government coalition ever since the establishment of the modern party system. Apart from the Christian Democratic Party, two other Christian parties are represented in both Houses of Parliament. Dutch electoral laws are based on the model of proportional representation which results in a variety of political parties and opinions in parliament. Because of this variety, there is always a need to build coalitions between the larger parties. A fairly new party, the Party for Freedom (PVV), has a strong anti-Islam profile. At the national level, it is currently only represented in the directly elected House of Parliament. Opinion polls predict a strong growth of its number of seats. A uniform and well-defined notion of church membership does not exist. Each church has its own criteria for membership, and these may differ widely from one church to another. These criteria, in turn, may differ from affiliation or non-affiliation as experienced by believers or non-believers. Also, there is no census in the Netherlands, so figures on religious affiliation as presented in statistical surveys tend to be quite rough. Depending on the way statistical surveys are set up, these may also differ quite significantly from one to another. A recent statistical survey mentioned figures of 58 percent of the population regarding itself as having a religious affiliation, 29 percent Catholic; 19 percent larger protestant denominations, which are united since 2004 in the Protestant Church in the Netherlands (two large reformed churches and the Lutheran Church in the Netherlands); 5 percent Islamic; and 6 percent affiliated with another religion or belief.[2]

II. CONSTITUTIONAL CONTEXT

Keywords in any description of the constitutional context of the relationship between religion and the state in the Netherlands are: separation of church and state, neutrality of the state with regard to religion and belief, and freedom of religion and belief. The latter is explicitly guaranteed in the Constitution (Article 6).[3] The principle of neutrality can be read in Article 6 in conjunction with Article 1,[4] which guarantees equal treatment on the basis of religion and belief. Separation of church and state is not explicitly mentioned in the Constitution or in any other legislation, nor has it ever been since it was first proclaimed in 1796, the year which definitely ended the Dutch Reformed Church as the established church. Nevertheless, one can say that it is implicitly embodied in a combination of Constitutional guarantees, notably those of Articles 6 and 1.[5] It is uncontested that these principles form the core of the constitutional context of church and state relationships.

2. See Centraal Bureau voor de Statistiek, *Religie aan het begin van de 21ste eeuw*, Heerlen 2009, 14 and 7.

3. Art. 6 Constitution: "1. Everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law. 2. Rules concerning the exercise of this right other than in buildings and enclosed places may be laid down by Act of Parliament for the protection of health, in the interest of traffic and to combat or prevent disorders."

4. Art. 1 Constitution: "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted."

5. In conjunction with these two articles, Article 23 of the Constitution should be mentioned. This article deals with education; it guarantees freedom of education and establishes the dual system of education with public schools and private (usually denominational) schools which are funded on an equal footing as public schools.

The formulation of these articles dates from the general constitutional revision of 1983. This Constitution abolished the former chapter "On Religion," that found its origin in 1814 and was amended in 1815, 1848, and 1972. Most of the remaining articles, however, had become obsolete. Perhaps the most relevant change that the 1983 Constitution was the fact that "churches" are no longer mentioned. As the fundamental rights in the Constitution protect individuals and organizations (as far as applicable), churches as organizations enjoy religious freedom and are treated equally. The 1983 revision brought important changes in the formulation of religious freedom. It also introduced a new system of limitation of fundamental rights in general, which was meant to increase the liberties of the individual. Due to the sensitivity of the subject, the formulation of Article 23, which guarantees freedom of education and introduces the dual system of public education alongside private (confessional) education funded by the state on equal footing, was not altered.

The system of education is exemplary of the Dutch way of dealing with organizations based on a religion or belief. A traditional feature of Dutch society is the strong presence of the voluntary sector, which are often organizations based on a religious denomination. In the field of health care, housing, education, welfare (poor relief), many voluntary, non-profit organizations traditionally existed on a denominational basis. With the expansion of public activity in these fields during the 1970s peak of the social welfare state, the state took the policy of accommodating these non-profit organizations into the system, often subsiding or supporting them on the same footing as the public alternatives.

The faith-based activities and faith-based organizations carrying out these activities were also subject to the same heavy regulation as their non-faith based equivalents. The law did respect the religious identity; nevertheless, a large number of organizations in core fields of education, health care, "moved closer" towards the state in the course of time. Organization on the basis of religion traditionally is a strong feature of Dutch society.

For some denominations, this societal self-organization was also a way to "emancipate" themselves socio-economically. As we just mentioned, this broader societal pattern of organization along denominational lines has become known as the Dutch "pillarization." It included newspapers, mass media associations, youth clubs, employer and employee organizations, and leisure organizations, such as football clubs. After the Second World War, in the spurt towards the social welfare state, pillarization diminished; in many existing organizations, the religious identity became less pronounced, with the exception perhaps of those establishments that have a strong educational character and deal with younger children, such as elementary schools.

The Dutch Constitution does not create a hierarchy of rights; all fundamental rights are guaranteed on an equal footing. In and through legislation, the balance between these liberties must be established for the particular issue at hand and where it concerns horizontal relationships, i.e., relationships in the private sector. This is predominantly a task of the parliamentary legislature, as the courts do not have the right to review parliamentary legislature on its constitutionality.[6] Courts do, however, apply and interpret the law in individual cases. They also have the power to assess such legislation on its compatibility with directly binding provisions of international treaties or decisions of public international organizations.[7] The Constitution has no preamble and does not contain any reference to the source of authority in the state, or reference to particular values; it contains no *invocatio dei*. At present, a State Committee is established to advise on a variety of constitutional issues, including the desirability of a preamble and, if desired, its possible content.

6. Art. 120 of the Constitution.
7. Art. 94 of the Constitution.

III. Theoretical and Scholarly Interpretations

As a result of the fact that the Dutch characteristics of church and state relationships are not explicitly mentioned in the Constitution combined with the fact that courts do not review parliamentary legislation on its compatibility with the Constitution, the principles of separation of church and state and of state neutrality with regard to religion and belief hardly feature in court rulings. As far as they appear in official documents, it is usually in the legislative process or, as in the last few years, in parliamentary debates.

Analysis of the way in which the principle of separation of church and state is interpreted in the policy domain, in politics, or in scholarly writings, shows a whole array of interpretations. This has largely been since the principle of church and state separation was formulated. This principle is sometimes interpreted as requiring a "strict" interpretation or – in line with the actual historical development as well as the current reality – to refer to a more "lenient" interpretation. At the same time, the principle of separation of church and state is sometimes used in a combination of a normative and descriptive ways: "The norm is separation of church and state and the Dutch situation *is* that of separation of church and state." However, the principle is also referred to in the following way: "We are on our way to a separation of church and state, but *we are not there yet*." Sometimes, strict and lenient interpretations and normative and descriptive perspectives are used in an implicit way, thus creating confusion.

As we have mentioned, difference of interpretation with regard to the interpretation has a long history. In the course of the last decades, discussions regarding the interpretation of the principle of separation of church and state had lost their sharp edges. In the classic Dutch social welfare state, the state covered all the basic needs of the citizens. Secularization (which also seemed to affect many societal organizations originally based on a religion or belief) combined with the idea that this process would further continue was the predominant mood as regards religion. Behind ongoing debates on political issues, an underlying consensus on basic values and norms existed in society.

In recent years, the situation has changed on all three fronts. Since the 1980s, the classic welfare state has been in a process of profound change. Religious issues feature more prominently in society and the strong presence of Islam is undeniable. Value pluralism is more apparent and seems to be more fundamental than before. This brings issues of church and state, state and religion, and religion and politics back in the limelight, and with this, the debate over the interpretation of the principle of separation of church and state. In these debates, the two widely differing views on this principle emerge: 1) a principle that promotes a strict interpretation and 2) a principle that favors the current system, based on the traditional Dutch way of accommodating religion in society and state.

These two different interpretations mostly follow the traditional splits. But among those who used to favor a mild interpretation, the question has arisen whether or not a model that worked favorably in the past can continue to work under the current changed circumstances. The interpretation of state "neutrality" with regard to religion and belief also moves along these two different lines, the one favoring a neutrality void of religion (in line with the French "laïcité"), the other including expressions of religion on an equal footing (the traditional Dutch way).[8]

In the meantime, public authorities are regularly facing concrete questions concerning their relationship towards religion or religious communities which pose themselves as dilemmas (such as the restoration of specific church buildings which are not ancient monuments and are actively used as places of worship; or providing subsidies for

8. A representative of the former, for instance, Paul Cliteur, 'Onbegrip en misverstand over de'laïcité'. Juist in deze tijd moet religie onzichtbaar zijn in het staatsdomein', in Marcel ten Hooven, Theo de Wit (ed.), *Ongewenste Goden. De publieke rol van religie in Nederland*, Amsterdam: SUN 2006, 252 - 266; of the latter, for instance, Wibren van der Burg, *Het ideaal van de neutrale staat. Inclusieve, exclusieve en compenserende visies op godsdienst en cultuur*, Den Haag: Boom Juridische Uitgevers 2009.

homework assistance in mosques; or for supporting integration programs in which male and female participants as a matter of principle are taught separately).

Often questions like these, and many others, are debated in terms of separation of church and state (or sometimes, neutrality). At the same time, these principles hardly seem to be the "right" labels for discussing these questions. First, predetermined interpretations of these principles linearly predict the answers to the question, and, thus, simply perpetuate already pre-existing differences of opinion. Second, they limit our ability to think and speak about these issues in other ways. This is all the more apparent, as over the last decades of relative "quiet," society has grown unused to dealing with these dilemmas and finding the right words and concepts to do so.

However, there is a way forward, which is to circumvent discussions about "strict" or "lenient" interpretations of separation of church and state and reduce the meaning of the label to its two-fold core. So, on one side, there is autonomy (institutional freedom) of the church from the state and, on the other side, there is a ban of any formal role for (the) church(es) in the public decision-making process. By thus limiting the scope of the principle of separation of church and state, one leaves room for a debate on the whole range of other issues, which do not need to be discussed in either a "strict" or "lenient" interpretation. Rather, this approach enables the development of a nuanced and differentiated perspective on how a modern liberal democracy anno 2009 should deal with religion not only as a private issue, but also in its societal and public dimensions.[9]

IV. LEGAL CONTEXT

A. General System of Law Relating to Religion and Churches

Religion and religious freedom are taken into account by the legislature. At the national level, this is done in and through specific legislation. For instance, educational law gives shape to the dual system of education outlined in the Constitution. Mass media law, amongst others, grants broadcasting time for churches and religious organizations. Labor law and equal treatment law take religion into account in various ways. Ancient monument law includes church buildings. Tax law creates a special regime for charitable organizations, which include churches. The Civil Code acknowledges legal personality of churches. In privacy law, "religion" is defined amongst the "sensitive" data. In penitentiary institutions and the armed forces, chaplaincy services are established, which find their basis in the law. There are laws relating to religious processions and church bell ringing. These are a few examples of legislation directly relating religion or churches. Legislation which favors Sunday as a weekly day of rest and the designation of certain Christian religious days as holidays find their origin in respect for religion; obviously, they have also become part of a general social and cultural pattern.

No *specific* "law on churches" or "law on religion" exists. Until 1988, a "Law on the churches" was in force. This law dated from 1853. At the time of its enactment it did not have a broader significance than appeasing tensions between Protestants and Catholics which surfaced after the restoration of the Roman Catholic hierarchy in the Netherlands in 1853. It only dealt with a few elements of the vast array of church and state issues. Its main importance at the time was the unequivocal acknowledgement of church autonomy; at present, this principle is expressed in the Civil Code in the provision dealing with the church as a legal person. This principle is concretized in other areas of the law as well.

Other examples of law which takes religion into account are those concerning certain forms of conscientious objection, and law relating to burial, or ritual slaughtering.

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9. See Sophie van Bijsterveld, 'Scheiding van kerk en staat: terug naar de bron voor een visie op de toekomst', in F.T. Oldenhuis (ed.), *Een neutrale staat: kreet of credo?*, Heerenveen: Protestantse Pers (Jongbloed) 2009, 13 - 26; and id., *Overheid en godsdienst. Herijking van een onderlinge relatie*, 2nd ed., Nijmegen: Wolff Legal Publishers 2009.

B. Interlocutors on the Side of the State

There is no body, agency, or department in the state that deals with religion with the exclusion of others. Every government minister and his department will need to take religion into account in the area of its competence. When it concerns parliamentary legislation, the same is true *mutatis mutandis* for both Houses of Parliament. Therefore, for churches and other religious communities every department is, in principle, relevant.

Two government departments play a special role, those of Justice and of Home Affairs. The special involvement of the minister of Justice is not only a consequence of the fact that he deals with a variety of issues that are relevant to churches and religious communities, such as criminal law (non-discrimination, blasphemy, immigration also of clergy, including imams). It also has a historic background. The Justice Department is the legal successor to the (former) department for the "Dutch Reformed Religion, and other religions except the Roman Catholic Religion" and that of the "Roman Catholic Religion." These were both abolished in the second part of the 19th century. Prior to their abolishment, they were temporarily "re-located" when the former was assigned to the department of Foreign Affairs.

The special involvement of the department of Home Affairs is due to the fact that this department is the "guardian" of the Constitution and issues of religion have a constitutional dimension. Additionally, issues of radicalization or polarization fall within the scope of this department as do the relationship with provinces and municipalities. The department takes an interest in regional and local dynamics concerning religion.

In integration issues, religion has turned from a "blind spot" into a dominant pre-occupation over the last few years. With this change, the interest of the department in religion has made a similar turnaround. The change slowly became visible at the end of the 1990s.

These government departments do not involve specific external councils or experts. Within the departments, those involved with religion in the sense just mentioned, various internal divisions within the department may be involved, depending on the subject matter at hand. As religion is now becoming more to the fore, one can see that these departments are more aware of the "religious dimension" in policy issues.

Over the last five to ten years, religion and issues of religion in the public domain have become such a widely debated topic and the focus of the debate has changed from "refinements" to fundamental dilemmas. Opinions in academia, society, and politics differ as to the role of religion in law and in the public domain. Assessments as to whether developments are "satisfactory" in practice and policy also differ. Nevertheless, it is fair to say that at the level of the national legislature, the traditional way of respecting religious liberty and of accommodating religion in legislation is upheld.

C. Dialogue

Pluralism and informality are characteristics of the structure between religious organizations and public authorities. On the side the Dutch Churches, two main bodies exist at the national level that serve as interface for dialogue with parliament and government. The first is the "Interchurch Contact in Government Affairs."[10] This organization, created after the Second World War, is a co-operative structure set up by Dutch Churches to monitor developments concerning legislation and administration that is of concern to churches and to jointly act on behalf of the member organizations vis-à-vis government and Parliament in these areas. It is not an ecumenical organization. Parallel to the re-emergence of the debate on religion in the public domain, its membership has expanded considerably. The other is the Council of Churches, which has an ecumenical focus and aims at presenting a "prophetic" voice of the joint churches in the Netherlands. As far as policy issues are concern, they are involved in issues such as poverty or the

10. The Interkerkelijk Contact in Overheidszaken (CIO). It has a strong overlap in membership with the Council of Churches, though membership of these organizations is not identical.

environment. The Council of Churches maintains relationship with government and parliament as well. Apart from this, churches can and do have contacts on their own with public authorities, on an informal (quasi-)regular basis or with respect to particular issues. A tentative and preliminary observation may be that such contacts have become more appreciated and valued on the side of the state over the last few years.

Muslim organizations are not included in either of the two organizations mentioned above. They have their own relationships with pubic authorities. As in many Western European countries, the process of self-organization of Muslims required time. For a long time, public authorities took a passive attitude towards this process. In part, this had practical purposes; in part, it was also seen as the appropriate attitude in the light of the principle of separation of church and state.

In the course of time, the desirability of interlocutors for the Muslim communities became more clearly envisaged on the side of the state. In the unrest after the terrorist attacks in Washington and New York on 11 September 2001, public authorities concretely experienced the need to reach the Muslim population in the Netherlands and to speak with their representatives. Other incidents, such as the murder of a filmmaker, public indignation over statements by radical imams, and the tense climate at the time of the riots abroad over "the Danish cartoons" in 2006, and the feared consequences of the release of an "anti-Islam" film by the leader of the Dutch Party for Freedom in 2008, only reaffirmed this. The policy of "wait-and-see" changed to a policy that actively stimulated the establishment of interlocutors and the practice of entering into dialogue. Likewise, the initial position of standoffishness on the side of the state with respect to the establishment of an imam education in the Netherlands (as this required a representative and authoritative interface) also changed. For the establishment of full-fledged chaplaincy services in, for instance, penitentiary institutions, such interfaces are necessary as well.

In the meantime, various organizations have been "recognized" by the state as interlocutors on the side of Islamic communities. Hindu and Buddhist organizations have been recognized too. These developments illustrate that contacts between religious organizations and public authorities work two ways.

D. Local and Regional Dynamics

In recent years, a whole new dynamic is developing at provincial and notably local levels. Local "interreligious platforms" have been created spontaneously or are being created. These often fulfill a variety of functions, such as organizing their joint members and making them acquainted with each other (integration), offering/providing practical mutual assistance, and especially serving as an interlocutor with the authorities to the mutual benefit of their constituent organizations (and believers) and of public authorities themselves.

V. The State and Religious Autonomy

Although the definition and meaning of the principle of separation of church and state is contested in the public and scientific debate, the core meaning is that the state respects the internal organization of the church and that the churches have no formal say in public decision-making. These are two sides of the same coin.

As we have seen before, the church as an organization is no longer mentioned in the Constitution. However, Article 6, Section 1, of the Constitution, guarantees everyone the free exercise of religion or belief, without prejudice to his responsibility for the law. Article 1, states: "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted."

It is acknowledged that not only individuals and groups of persons, but also organizations, are protected under the Constitution and by fundamental rights other than those directly relating to religion. As the history of its enactment makes clear, Article 6 of the Constitution does not only guarantee the liberty to hold an opinion but also the liberty

to manifest one's religion in practice. Thus, church autonomy in the sense of freedom of church organization is protected by Article 6.

The Civil Code concretizes this. Churches are legal categories *sui generis* and they enjoy legal personality as such. Article 2:2 of the Civil Code simply states: "Churches, their independent units, and bodies in which they are united have legal personality. They are governed by their own statute in so far as this does not conflict with the law (...)."

This Article serves both hierarchically organized churches, such as the Roman Catholic Church, and decentralized organized churches. No prior recognition of any kind is required. Most other articles in the Civil Code generally applicable to all legal persons are not applicable to churches, albeit that analogous interpretation is not excluded. Church autonomy also finds concretization in other laws. No prior dismissal permit from public authorities, for instance, is necessary for firing clergy. The Equal Treatment Act, which, shortly put, forbids distinction on the basis of *inter alia* religion in a wide field of societal activities, is not applicable to churches or relationships within churches. This, however, does not mean that churches can act at will. Fairness, acting in good faith, following fair procedure are elements that courts can and will use in reviewing church decisions.[11]

Islamic bodies are usually organized as a foundation (or less usual: associations) for the employment of an imam or the management of a building of worship. In such case, the usual rules for foundations (or associations) apply. However, within this framework organizational freedom of religion is relevant as well.

Issues of the autonomy of religious organizations not only manifest themselves where the enactment of (national) legislation is concerned. Often more subtle processes of interaction are taking place in the context of subsidy requirements or contractual agreements or simply dialogue.

As to individual liberty, this is not only relevant in relation to the state. To a certain extent, it is also relevant vis-à-vis a church or non-Christian equivalent. As far as the state is concerned, this includes the responsibility to guarantee a realistic right to leave a church or to change one's religion. This has recently become an issue with respect to Islam. In the Christian domain, remarks that a clergy man made in a prayer during a church service with regard to a former member of his church for quitting the church was regarded unlawful in court.[12]

No specific legislation exists regarding peaceful coexistence and respect between religious communities. The former "Law on the churches" (see above, Section 4) contained a ban on erecting places of worship within a certain distance of another. The constitutional ban on processions, which formally existed until 1983, was another example, as was the ban on wearing clerical garb outside buildings and enclosed places. Currently, provisions do exist that simultaneously shape religious liberty and contain limitations, such as the power of local authorities to regulate church bell ringing and its Islamic equivalents. They are not primarily or predominantly enacted to facilitate peaceful coexistence and respect between religious communities, but they may also fulfill this function to a certain extent. The same is true with the law regarding public manifestations and hostile audiences.

Tensions are present in society over issues relating to religion, which tensions find an outlet (sometimes as indignation) in public debate and commentaries over judicial and quasi-judicial decisions. They are also canalized through dialogue and contact with religious organizations and public authorities, and efforts on the side of public authorities or spokespersons on the side of religious organizations, whether publicly or diplomatically.

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11. S.C. van Bijsterveld, 'Church Autonomy in the Netherlands. The Distinctiveness of the Church. The Interplay between Legal, Popular, and Ecclesiastical Perspectives. Church Autonomy as a "Test Case," in Hildegard Warnink (ed.), *Legal Position of Churches and Church Autonomy*, Leuven: Peeters 2001, 147-163; see also A.H. Santing-Wubs, Kerken in geding: burgerlijke rechter en kerkelijke geschillen, Den Haag: BJu, 2002.

12. Vz. Rb. Arnhem 22 februari 1989, *KB* 1989, 114.

VI. Religion and the Autonomy of the State

Religious communities do not have any role in the secular governance of the country. This would conflict with the separation of church and state. There are no representative bodies in which churches have a seat *qualitate qua*, or which are reserved to representatives of certain religious denominations. Generally, speaking however, in the Dutch pluralistic society, care is taken with composing membership of advisory bodies or appointments in the public sphere (such as for burgomasters), that no obvious unbalances exist in relevant backgrounds, particularly political backgrounds. Religious preferences may play a role implicitly. It must be stressed, however, that such appointments are not a matter of *representation* of various denominational or other backgrounds as such. The relevant personal qualities should be decisive.

Between 1848 and 1887, the Constitution contained a ban for clergy to be a member of Parliament. For municipal councils, the Municipality Act contained a similar provision until 1931.

No religions have power to control other religious communities under the law.

VII. Legal Regulation of Religion as a Social Phenomenon

The law contains specific arrangements for religious organizations. A number of these are already indicated above. The special status of a church as a legal person, the non-applicability of the Equal Treatment Act, are just a few examples of regulations that are either specifically created for churches or which exempt churches from generally applicable legislation. Usually such legislation is an expression of respect of religious freedom. Other examples include respect in the Criminal Code for religious worship or regulations meant to respect certain religious burial rites. For individuals, conscientious objection is recognized in specific areas, such as conscription for military service; another example is legislation which respects conscientious objection for religious reasons against all forms of insurance. Occasionally, the legislature deliberately decided not to enact legislation because of the expected conscientious objections, as was the case with inoculations. Only rarely specific restrictions occur. A well-known example is the ban on conducting religious ceremonies with respect to marriage before a civil marriage has taken place (see below).

The law in general has developed against the background of a Western culture based on a morality influenced by Christianity. Many arrangements which respect religious practices are part of the general culture, such as the calendar, the religious holidays and festivities and designation of Sunday as a day of rest. To accommodate those believers with another "religious calendar," the law or collective employment agreements create alternative facilities.

Some legal provisions create facilities which are not exclusively aimed at religious organizations, religious believers, or religion, but include these organizations implicitly. Examples are tax benefits for charitable purposes or grants for the maintenance or restoration of ancient monuments (including church buildings). In data protection law, "religion" belongs to the category of "sensitive data," but along with other data, such as health records or criminal records. Anti-discrimination legislation works with a variety of "suspect" criteria for making distinctions, such as on the basis of other criteria. The same is true for restrictions to the freedom of speech in criminal law.

Also opt-out facilities exist in the law, which started as exemptions exclusively related to religion, but which have been extended in the course of time. An example is the possibility of conscientious objection against military service, which is not only possible for religious reasons.

In a pluralistic society, such as the Netherlands in which dominant values have changed considerably over the last few decades, the frame of reference for dealing with issues of religion also changes. What was perhaps until recently a dominant view may have become a minority view. When such views have a religious dimension, issues of religious liberty and religious conscientious objection are at stake. With the introduction

of same-sex marriages, for instance, the issue-conscientious objection to performing such marriages may be raised by civil registrars against performing such a marriage.

The state no longer obligatorily keeps records of the religious affiliation. Censuses are also no longer performed. However, with the recent rediscovery that religion is more than just a private matter, the state is increasingly interested in religious affiliation and beliefs, as well as in social consequences of religion. Religious sociology is undergoing a revival in the Netherlands, due in part to the interest that public authorities take in the results.

VIII. State Financial Support to Religion

A. Financial Relationships between Church and State in General

The basic situation is that churches are funded by the believers themselves. The system of church and state relations as it is in the Netherlands does not allow for general state funding of religious activities as such. However, there is a variety of ways in which funding of religious activities takes place. It is not very well possible to give a precise indication of the actual amount of support. Nevertheless, the following analysis probably provides an insight into the financial significance of the support.

B. Societal Activities Provided by Churches

As we have seen already, prior to the development of the welfare state churches, church-linked organizations were active in the fields of education and health, as well as in other fields of social life, such as care for the elderly. With the development of the welfare state, the state started to organize and provide more activities in these fields as well. Thus, a system developed of parallel activities: those offered on a private, often denominational basis, and those offered by public authorities on a neutral, non-religious basis.[13] This continues to the present day. The growth of regulation and financial intervention of the state in these domains also stretched to the private providers. As a result, these activities are usually regulated by the same body of law and share in the same financial system (which is often quite complex). The denominational background and inspiration of the activities provided on a confessional basis is respected by law.

IX. Other Socio-Cultural Activities

The Dutch state traditionally has a significant role in the redistribution of financial resources through the tax system. It has developed a well-organized and complex system of facilities for the well-being of its citizens. Traditionally, and certainly at the height of the welfare state, the state (including, notably local authorities) funded many activities in the socio-cultural sector. This was often done on a voluntary basis (not required by the Constitution or parliamentary legislation) and could include cultural activities, sports activities, or youth activities. These were often carried out by the private sector but funded through public subsidies. If these activities were also offered on a denominational basis, and fell within the objective criteria under which these subsidies were offered, they could not be excluded on the basis of the fact that they had a denominational background. Although these subsidies have decreased in the last few decades due to the overall necessity of public budget cuts, the general idea is still valid.

X. Chaplaincy Services

Public institutions like the armed forces or penitentiary institutions have chaplaincy services. These are funded by the state. The justification for these concerns freedom of religion for the individuals. For instance, individuals in the armed forces or in

13.. See also Section II and supra n 4.

penitentiary institutions live under extraordinary circumstances by which they cannot take part in ordinary religious life. Since, the state has some responsibility for people living in these circumstances, the state has a positive obligation to provide for their religious needs. The chaplains are appointed by the Ministers of Defense and Justice respectively. The religious denominations involved propose the chaplain to be nominated (whether Christian, Jewish, or other). The Protestant Churches co-operate together for this purpose. Of course, the numerical situation must be such that the employment of a chaplain of a certain denomination makes sense. Where this is not the case (certainly in the beginning for the Islamic belief), the practice of contracting chaplain services developed.

As hospitals are organized, run and funded in a different way, the organization of the chaplaincy service is slightly different. Hospital boards employ chaplains or involve them on a contractual basis. They are funded through the general hospital funds. An Act of Parliament guarantees the availability of such spiritual care as part of the overall care that the institution provides.

XI. Church Buildings

The general rule is that church buildings are financed by the churches themselves. Many church buildings, notably Christian church buildings, are designated as monumental buildings. For such buildings, possibilities for public funds for maintenance and restoration exist. Such funds also exist for other monuments that form part of the cultural heritage of the country, such as castles, windmills, farms, and city houses. These funds only cover part of the costs. It is becoming increasingly difficult for churches to find the financial resources for the upkeep and restoration of their buildings, both the monumental buildings as well as non-monumental buildings. With regard to church buildings, some specific arrangements exist in the fiscal sphere; their purpose it to prevent the creation of undue burdens on the owners of church buildings. In the past, temporary arrangements have existed to support church communities in the establishment of new church buildings. This was the case, for instance, where land was reclaimed from the inland sea and where new villages and cities were erected. To support Muslims in the establishment of mosques, temporary subsidies regulations were enacted but have now expired.

XII. Tax Facilities

The final category of public support for religions is tax facilities. A variety of mechanisms exist in this field. Exemptions or reduced tariffs are available in the context of inheritance tax and donations by groups and individuals to churches. Thus, they encourage private financial donations to churches (and, more general, to religious causes). These facilities are not exclusively available for the religious sector. They are available for all sorts of charitable institutions and charitable purposes.

XIII. Current Issues

From the above, it is clear that the state does not allocate funds to support particular religious organizations or activities such as clergy salaries or worship services; in the past (until the 1950s), however, support for clergy salaries, or other particular religious activities did take place here and there at the local level. Currently, the question of funding religious activities has gained a new topicality, especially at the local level. This may occur, for example, in the context of creating favorable financial arrangements for the building of one particular place of worship, or the restoration of one particular religious building. It also occurs with new forms of co-operation between state and religious organizations in the socio-cultural sphere.

Issues are raised in the public debate about the proper relationship between state and religious organizations particularly in a time when the state “contracts out” activities which, until recently, were in its own domain (such as the provision of particular youth work) and when the state is contracting out to *one* organization only. In the first case,

apart from financing as outlined, issues about subtle influencing of the religious organizations are debated. In the second case, issues of undue influencing of the public domain by religious organizations are raised. Leaving aside technicalities and the more subtle conditions of such arrangements, from a constitutional point of view, nothing speaks against such arrangements as such. It must also be borne in mind that the reasons for entering into such arrangements by the state are not promoting a particular religion, but fulfilling public policy goals which coincide with aims of the religious organizations involved.

XIV. Civil Effects of Religious Acts

As legal entities, churches can enter into legal relationships under civil law, like any individual person or any legal person. Buying and selling property, renting and letting property, hiring and firing of personnel are common activities of legal persons, and churches and religious communities can engage in such activities as well. Obviously, these legal acts need to be valid internally, that is, the persons or bodies acting on behalf of the church must be authorized to do so according to their own statues.

Churches have their own mechanisms for internal conflict resolution. These mechanisms and the decisions they produce do not have any status under public law; they are decisions made by legal persons under civil law and their status is accordingly. Where "purely" religious issues are at stake – that is, issues which do not have any civil law dimension – secular courts have no jurisdiction; secular courts do not take sides in theological questions. However, where civil law aspects are at stake, secular courts have competence too. Article 17 of the Constitution states: "No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law."

In cases in which a competence of a secular court exists, such court, when approached, may step back temporarily pending an ecclesiastical procedure or when an ecclesiastical procedure is still an option. Afterwards, they may look at the case marginally. The subtleties of the relationship between secular courts and ecclesiastical procedures are not fully crystallized, in part due to a lack of cases. It is clear, however, that ecclesiastical decisions as well as decisions of ecclesiastical conflict resolution procedures must comply with fundamental rules of fairness, such as *audi et alteram partem* or acting in good faith.

A special issue is the relationship between civil marriage and religious ceremonies relating to marriage. The only legally valid marriage in the Netherlands is civil marriage conducted by a civil registrar. The Civil Code (Article 1:68) is clear that religious ceremonies with regard to marriage cannot take place prior to the performance of a legally valid marriage. The church minister who performs a religious ceremony with regard to marriage without having verified the existence of a legally binding marriage is liable to prosecution (Art. 449 Criminal Code). Discussions in the 1990s about the abolition of the requirement of a prior civil marriage before a religious ceremony with respect to the marriage have not led to any change in the law. This arrangement has been challenged under Article 9 of the European Convention on Human Rights. In 1971, the Dutch Supreme Court upheld this system as a justified restriction of religious freedom.[14]

XV. Religious Education of the Youth

As we have mentioned already, the Constitution outlines the main elements of a dual system of education. Freedom of education allows confessional education to exist alongside public authority schools. Freedom of education entails freedom to found a school, to administer a school, and to determine the confessional identity of the school and its education. According to the Constitution, elementary confessional schools are financed by the state on the same footing as public schools. For secondary education and higher education, including universities, this is system is adopted through ordinary

14. HR 22 June 1971, *NJ* 1972, 31

legislation (as we have mentioned above). Currently, also Islamic schools are established and funded through this system, both at the elementary and secondary levels. Confessional schools are quite popular in the Netherlands; about two thirds of the schools are based on a religious confession.

The confessional school authorities determine the confessional character of the school. This can range from strict to quite liberal. Generally speaking, school authorities may also determine whether they have an open admission policy for pupils and require loyalty to the religious denomination for specific staff only, or for both. However, in determining this, they need to keep within the margins of the law, notably the General Equal Treatment Act. This means at least that they cannot act at will, but must carry out their policy in a consistent manner.

Public authority schools teach religion. This is done on a neutral, non-confessional basis. One could better call this teaching "religions." Public authorities (elementary) schools may offer on a voluntary basis, outside of the normal curriculum, the option for religious education on a confessional basis. If they do so, this education is funded by the public authorities themselves. Another requirement is that they must offer not only this education in one denomination but treat the various denominations on an equal basis. This also includes non-religious humanist education. Of course, there are practical limits to this. The school authorities appoint these teachers that represent a specific denomination. The school authorities do not interfere with the religious doctrines.

XVI. RELIGIOUS SYMBOLS IN PUBLIC PLACES

Dutch neutrality in the public domain is not interpreted such that the public domain should be void of any religious expression. On the contrary, the plurality of religious expressions is respected. Where education is concerned, the Constitution states: "Education provided by public authorities shall be regulated by Act of Parliament, paying due respect to everyone's religion or belief" (Article 23, Section 3). Practically, this means that there is room for religious expressions of teachers and pupils (such as the wearing of headscarves, crucifixes); however, teachers must be committed to work in a "neutral" environment, that is, to provide public authority education. The Equal Treatment Act which forbids making distinctions – in this case, by the authorities of the public school - on the basis of religion; other requirements may constitute an indirect distinction on the basis of religion, which is not allowed in principle, but for which justification grounds may exist. Where garments are concerned which cover the (female pupil's) face completely, the Equal Treatment Committee set up under the Equal Treatment Act accepted justification grounds in pedagogical and communicational arguments.

The Equal Treatment Act is also applicable to the private sector. Obviously, it grants organizations based on a religion or belief room to require loyalty of its personnel to its religious identity (albeit not unqualified); in the case of schools, it also allows them to follow their own admittance policy in this respect (again, not unqualified). Although private organizations operate in the societal sphere and often provide important social services, they are, legally speaking, not "public."

This system – with the Equal Treatment Act as a legal framework which covers many cases in the area of religious symbols in public places – is also applicable to domains other than education. The weighing of justification grounds is obviously not a completely technical or (value) neutral operation. This may lead to the fact that similar cases are assessed differently. It also necessitates critical analysis and debate on the arguments and outcomes of specific cases, both as such as in connection with other cases.

As regards public facilities themselves, there is no specific law covering the use of religious symbols. Occasionally, a religious symbol, such as a crucifix, may be found in a town hall. Also, a (non obligatory) prayer may take place preceding the meeting of a town council. [15]

15. In this context, mention must be made of a ruling of the European Court of Human Rights in an Italian

XVII. Freedom of Expression and Offenses against Religion

Dutch criminal law contains a variety of explicit references to religion. These relate to expressions, gatherings, and religious rituals.[16] Although they are subject of discussion from time to time, until recently they were for the most part taken for granted. The last few years, however, an intense public debate has emerged over both the legal provisions and their application in concrete situations.[17] Over the last number of years, some of these provisions have been extended in terms of the grounds of defamation as well as the circumstances in which the defamation takes place and in terms of the maximum penalty.

Article 137c of the Dutch Criminal Code penalizes as "serious offenses against public order" defamatory statements about a group of persons on the grounds of inter alia their religion or personal beliefs. It also penalizes defamatory statements on other grounds: race, hetero- or homosexual orientation, and physical, psychological, or mental handicap. This is includes statements made on the basis of religious conviction (notably relevant with respect to homosexual orientation). The criterion is that that the statements must be made "publicly" and "intentionally"; they include statements orally, in writing, or by image.

Similarly, the incitement of hatred of or discrimination against persons or violence against their person or property is penalized as a serious offense against public order (137d). Article 137e Criminal Code penalizes making an offensive statement "for any other reason than that of giving factual information," where a person "know or should reasonably suspect this is the case or "incites hatred of or discrimination against people or violence against their person or property." The grounds are those mentioned above. The dissemination of an object or having it in stock for that purpose is covered as well.

Blasphemy is also covered by the Criminal Code: Article 147 Criminal Code penalizes, among other things, making public statements offensive to religious feelings through "scornful blasphemy," orally, in writing, or by image as a serious offence against public order.[18] Article 429bis Criminal Code, penalizes exhibiting writings or images with such content in a way that is visible from a public road as a misdemeanour.

In a civil lawsuit, an expression may be regarded as wrongful vis-à-vis another party, even if that same expression would not lead to a criminal conviction.

XVIII. Conclusion

We started this essay with the observation that the relationship between religion and the secular state has again become a hotly debated topic in a variety of fora. Also for the state itself, the controversies that characterize these debates present real dilemmas. Although there is more to it, the integration of Islam into Dutch society is an important element in the debate. Current trends and developments in the legal and political spheres are not always mutually consistent. It will be a challenge to uphold traditional way of respecting religious liberty and of accommodating religion in legislation the basic pattern of Dutch law. It is a challenge worthwhile to undertake.

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case concerning a crucifix in a public school (ECHR 3 November 2009, Lautsi v. Italy (application no. 30814/06)). Following the initial judgment against Italy in November 2009, the Court agreed to hear the case in the Grand Chamber on 30 June 2010. Decision in the case is pending. See case and related documents at http://www.strasbourgconsortium.org/cases.php?page_id=10#portal.case.table.php.

16. The Criminal Code Articles referred to are formulated in a quite detailed manner, as can be expected for such Articles. In the brief reference we make to these Articles it is unavoidable that some of the nuance gets lost. The relevant provisions are the Art. 147, 147a and 429bis; Art. 137c-137e, and 137f and 137f; and 429 quater.

17. See Sophie van Bijsterveld, *Overheid en godsdienst. Herijking van een onderlinge relatie*, 2nd ed., Nijmegen: Wolff Legal Publishers 2009.

18. See also Art. 147a. Recently, a parliamentary initiative has been introduced to abolish blasphemy in the Criminal Code.

REX TAUATI AHDAR

The Religious Demography of New Zealand

If a typical rugby-loving, suburban dwelling New Zealander was asked by a pushy social scientist or pollster to take an annoying word association test, his or her response to the word "religion" might be a muffled yawn accompanied by an answer such as "irrelevant," "boring," or "outdated." Public interest, debate, or for that matter, consternation over matters religious is rare: religion, church, and "all that God stuff" are not pressing concerns in the lives of most of New Zealand citizens. In one sense, the widespread cultural disinterest in organized religion that typifies much of our history may be viewed as a positive thing. It can hardly be a cause for regret that New Zealand has, by and large, not witnessed the large-scale and bitter religious turmoil that has beset many nations.[1]

New Zealand's largest religious affiliation is Christian, and within Christianity, the largest denominations are Anglican, Roman Catholic, and Presbyterian. Unspecified numbers of Pentecostals and Evangelicals are a growing sector within Christianity as well. The actual churchgoing is significantly less than the census figures, with the latest International Social Survey Programme report (in 2009) recording that some 20 percent indicated that they attended church service at least once a month.[2] Notably, the "no religion" sector has grown significantly in each six yearly census since the 1970s and the latest census recorded some 34 percent. The major groups are summarized in Table 1.

Table 1: Religious Affiliation in New Zealand (2006 Census)

Religion	**Total (4.180 m)**	**Percentage**
ChristianAnglican	554, 925	55.6
Roman Catholic	508, 437	14.8
Presbyterian, Reformed	400, 839	13.6
Methodist	121, 806	10.7
Christian (not further defined)	186, 234	3.3
No religion	1,297,104	34.7
Muslim	36, 072	0.9
Hindu	64, 392	1.7
Buddhist	37, 590	0.9

I. SECULAR FOUNDATIONS

New Zealand has never had an established church. There were, to be sure, various early regional attempts at religious establishment by the European immigrants. Otago and Southland were Free Church of Scotland settlements. There was, at most, a modest initial preference for the Anglican Church leading some to describe that Church as having a quasi-establishment role in the colony. But "the Anglican Church's pre-eminence was a shadowy affair in comparison with its position in the home country or in older established

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1. Ahdar, Rex, "Reflections on the Path of Religion-State Relations in New Zealand, 2006 BYU L. Rev. 619; Mortensen, Reid, "Art, Expression and the Offended Believer," in Rex Ahdar (ed.), *Law and Religion*, Ch. 9, Aldershot: Ashgate (2000).

2. Massey University, *Religion in New Zealand*, International Social Survey Programme. Palmerston North: Department of Communication Journalism and Marketing, Massey University (2009).

colonies of settlement."[3] New Zealand was settled as a British colony at the time when the principle of non-establishment was gaining favour in Britain and the disestablishment of the Church of England was being seriously debated. In the nineteenth century there was a substantial formal separation of church and state, the Freethinkers of the 1880s did not need to mount a constitutional campaign for the separation of church and state as "the two were relatively separate" already.[4]

The Supreme Court in *Carrigan v. Redwood*,[5] could thus confidently state at the turn of the twentieth century:

> There is no State Church here. The Anglican Church in New Zealand is in no sense a State Church. It is one of the numerous denominations existing in the Dominion; and, although no doubt it has a very large membership, it stands legally on no higher ground than any other of the religious denominations in New Zealand.

The Court of Appeal affirmed this more recently in *Mabon v. Conference of the Church of New Zealand*: "Unlike England and Scotland, New Zealand does not have a national established church."[6]

In *Doyle v. Whitehead*,[7] Sir Robert Stout, Chief Justice of the Supreme Court, made what appears to be the only judicial statement pronouncing New Zealand to be a secular state. The Wellington City Council passed a by-law prohibiting playing golf on Sundays in Town Belt Reserves. Following a complaint from the Ministers' Association and clergymen of the Presbyterian Church (concerned it seems at the bad example to the young at the adjacent Presbyterian orphanage) the respondent, who breached this by-law, was charged. A Magistrate acquitted him on the grounds that the by-law was made for no other reason than to enforce Sunday observance and was thus bad in terms of the relevant legislation. The Supreme Court unanimously upheld this finding. Stout CJ declared:

> Considering that the State is neutral in religion, is secular, and that the State has provided for Sunday observance only so far as prohibiting work in public or in shops, &c, is concerned, and not prohibiting games, it cannot be said that this by-law is a reasonable by-law. It has also to be borne in mind that recreation on Sunday is not an offence even in countries where the Christian religion is established.[8]

II. RELIGIOUS EQUALITY AND RELIGIOUS FREEDOM

Historically, New Zealand has had an ongoing commitment to religious equality. We can trace this back to the Treaty of Waitangi, a founding document whereby the leaders of the indigenous inhabitants, the Maori people, ceded sovereignty to the British Crown in return for becoming the British subjects and securing the continued protection of their lands. The signing of Treaty of Waitangi[9] on 6 February 1840 saw the unexpected inclusion of an assurance concerning religious freedom and equality:

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3. Wood, G. Antony, "Church and State in New Zealand in the 1850s," 8 Journal of Religious History 255 (1975).

4. Lineham, Peter, "Freethinkers In Nineteenth-Century New Zealand," 19 *New Zealand Journal of History* 61 (1985).

5. [1910] 30 NZLR 244, 253

6. [1998] 3 NZLR 513, 523

7. ,[1917] NZLR 308

8. Id.

9.See http://www.nzhistory.net.nz/category/tid/133 [last consulted 13 July 2010].

> *E mea ana te Kawana, ko nga whakapono katoa, o Ingarani, o nga Weteriana, o Roma, me te ritenga Maori hoki, e tiakina ngatahitia e ia.* ("The Governor says the several faiths of England, of the Wesleyans, of Rome, and also the Maori custom, shall be alike protected by him.")

The earliest Parliamentary debates are also indicative of this desire for religious equality. The opening session of the first sitting day of Parliament, 26 May 1854, witnessed a snap debate on the question of an opening prayer. James Macandrew, a Presbyterian from Dunedin, offered to fetch a nearby Anglican parish minister to ensure there should be "an acknowledgement of dependence on the Divine Being." A counter-motion was immediately put that the House of Representatives "be not converted into a conventicle, and that prayers be not offered up." A vigorous debate ensued. Some considered such a prayer would seem "to involve the question of a State religion, the very appearance of which ought to be avoided" by the House. The House eventually passed this resolution:

> That, in proceeding to carry out the resolution of the House to open its proceedings with prayer, the House distinctly asserts the privilege of a *perfect political equality in all religious denominations*, and that, whoever may be called upon to perform this duty for the House, it is not thereby intended to confer or admit any pre-eminence to that Church or religious body to which he may belong.

The Rev F. J. Lloyd was introduced, read prayers and never appeared again, the prayer being said thereafter by the Speaker of the House. In the modern era, the passing of the New Zealand Bill of Rights Act 1990 ("NZBORA") marked a new epoch in New Zealand constitutional history.[10] The Act applies only to the actions of the government and to persons exercising "public" functions. Regarding religious freedom, there are four provisions of direct relevance.

> *Section 13* provides: "Freedom of thought, conscience, and religion – Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference."
> *Section 15* next addresses the outward, social expression of such belief, and states: "Manifestation of religion and belief – Every person has the right to manifest that person's religion or belief in worship, observance, practice or teaching, either individually or in community with others, and either in public or private."
> *Section 20* provides protection for religious and other minorities: "Rights of minorities – A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or use the language, of that minority."
> *Section 19(1)* states: "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993." Turning to the latter Act, we see that section 21(1) sets out 13 prohibited grounds of discrimination, including: "(c) Religious belief; (d) Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions."

Thus, state discrimination based on a person's religion or lack of religion is not permitted.

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10. Rishworth, Paul et al., *The New Zealand Bill of Rights*. Melbourne: Oxford University Press (2003).

III. PRAGMATIC SECULARISM: THE EDUCATION QUESTION

A third theme in New Zealand's religion-state history has been what I shall characterize as "pragmatic secularism." This is a secular stance born of a practical desire to avoid religious friction, rather than representing an ideological animosity to institutional religion.

Education is often a major battlefield for church-state conflict and New Zealand is no exception. The churches began their own schools at first. Private religious schools continue today as "integrated schools" under the Private Schools Conditional Integration Act 1975. They receive public funding provided they follow a national educational curriculum and accept a small (5 percent) coterie of students who do not adhere to that school's religion. In 2005 there were 2607 such schools, the largest number being Catholic (Mooney Cotter).[11]

Turning to state schooling, the abolition of the provinces in 1876 meant there was a need for a national policy on public education and a clarification of the roles of church and state. The debate on education in the late 1870s was conducted "against the background of increasing sectarian tension."[12]

The Education Act 1877 established a national system of education that was to be free, secular and compulsory. The famous "secular clause" (section 84(2)) read: "The school shall be kept open five days in each week for at least four hours, two of which in the forenoon and two in the afternoon shall be consecutive, and *teaching shall be entirely of a secular character*."

Scholars emphasize that the secularity of the national education programme was not due primarily to anti-religious sentiment or the advocacy of secularism, but rather was an attempt to defuse sectarian strife:

> Careful study of the debates and divisions shows that there was very little doctrinaire secularism among members. Although [some] members of the Legislative Council… signed a protest against the secular provisions of the act, others saw parliament's action as a necessary way of distinguishing the sacred from the secular, or at the very least as a practical political solution to the educational tensions caused by denominationalism.[13]

IV. AN ALTERNATIVE HISTORICAL ANALYSIS: A *DE FACTO* OR CULTURAL CHRISTIAN ESTABLISHMENT

While New Zealand may not have had a legally established church, or for that matter an established religion, a solid case, I suggest, can be made that there was a *de facto* or cultural establishment of a generic Christianity.[14] The laws and institutions in New Zealand naturally reflected Christian values given the religious composition of the population. For example, according to the 1896 Census figures, some 94 percent of the population were Christian. Anglicans were the largest denomination (at 40 percent). Moreover, the governing elite were also predominantly Christian.

11.Mooney Cotter, Anne Marie, *Heaven Forbid: An International Legal Analysis of Religious Discrimination*. Aldershot: Ashgate (2009).

12. Davidson, Allan K., *Christianity In Aotearoa: A History of Church and Society in New Zealand*, 3d ed. Wellington: Education for Ministry, 2004.

13. Breward, Ian. *Godless Schools? A Study of Protestant Reactions to SecularEducation in New Zealand.* Chrisitchurch*:* Presbyterian Bookroom, 1967.

14. Ahdar, Rex, "A Christian State?" 13 *Journal of Law and Religion* 453 (1998): Ahdar, Rex, *Worlds Colliding: Conservative Christians and the Law.* Aldershot: Ashgate (2001).

While, as we saw earlier, public education was ostensibly secular, schools (beginning in 1897) permitted religious, specifically Protestant, teaching on a limited basis under the "Nelson system" – named after a Nelson clergyman, Rev J. H. McKenzie. It was argued that as schools were open for five hours a day, three in the morning and two in the afternoon, a school might declare either the first or last hour of the morning as one designated for voluntary religious instruction. This was possible under the 1877 Education Act since that legislation allowed school buildings to be used on days and at hours *other than* those used for public school purposes. The sharp-witted realized this enabled religious instruction as well as the statutory minimum four hours of secular education to take place within the customary school hours.

The legislation currently in force, the Education Act 1964, repeats the secular clause, simply formalizing this long-standing arrangement. Section 78 authorizes the technical "closure" of a school for up to one hour per week to allow religious instructors to give instruction or religious observances to be conducted during school hours in a manner approved by the board of that school. Such instruction has to be undertaken by voluntary instructors, not teachers, but may take place within school buildings. Section 78A allows "additional religious instruction" if the majority of parents of pupils at a school desire it and the instruction does not detract from the normal curriculum. Under section 79, parents have the right to withdraw their children from any such religious instruction or observances if they so wish.

Sir Ivor Richardson (1962) surveyed the religious dimension of New Zealand laws and rejected the view that Christianity was part of New Zealand law or that New Zealand was a Christian State. As he put it: "If this means that the doctrines and principles of Christianity are legally binding on all citizens or that the political apparatus of government is subject to the mandates of the Christian religion, then the statement is incorrect."[15] However, he continued:

> Nevertheless there is a certain amount of truth in the statement that Christianity is part of our law. In the first place, the Christian religion has played an important part in shaping our culture, our tradition, and our law. As Lord Sumner pointed out in *Bowman* v. *Secular Society Ltd*,[16] the family is built on Christian ideals, and Christian ethics have made a tremendous impact on the development of our law, as is only natural considering the majority of New Zealanders come from a Christian background.

New Zealand has its own instances of what some Americans scholars have dubbed "ceremonial deism." The symbolic or ceremonial examples of Christianity's special position in society include:

- The opening prayer said by the Speaker of the House of Representatives;
- The swearing of oaths on the Bible (but affirmation is available also);
- Public holidays such as Christmas Day, Good Friday and Easter Monday;
- The monarch, Elisabeth the Second, is "by the grace of God", the Queen of New Zealand, and one of her titles is *Fidei Defensor*, the "Defender of the Faith";
- The national anthem, a hymn entitled "God Defend New Zealand";
- Blasphemous libel on the statute book as a criminal offence (section 123 of the Crimes Act 1961).

15. Richardson, Ivor L. M., *Religion and the Law.*Wellington: Sweet & Maxwell (1962).
16. [1917] AC 406, 464-465.

V. CULTURAL DISESTABLISHMENT: EROSION OF THE *DE FACTO* CHRISTIAN ESTABLISHMENT

The unquestioned reflection of the Christian ethic and a diffuse Christianity continued until about – and exactitude is of course difficult – the 1960s. This decade might be described as the beginning of the erosion of the cultural or *de facto* establishment of Christianity. There has been a gradual but unmistakable disestablishment or wresting of generic Christianity from its position of cultural ascendancy.

The various Christian observances and practices historically protected in New Zealand law are continually being challenged. Some have been overturned, while others face, I submit, a precarious future.

The Speaker's prayer in Parliament remains intact, but criticisms are regularly voiced, such as those of one MP who in 2003 who complained that the prayer "is no longer appropriate for the Parliament of a diverse and multicultural nation."

Sunday observance by the commercial sector is a thing of the past, with shop trading on Sundays allowed for all retailers. Restrictions on the sale of liquor on Sundays took a little later to be repealed but such sales are now also permitted. The Good Friday and Easter Sunday shop trading ban still prevails but defiant shop openings at Easter may test the remaining bans on trading on these Christian festive days as well. Bills to repeal these remaining restrictions continue to come before Parliament, although none has yet succeeded. There must be some prospect that these remaining religious-based trading prohibitions will be eliminated if an anti-establishment style, freedom *from* religion interpretation of the freedom of religion protections in the NZBORA 1990 is adopted.

Returning to the issue of shop trading restrictions to mark religious holidays, an interesting recent case which tested the law was *Department of Labour v. Books and Toys (Wanaka) Ltd.*[17] The defendant traded as a bookshop, Wanaka Paper Plus, in the popular South island tourist resort, Wanaka. On Easter Sunday 2004 it decided to open for trading in direct contravention of section 3(1)(b) of the Shop Trading Hours Act Repeal Act 1990. This provision requires shops to be closed on Good Friday, Easter Sunday, Christmas Day and ANZAC Day morning. The defendant pleaded guilty and despite the offence carrying a maximum penalty of a NZ$1000 fine, the District Court ordered that it to be convicted and discharged without any financial penalty. A major contributing factor to this leniency was, as the court noted, the "anomalous" nature of the trading ban, since certain other nearby shops (some selling the very same items as the defendant's) had been allowed to trade on the day in question. These shops were in a zone that, historically, had been able to secure an exemption under the legislation for retailers operating in a designated tourist area. Wanaka Paper Plus however was just outside this narrow zone. The interest in the case lies in the submission that the Easter trading ban in was an unreasonable limitation on the defendant's right of religious freedom under sections 13 and 15 of the NZBORA.

Although, as noted earlier, the New Zealand courts have no power to declare that legislation inconsistent with the NZBORA is invalid or ineffective, courts have discovered the power to issue "indications of inconsistency." These judicial pronouncements declare that although the enactment in question must still be enforced and cannot be nullified, its continued existence calls for the attention and remedial work of Parliament. However, in this case, Judge Noel Walsh ruled that to question the Shop Trading Act would, he cautioned be unwise and "would have the potential to undermine public confidence in my role as a District Court judge, and in the judiciary's independence from the political process." He added that even if he did have jurisdiction he would have refused to make the declaration sought here. The genuineness of the

17. [2005] 7 HRNZ 931.

defendant's religious liberty claim was doubted: "in reality [Wanaka Paper Plus] opened on Easter Sunday purely for economic reasons, and not on the basis that the 1990 Act infringed any of the rights guaranteed by the NZBORA." Although the applicant failed to overturn the trading ban or even secure an indication of inconsistency, the groundwork has been laid for future applicants to succeed. Once an indication of inconsistency is signalled, Parliament may well decide to abolish the Christian based trading restrictions.

The blasphemy offence is now all but a dead letter. In March 1998, the Museum of New Zealand, *Te Papa*, ran a controversial exhibition containing two works highly offensive to many Christians (Mortensen). The exhibition included the *Virgin in a Condom* statue (a 7.5cm statue of the Virgin Mary clad in a contraceptive) and a contemporary version of Leonardo da Vinci's *The Last Supper*, with a topless woman at the centre of the table in place of Christ. Notwithstanding Catholic (and other religious) protests – and even an attack on the statue – the Museum refused to withdraw the exhibits. In a pluralist society where the Museum acted as "a forum within a varied social and cultural mix," the chances of one cultural or social group being offended was "a daily risk" and so censorship would simply be inappropriate, defended senior Museum officials. Compared to (what Christians perceive as) the unquestioned acceptance of religious ideas in the era of cultural ascendancy, this looks like and is experienced as a downgrading of religion, a marginalization. An application to invoke the long-disused criminal prohibition against blasphemous libel was rejected by the Solicitor General. Such a prosecution, he said, would be inconsistent with the NZBORA's protection of Freedom of Expression in Section .[14]

Queen Elizabeth II may still be the "defender of the faith," but explicit acknowledgment of the Christian faith in her presence in her outermost former colony was recently deemed inappropriate. In February 2002, the Prime Minister, Helen Clark, came under attack for her decision to drop the saying of grace at the Commonwealth Heads of Government banquet attended by Queen Elizabeth and other dignitaries. She defended:

> There was no grace for the same reason as there is none now in New Zealand, because we're not only a society of many faiths, but we're also increasingly secular. In order to be inclusive, it seems to me to be better not to have one faith put first. We haven't had the grace at state banquets for the last two years.

VI. Renewed Tensions over Religion in State Schools

The Nelson system of voluntary religious instruction in state primary schools preserved by the Education Act 1964, which I summarized earlier, has not yet been directly challenged. But the climate sympathetic to its abolition exists.

An interesting pointer to this is the debate that erupted in 2005 over a weekly lunchtime religious club run at a Wellington state primary school.[18] The board of trustees of Seatoun School banned the weekly "KidsKlub" meeting, a Christian club attended by around a third of the School's 400 pupils and which had run since 2002. The board pointed to its obligation under the Education Act 1964 to "deliver a secular education" and it had "chosen to maintain a level of consistency by operating in the same manner outside of teaching hours, while the school is open." The board's legal advisers backed its position. KidsKlub is based on a Scripture Union program and similar groups are held in

18. Ahdar, Rex. "Reflections on the Path of Religion-State Relations …" supra n. 1 at 619.

18 other primary schools throughout the country. The club meetings – involving Bible stories, craft activities, dances and songs – were voluntary, held during the school's lunch-break and taught by trained volunteer parents and grandparents. Children who wanted to attend needed the permission of their parents to do so.

A group of parents, stung by the incoming board's ban, sought a legal opinion from Sir Geoffrey Palmer, a former Attorney General and Prime Minister and the principal architect of the NZBORA 1990. In his written opinion, Palmer concluded that the ban breached the Act's religious freedom guarantee. Pupils who did not wish to participate in KidsKlub were free to decline: there was no evidence of any compulsion, nor was there any suggestion of any peer pressure exerted on children who did not wish to go. However, as for the religious rights of those pupils who wished to attend, there was a clear infringement here. Section 5 of the NZBORA provides that rights and freedoms may be subject "only to such reasonable limits prescribed by law and demonstrably justified in a free and democratic society." The Education Act did not proscribe voluntary religious programs at schools. Just the opposite: voluntary religious programs were expressly permitted. KidsKlub was in accord with the statutory scheme. The reasonableness of the ban here was similarly suspect. It was difficult to see how those who did not wish to attend had experienced any curtailment of their rights. Furthermore, children who wished to attend had to have parental consent. In other words they had to positively "opt-in." This then was a different situation from those where religious instruction or observances were a built-in part of the school program and those not wishing to participate had to positively "opt-out."

In some nations, such as Canada, courts have invalidated such opt-out programs on the basis that the requirement on non-participating pupils to withdraw meant the pupils incurred stigma and concomitant peer pressure to conform and hence their religious freedom was impinged.

The Seatoun School fracas was raised in Parliament. The Minister of Education, Trevor Mallard, was reluctant to become embroiled in the debate simply responding that school boards were autonomous bodies: "I do not back the decision but I back the board's rights to make it." After reconsidering the matter and perhaps dismayed by the adverse publicity, the board eventually resolved to reinstitute the KidsKlub meetings.

The Seatoun School case did not involve the more traditional and prevalent form of religious instruction program run at state primary schools, namely, those run in school hours (not lunchtimes) where the presumption is that children will attend unless their parents take actives steps to excuse them. The longstanding "Bible in Schools" program operates in about 60 percent state primary schools with some 4000 volunteer instructors and about 6 percent of pupils opting out in their respective schools. It may well be that New Zealand courts follow the Canadian courts and similarly rule such Bible in Schools programs as violations of the non-participating children's religious freedom.

VII. Official State Endorsement of Indigenous (Maori) Spirituality

As the cultural disestablishment of Christianity accelerates, the appearance of a more genuine secular state has been belatedly thwarted by a recognition and adoption of a resurgent traditional Maori spirituality.[19] This represents a stark *volte-face*, because, historically, New Zealand governments were decidedly unsympathetic to Maori religion. The Tohunga Suppression Act of 1907 is a well-known example. Here, the Government sought to curb the activities of Maori traditional healers or *tohunga* by making the

19. Ahdar, Rex, "Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments," 23 *Oxford Journal of Legal Studies* 611 (2003).

practice of their medicinal arts a criminal offence.

Official government support for Maori and their spiritual concerns can be traced to the state's belated desire to honour its obligations under the Treaty of Waitangi. Perhaps some commentators are not far from the truth in their argument that Maori culture and spirituality were a particularly suitable focus in a climate made up of such diverse ideological streams as post-modernism, anti-colonialism, post-colonial guilt feelings and fascination with New Age values.[20] Examples of the official recognition of Maori spirituality are numerous.

In 2002, construction on a major four-lane highway was halted, and the road was eventually re-designed, when the local Maori sub-tribe, Ngati Naho, expressed concern that the expressway would disturb the lair of "Karu Tahi," a one-eyed *taniwha* (spiritual guardian or monster). When AgResearch, a Crown agricultural research facility, sought to develop through genetic modification a class of Fresian cow that would produce milk containing the human myelin basic protein, local Maori, amongst others, vigorously objected. The sub-tribe, Ngati Wairere claimed that alteration of *whakapapa* (genealogy) of humankind by mixing the genetic makeup of humans with other species would be deeply offensive and contrary to *tikanga* Maori (Maori custom). Both *whakapapa* and *mauri* (roughly, life-force possessed by all things) were intangible *taonga* (treasures) deserving of active protection in terms of the relevant legislation and the Treaty of Waitangi. The Foreign Affairs and Trade Ministry came under criticism in 2001 for funding the travel of *kaumatua* (elders) to overseas embassies to perform *hikitapu* or spiritual cleansing ceremonies in the buildings concerned. Aside from these controversy-generating instances, the recognition of Maori spiritual concerns is a fairly unobtrusive and commonplace thing: for example, the use of *karakia* (prayers) to commence court proceedings or public meetings is increasingly permitted and sacred sites (*waahi tapu*) are acknowledged and protected under environmental legislation. The Ngai Tahu Claims Settlement Act of 1998 contains extensive statutory acknowledgement of the mythological and sacred origins of natural landmarks, such as Aoraki (Mount Cook), and Ngai Tahu's special cultural and spiritual association with them. Rather than simply multiply further instances I shall take one recent example and explain it in more detail.

VIII. BEWARE THE MAORI "DRAGON"

There was an urgent need for a prison in Northland and, in 1999, the Government selected Ngawha, a rural location, as the site. The Northland Regional Council, however, declined to grant the necessary resource consents. The Minister of Corrections on 3 April 2001 appealed to the Environment Court against the Council's refusal and various persons appealed against the Minister's original designation of the site as a prison. The Council's refusal of the consents was solely due to the harmful effects the installation would have on the cultural, spiritual and other interests of certain local Maori. Following a lengthy 21-day hearing, the Environment Court delivered a 200-page decision upholding the original decision to designate the site for a prison and granting the resource consents needed by the Government (Williams).[21] Unlike the Council, the Court did not find that Maori cultural, spiritual or health interests would be adversely affected.

Maori concerns are expressly mentioned in the purpose provisions of the Resource Management Act 1991 (RMA). Of the various concerns raised by the Maori opponents to

20.Kolig, Erich, "Of Condoms, Biculturalism and Political Correctness: The Maori Renaissance and Cultural Politics In New Zealand," 46 *Paideuma* 231 (2000).

21. Williams, Ian H (2003) "The Minister's Prison and The Cultural Prison: Lessons from The Northland Prison Litigation," 20 *New Zealand Univ. L. Rev.* 320.

the prison – and not all Maori were against the proposal – the most fascinating contention was that the prison would interfere with the relationship of the *tangata whenua* (native people) with a *taniwha*, named "Takauere." It was claimed that Takauere's domain encompassed the prison site at Ngawha and the installation would interfere with his pathways to the surface and his *mana* (authority or prestige).

Several pages of the Environment Court decision were devoted to summarizing the evidence about this *taniwha*. Of the ten who testified, three saw the development adversely affecting Takauere, the spiritual guardian of this area. He was not some sort of mere "mascot" in the *Pakeha* (European) sense, said one, and the proposed construction would hinder his free movement and "literally throw mud in his eyes." On the other hand, seven other witnesses denied the installation would have any effect on the *taniwha*. One elder doubted its *ana* (lair) embraced Ngawha and, even if it did, the *taniwha* was adaptable and "would simply find other passageways and other places to reside. The prison and the *taniwha* can co-exist." Another witness suggested that Takauere "was being misused to fight a prison" in a way that he found offensive.

The Court accepted that there were those who sincerely believed in the existence of the *taniwha*, Takauere, which it described for present purposes as "a mythical, spiritual, symbolic and metaphysical being."

The Court respected such sincere spiritual beliefs and noted Parliament enjoined it to do so by virtue of Sections 13 and 15 of the NZBORA. It emphasized that nothing in its ruling ought to be taken as "belittling" the believers in the *taniwha* nor "the importance that their belief in Takauere has for them." But there were limits both in terms of policy and practical decision-making. It observed:

> Even so, the Act and the Court are creations of the Parliament of a *secular State*. The enabling purpose of the Resource Management Act is for the well-being of people and communities, and does not extend to protecting the domains of *taniwha*, or other mythical, spiritual, symbolic or metaphysical beings…. Neither the statutory purpose, nor the texts of [the Act], indicates that those making decisions under the Act are to be influenced by claimed interference with pathways of mythical, spiritual, symbolic or metaphysical beings, or effects on their mythical, spiritual, symbolic or metaphysical qualities.

Practically speaking, the Court admitted to difficulties in evaluating questions about such metaphysical matters. In the wake of conflicting evidence about the *taniwha* it had no reliable or objective way to resolve the dispute. For instance, "the *taniwha*'s pathways are not physical passages that can be measured and (at least on some accounts) the dimensions of the *taniwha* range from time to time."

Furthermore, the tribunal had to be persuaded on the facts that the being existed and would be impinged upon. In light of the evidence presented:

> None of us has been persuaded for herself or himself that, to whatever extent *Takauere* may exist as a mythical, spiritual, symbolic or metaphysical being, it would be affected in pathways to the surface or in any way at all by the proposed prison, or any earthworks, streamworks, or other works or development for the prison.

An opponent of the prison proposal appealed to the High Court. The appellant's case was that the Environment Court had erred by confining the ambit of that provision to tangible, physical matters, whereas spiritual, metaphysical concerns, such as the *taniwha*'s plight, ought to have been properly considered.

In the High Court decision, *Friends and Community of Ngawha Inc v. Minister of Corrections*,[22] Wild, J. noted that *if* the lower court had excluded *taniwha* from its section 6(e) evaluation it would have erred. An important earlier High Court case on genetic engineering and Maori belief (*Bleakley v. Environmental Risk Management Authority* [23]), had made it abundantly plain that "taonga embraces the metaphysical and intangible (e.g., beliefs or legends) as much as it does the physical and intangible (e.g. a treasured carving or mere)." However, the Environment Court had clearly cited and applied *Bleakley*. That Court had spent some considerable time on the existence and vulnerability of the *taniwha*. It had concluded that Takauere would not be harmed by the proposal: "That is a factual finding which was open to the Court on the differing evidence it heard." A rather optimistic submission that the Court had been remiss in concentrating too much on the *taniwha* himself at the expense of Maori belief in him was rebuffed. It was going too far to say belief about *taniwha* came within the definition of "environment" under the RMA. Wild, J. expressed "difficulty in following how beliefs can be regarded as a natural and physical resource, or how they can be sustainably managed." The appellant's argument that the Treaty duty of active protection under Section 8 of the RMA had been breached was rejected. For one thing, the land in question was not and had not been Maori land for over a century. Although the Court was not, strictly speaking, required to consider alternatives to the challenged proposal, it had done so anyway here. The Court of Appeal refused to grant leave to hear an appeal. The lower courts had given proper consideration to Maori spiritual beliefs concerning the *taniwha*.

State recognition of Maori religious concerns has not gone unchallenged. Criticisms have been voiced that it unfairly privileges one religion over another, or worse still, that it simply enables some Maori to cynically exploit traditional religious beliefs for pecuniary gain. For secular liberals, rationalists and sceptics in the Enlightenment tradition, it represents a regrettable reintroduction of religion "through the back door."[24]

IX. CONCLUDING THOUGHTS

The secularity of public life remains a live issue. There is a constituency that would potentially favour a "naked public square," given, as I just noted, that nearly a third of New Zealanders indicate they have no religion. Some 50 percent of the population believe that churches and religious organizations have about the right amount of power in the nation, 15 percent stating they have too much, 10 percent too little, with the rest undecided.[25]

The last vestiges of public Christian ritual and symbolism are just that. There is a steady pattern of dismantling these historic Christian remnants from the public square. With each passing year, people of faiths other than Christianity, as well as atheists and agnostics, have less to complain about. Indeed, it might be replied that it is the Christian community that has been remarkably tolerant. Not only are most of their cherished historic public observances being expunged, but they face regular galling reminders of that Christianity must "know its place" in 21st century New Zealand. For instance, the Broadcasting Standards Authority recently dismissed a complaint by a Presbyterian pastor about a promotion run on the state-owned television station. According to the Authority,

22. [2002] NRMA 401.

23. [2001] 3 NZLR 213.

24. Kolig, Erich, "Coming Through the Backdoor? Secularisation in New Zealand and Maori Religiosity", in John Stenhouse et al. (eds), *The Future of Christianity in the West: Historical, Sociological, Political and Theological Perspectives from New Zealand*. Adelaide: ATF Press 183 (2004).

25. Massey University. *Religion in New Zealand*, International Social Survey Programme. Palmerston North: Department of Communication Journalism and Marketing, Massey University (2009).

the exclamation, "For Christ's sake!" in the commercial, was not a blasphemous phrase and did not call for censure by the state watchdog.

There is no small irony here. The same Human Rights Commission that expresses pleasure at the explicit state recognition of indigenous spirituality seems oblivious to the offence that a much greater segment of New Zealand society feel when their privileged religious symbols and institutions are criticized, if not outright dismantled. Privileging of Maori spirituality is fine; privileging of Christianity, however, implicates religious liberty.

Perhaps the state's belated adoption of Maori ritual is the beginning of a civil religion with a strong indigenous flavour. The question whether New Zealand has ever had a significant "civil religion" is one that has exercised many sociologists and historians.[26] The recent recognition of Maori spiritual concerns in state ceremonies and in environmental and other laws may be a harbinger for the inclusion and recognition of further religious values and rituals. Or, it may be that Maori spirituality remains as an exception justified on historic, bicultural grounds. As the twenty-first century unfolds, the answers may hopefully become clearer.

26. Hill, Michael & Wiebe Zwaga, "Civil and Civic: Engineering A National Religious Consensus", 2 New Zealand Sociology 27 (1987): Pierard, Richard V. "'In God We Trust . . . All Others Pay Cash': Reflections on Civil Religion" 10 Stimulus 11.0 (2002).

CARLOS VALDERRAMA ADRIANSÉN

Religion and the Secular State in Perú

I. SOCIAL CONTEXT

The most professed religion in Perú is Catholicism. In a recent poll performed by the Catholic university "Pontificia Universidad Católica del Perú," from a population of 27 million, 79.21 percent, recognized themselves as Catholic, while 12.89 percent reported being members of an Evangelical Church. Much smaller percentages represented other gorups: 1.92 percent reported as Jehovah's Witnesses, 1.65 percent as Adventists, 0.19 percent as members of the "*Iglesia Israelita del último pacto universal*" (religious group of Perúvian origin); 3.19 percent reported that they believed in God without participating in any specific religious group, and 0.65 percent reported a as "members of a different faith."[1]

II. THEORETICAL AND SCHOLARLY CONTEXT

To a certain degree, it is difficult for the Perúvian State to exist because Perú has its roots in a syncretic Andean-Catholic Religion. This syncretism provides Perú its ontological value. Spanish monarchs between the fifteenth and nineteenth centuries supported their titles of conquest and permanence in Perú by legal regulations, known to Popes as Alexandrine Bulls, that constituted their mandate (Alexadre VI and July II) from the Spanish Kings of spreading Catholic faith in exchange of possessing, administrating, exploiting, and governing the territory. After gaining independence from Spain, Perú determined its borders according to the territory that the Church considered as the Metropolitan Archbishopric of Lima.

As long as territorial controversies persist, the state must give the Catholic Church legal preeminence to avoid weakening its own title in the occupied territory. As a matter of fact, due to rough Perúvian geography, the state, since its foundation until now, relies on the Catholic Church for legal presence throughout the territory similar to that of the Catholic Church due to its 15th century missionary labor. It is said in Perú that "wherever there is a Church there is also a Perúvian flag."

Due to the Perúvian people's strong allegiance to the Andean-Christian faith, the state must also turn to the Catholic Church to solve social problems, especially in places far away from Lima, the capital. Jeffrey Klaiber[2] says that it is important to mention that the Catholic Church in Perú, as in any other part of the Catholic world, has been influenced, molded, and conditioned by its social surrounding. It is important to note that the Church does not remain isolated from society, but society and church mutually influence each other; further, many problems the Church currently faces are due to societal circumstances, not necessarily any wrong decisions made by the Church. This mutual

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1. *El Comercio Newspaper (Lima).* Year 166, edition Nº 85,642. Friday 14 April 14 2006, A2. *Technical File*: Poll performed by Pontificia Universidad Católica del Perú. Register number: 0108-REE/JNC. Date: March 24 to 26, 2006; Sample: 1,945 people of 24 provinces of country; Error of margin: +2% -2%. Trust level: 95%.

2. *Klaiber, Jeffrey.* "La Iglesia en el Perú" Fondo Editorial de la Pontificia Universidad Católica del Perú. Lima 1988.

influence will be key to understanding the relations between the powers of the state and religious groups in Perú.

III. Constitutional Context

Because high clergy and hierarchy during Independence were Spanish and realist, they abandoned Perúvian territory during the Wars of Emancipation and the parishioners of the Catholic Church had no religious authorities. The Perúvian State, in its first years, had to assume the role of ecclesiastical authority in order to preserve the Catholic religion as the only element of unity in a multicultural, multiethnical, and geographically rough environment. This role started diminishing in 1880 with the dictatorial decree of 27 January 1880, of President Nicolás de Pierola and Praeclara Inter beneficia Bull of Pope Pío IX and formally ended when the Perúvian State resigned its ecclesiastical prerogatives through the law 23147 of 16 July 1980.

The current constitutional model of the relations between the state and religion is considered cooperative by ecclesiastical doctrine. The state and Catholic Church determine their legal entailment in mutual cooperation for the benefit of mankind. This collaborative regime, valid in almost all Latin American countries, strengthens when the state decreeing freedom of religion and conscience decides, due to legal and historical reasons, to maintain special entailments with the prevailing religion. Church-state relations within this regime of religious freedom are not considered a private matter, but a valuable element for the community; churches do not receive the ordinary treatment of associations subordinated to common law, but instead have specific regulations due to their status as collective subjects of religious freedom.

This cooperative model is not only expressed in substantial aspects or aspects public aid of the individual or collective exercise of religious freedom, but also in a regulated or formal dimension. The Concordats and agreements create comprehensive negotiating regulations that suppose a state recognition of common matters to be mutually decided (i.e., churches and the state together establish prime aspects of their legal regime). Note, for example, the agreement signed by the British Plenipotentiary Minister of Queen Victoria and Perúvian Chancellor representing the Perúvian President Marshal Andrés Avelino Cáceres on 5 January 1846, and the International Agreement signed by Perú and the Vatican on 19 January 1980. Constitutional regulations consecrate the principle of respect to religious freedom. However, in a country that consecrates religious freedom, it is contradictory for constitutional law to protect one religion over another, because protection necessarily implies intervention. Therefore, Subsection 3 Article 2º of the Perúvian Constitution declares that "Every person has the right to freedom of conscience and religion, *individually or as an association. There should not be persecution due to ideas or beliefs. The public exercise of all creeds is free, if it does not affect the morale or alter public order*."

The Catholic Church, therefore, may appear privileged in Perú. However, the opposite is true: the Catholic Church does not receive any privilege from the state and the law, but rather is required to end the formation of a national identity. Because of this, Article 50 of the Perúvian Constitution states "Within an independent and autonomous regime, the state recognizes the Catholic Church as an important element in Perúvian historic, cultural, and moral formation *and cooperates with it*." The constitutional regulation recognizes, as mentioned above, that the state needs the Catholic Church to form its own identity; cooperation is due to this process of formation and not the religious aspect of the Catholic Church. If the state cooperates with an entity because it is religious, the cooperation would be dangerously close to state denominationalism. States that claim equality and religious freedom should pay no attention to religious entities for their religious aspect.

There is an important reference to God as a base or source of law in the introduction of the Constitution: "*The Constitutional Democratic Congress, invoking Almighty God, complying with Perúvian people mandate and remembering the sacrifice of all the generations that have preceded us in our country, has decided to issue the following Constitution.*"

In this respect, the procedural regulations contained in the Procedural Constitutional Code, in Article 37, are pertinent, which states: *"Protection proceeds when defending the following rights: 1)Of equality and non-discrimination due to origin, sex, race, sexual orientation, religion, opinion, economic or social condition, language, or any other type; 2)The public exercise of any religious creed; 17) To education, as well as the right of parents to choose the school and to participate in their children's education process."* Protection is a legal action that, when submitted to a judge, permits the state to suspend, defend, or allow the exercise of fundamental rights contained in the Constitution, international agreements, and other relevant regulations. This appeal for legal protection, a summary procedure is a common protective action usually allowing neutrality and equality among religions.

Perú's cooperation with religious groups is not supported by their religious status, but by their labor in the social, educational, and cultural fields. These benefits to the state are balanced by providing certain facilities and tax exemptions. A careful reading of Article 50 reveals that the cooperation between the state and Catholic Church occurs not because cooperation is a religious creed, but because of its permanent work in the historical, cultural, and moral formation of Perú.

Perú regards other religions the same, as established in the second paragraph of Article 50: "The state respects other creeds and may establish forms of cooperation with them." The regulation does not mention "recognize" or "accept" because those verbs go against the real sense of religious freedom, which is consecrated only with the abstention of public power; thus the Perúvian Constitution uses the term "respect" to express consideration, deference, and compliance, due to courtesy; there is no state interventionism in religion whatsoever.

IV. Legal Context

A. This section simply transcribes fundamental portions of a jurisprudential and doctrinal sentence about religious freedom issued by the Constitutional Court on 15 May 2004[3] that will provide a clear idea of what is officially thought and supported:

> It is objectively clear that the freedom to profess any creed and, especially the freedom to become or refrain from becoming part of any religious worship is a central consequence of the principle of autonomy of the person. In the same sense, freedom is something that man naturally has and possesses in the order of being, in ontological dimension or natural right. In this perspective, a person may choose to establish a relation with what he/she considers transcendent, a deity, or god. Therefore, religious freedom is not something to reach, but a quality of the desire of human being.
>
> No one can be prevented from exercising his/her option to adore any deity because it is one's free expression of conscience, which previously starts from the recognition of the existence of an individual's reserved field where interference by a third party cannot take place.
>
> Therefore, religious freedom takes the form of a "reserved area" and it is forbidden for the state or the society to intervene. It is a negative freedom, regarding it

3. EXP. N.° 3283-2003-AA/TC. JUNÍN - TAJ MAHAL DISCOTEQUE Y OTRA.

the state must only limit itself to forbid or restrict certain behaviors (not convictions) that attempt on religious freedom, or public order and social morale. The recognition of a religious profession produces, by consequence, the rights to practice acts of worship and to receive religious assistance from the faith itself; to celebrate festivities and wedding rites; and to receive and teach religious information of all kinds according to one's own convictions. In accordance to these faculties the principles of immunity to coercion and non-discrimination are created.

The principle of immunity to coercion consists of the idea that no person can be obliged to act against his/her religious beliefs; that is to say, he/she cannot be obliged or legally compelled to act opposing those convictions. This exemption also includes atheists and agnostics, which cannot be ordered to take part in any kind of worship or to act according to rites or practices derived from a religious dogma or to swear under these forms or convictions. In accordance with this principle "no one could be subject to coercion that could infringe on the freedom to have his/her own religion or convictions. The state cannot forbid people to act or stop acting in accordance with their religious beliefs, as long as they are not detrimental to third parties or break political order or social morale. This consideration is also valid for nonbelievers.

The principle of non-discrimination establishes the proscription of an agreement that excludes, restricts, or separates, undermining the dignity of the person and preventing him/her from enjoying his/her fundamental rights. It is applicable to the unjustifiable differentiation in the working, educational fields, etc., or to the performance of public functions or positions that are conditioned to taking part in or abstaining from a religious group.

Religious freedom takes the form of an individual and collective right, because it is applied to the person individually as well as the group of associates of a church, creed, or religious community. In the last case, it is expressed in the right to establish places of worship, to form and name religious operators, to teach and spread faith of the religious association, etc.

Religious freedom is not only expressed positively in the right to believe, but also in the right to practice. In this context, freedom of worship appears as the power that any person has to act and participate in representative ceremonies connected to his/her religious beliefs. Therefore, when the religious conviction is formed, faith goes beyond the believer's heart and is shown socially, having the power to attend places of worship and practice worship rites or adoration to "their" deity and even the adoption of certain rules of social interaction (greeting, clothing, etc.). The existence of religious worship harnesses the possibility of sacred constructions; the usage of formulas and rite objects; the exhibition of symbols; the observance of religious holidays; and even the prerogative of asking for voluntary contributions. As long as it produces social relations that gravitate around social life, worship can be subject to legal regulation, but only in a negative sense. Law cannot tell which actions could be the content of worship, it may only limit itself to describe the reserved behaviors, due to religious practice.

Along that line, the principle of no grievance to rights of third parties, as a basic guideline, that contains an objective limit to freedom of worship, consists of the proscription of pernicious behaviors or inconvenience during the exercise of religious worship or practice, which damage or undermine the rights that the Constitution and the law grant to the believers and nonbelievers of different creeds.

About this matter, damage to third parties could not consist of the nuisance that they suffer when they witness or know the exercise of worship that they do not share because of their own intolerant attitudes regarding those worships. The damage that comes from not accepting the personal autonomy in matters of conscience could never be considered for the application of this principle.

Within a denominational state the relationship between political bodies and churches that come from the recognition of religious pluralism that is ruled by the principle of reciprocal incompetence; that is to say, on one side, the state recognizes the existence of "spaces" in the life of people where it cannot regulate or act. In accordance with this, churches accept as an ethical and legal fence the prohibited institutional intervention in state matters.

We recognize a denominational state as "one with no official religion, which allows the existence of several religions, but recognizes special cooperation of the State with the predominant religion." In this state modality it is assigned the personal power to reach the substantial aim, in accordance with its own conscience convictions: accepting or rejecting the existence of God, and the unconditional spiritual fulfillment. Therefore, it is denied to political power the faculty to recognize a theological truth, although it can recognize the historical, social, or cultural role developed by a church, creed or religious community in favor of the institutionalization and development of that political society.

Another aspect regards the implications of Catholicism in a state like ours and its relation to the exercise of several fundamental rights of people, whether natural persons or legal entities. In this respect, our Constitution cites religious freedom as an essential characteristic of every person (Article 3°, Section 2). The systemic reading of the Constitution makes it clear that the state dissociates the temporal matters from the spiritual ones: aspects relating to transcendental faith and morale are left exclusively to the conscience of each person. Nevertheless, it cannot be avoided that the Catholic religion has been and is the traditional faith of Perúvian people – which for several reasons is articulated to our concept of nation – and that has determined that Article 50° of the Constitution establishes as a recognition to its institutional tradition, that "within the regime of independence and autonomy, the state recognizes the Catholic Church as an important element in the historical, cultural, and moral formation of Perú and cooperates with it." This cooperation was formalized through Concordat with the Vatican of 1980, where a special regime was established; this regime rules the subventions for people, works, and services of the Church, besides the exonerations, benefits and tax franchises, completed liberty to establish schools under ecclesiastical administration, and the subject of religion as a regular school subject, among other agreements. Also, it establishes other forms of cooperation between them: the commitment of religious provision for Catholic staff in the Army and National Police through a military vicar and religious services for the faithful of this religion that are in hospitals, tutelary centers, and prisons of the state. However, the duty of state cooperation in favor of the Catholic Church as a recognition of its important role in the historical, cultural, and moral formation of the country, does not mean that it is allowed to invade the area of other creeds or ways of thinking, because if so it would have no sense that the Constitution stated freedom and it would then neutralize other religions.Even though there are religious customs rooted in our community, that does not mean that the state, in a broad sense, could establish prohibitions that are not compatible with the Catholic dogmas and rites; it is clear that those behaviors could not infringe on public order or offend public morale. That is why, if any state organization banned people against acting according to their religious customs, it would be going against the principle of immunity to coercion, and thus going against the freedom of religion and conscience.

Public order is the group of values, principles, and guidelines to political, economic, and cultural behavior in its broad sense, which purpose is the conservation and adequate development of coexistent life. In that sense, plurality of creeds, interest, and community practices aim to the same purpose: the social fulfillment of the members

> of a state. Public order refers to the basics and fundamentals for community life; that is why it is constituted in the foundation of an organization and structure of a society. In this context, the state may establish restrictive measures in the freedom of citizens in order to avoid the consummation of acts that could produce disruption or conflict in the specific case of defending values as peace or principles such as security. Therefore, to protect material order – an element of public order – the state could regulate behaviors that could help to support public and citizens' peace, etc."

B. In the Department of Justice, within the General Justice Affairs Office, there are two general sub-departments by resolution of the Organic Law regulating this Department: "The Inter Confessional Affairs Office" and "The Catholic Affairs Office." The first performs duties such as "coordinating and stimulating the affairs between the government and other religions different from the Catholic. This Office is in charge of: a) Organizing and coordinating any course of action that will strengthen the relationship between the government and other religions different from the Catholic to promote religious freedom; b) answering any inquiries and coordinating any issues related to this office; c) sending reports and endorsing any donations coming from abroad aiming to benefit the religious groups; and, d) performing any other duty appointed by the National Director."

On the other hand, under the law, this sub-department was appointed to administrate the Special Record of Religious Organizations other than Catholicism, so as to legalize the signatures of the authorities belonging to these religions other than Catholicism, and who have been previously registered and have provided the migration documents of their staff as well as other ecclesiastical papers to be used abroad for civil purposes. Moreover, the Inter-Confessionals Affairs Office is in charge of implementing the record for administrative purposes. They deliver judgment on the admissibility or the inadmissibility of the registration of a confession in the Inter-Confessionals Affairs Office. Finally, they are in charge of making the registration of a confession viable, as appointed by the National Justice Office, when this office declares upon resolution the admissibility of its registration, by delivering the Registration Certificate to whom it may concern.

The Special Record of Religious Organizations differs from the Catholic Record as it works under administrative regulations and not constitutive ones, since the registration in this Record does not provide any Legal Personality to the confession but assumes that the confession is an association and is registered in the Public Records Office, as a Legal Personality of Private Right.

The law does provide any constitutive characteristics to the registration of the confessions, registration being the only requirement needed to recognize the confession as an association. However, according to the Civil Rights, Article 81, in order to become a religious association, confessions need the approval of an authority recognized by the Record Office, and even then, the confession cannot be registered without a Legal Personality recognized by its authority, which can be recognized while it has not been registered in the Record of Confessions. This circumstance has created a major legal contradiction, since the future association with religious purposes cannot become such without an accepted authority when the association is registered according to the Organic Law of the Department of Justice, as required by the Civil Rights to become an association. Now, there is an impossible legal answer between both laws. In some cases, to be constituted and registered, the confessions have had to resort to the Catholic Church to approve its constitution and pass its regulations, because the acknowledgement of the authorities of this Church is recognized according to other laws. The confessions registered in the previously mentioned Record were able to do so because there were other civil associations with religious characteristics before the Record was created. In practice, the new confessions struggle with a number of bureaucratic difficulties with registration.

Confessions other than the Catholic Church are entitled but not required to register in the Special Record of Religious Organization. Nevertheless, since the laws of VAX payment exemption are general, property exemption depends on the purposes of the property and not on its religious origin. For instance, property belonging to the fire department, medical services, churches and others are free of taxes. Following this criterion, the Record Office offers the registered religious confession administrative fiscal capability so their sites of worship are recognized legally as temples and are therefore tax free. The statement of precedence of registration will generate a Certificate from the National Head of Justice, which verifies the status of Confession other than the Catholic Church for all purposes before national, regional, local, and other authorities, whenever it shall be required or established.

The second general sub-department of the Catholic Affairs Office is in charge of coordinating the affairs between the government and the Catholic Church. Their duties are (a) Direct and coordinate actions aiming to deepen the collaboration between the government and the Catholic Church; (b) Answer any inquiries and coordinate affairs related to its office; (c) Plan decrees to create or suppress ecclesiastic jurisdictions appointed by the Holy See, as well as resolutions recognizing the appointment of the members of the ecclesiastic hierarchy, and the pensions granted to resigning Bishops; (d) Legalize the signatures of the authorities of the Church in migration documents related to their staff as well as other ecclesiastic documents to be used abroad for civilian purposes; (e) write reports and arrange the approval of donations from abroad to benefit jurisdictions of the Catholic Church; and (f) perform any other duty appointed by the National Director.

There are two different offices in the Department of Justice because affairs concerning the religious confessions other than the Catholic Church are ruled by the Internal Public Laws, whereas the affairs concerning the Catholic Church are ruled by the International Public Laws.

C. There are formal bilateral relationships between the government and the religious communities. Whether or not these relationships are based on equal terms, they are only valid for the Catholic Church, since it is governed by The Holy See, which is a Legal Personality with International Public Rights, and both the government and the Catholic Church are deemed "Perfect Societies" as they do not recognize any higher power or authority; their relationships are based on equal terms according to the International Public Rights. In the other cases, as it is stated in the second paragraph of Article 50 of our Constitution, the government respects all confessions. However, when in times of great national need, the government summons the help of the Catholic Church, as well as the Evangelical Church, in equal terms and rank.

V. THE STATE AND RELIGIOUS AUTONOMY

Religious confessions are usually composed of religious communities, but in Perú the two can be distinguished based on Andean religious syncretism. The religious confession is identified by its hierarchy and the religious community by its social grassroots organizations, which practice Catholicism but keep their original Andean social structures and social network through a syncretic devotion. For instance, the official affairs between the Catholic hierarchy and the state government are structured according to principles of western judicial autonomy, independence, and mutual collaboration, but the grassroots organizations of Catholic parishioners are forbidden to own property and legal existence must be first authorized by the Catholic hierarchy.

There is, then, a double standard, with the Catholic hierarchy enjoying a cooperative and mutually respectful relationship with the Perúvian Government, and the non-

hierarchal religious communities being persecuted as the law forbids property ownership and requires previous approval of the official hierarchy for legal recognition; this situation has been confirmed by President Alan Garcia Perez, during his first government, by Law 25046 from 15 June 1989. Regarding confessions other than Catholicism, Perúvians in general recognize that non-Catholic religious leaders are good-hearted people who share the word of God, encourage parishioners to avoid alcohol and other vices, and participate actively in grassroots organizations.

This last point is perfectly understandable considering the consequences of the eradication of idolatries during the Spanish presence in Perú.

VI. Religion and the Autonomy of the State

In Perú, no religious confessions participate actively in the administration and politics of the state. However, in times of great national need, they make their point of view clear, more as guidance than as imposition, generally from a moral perspective of respect towards the Perúvian culture. That does not mean that religious members of certain confessions endorse one political side, though this occurs in isolated, infrequent cases. No confession has been granted the power to rule another, except by the second paragraph of Article 81 of the Civil Law, which demands the authorization to form associations with religious purposes. However, the law is a reflection of legal writing and judicial technical deficiencies, and although it has caused certain inconvenience for its pretentious claim, it does seek control over other religions.

Now, distinguishing between religious confessions and religious communities, the state law gives absolute control to the ecclesiastic hierarchy identified as religious confession, strictly speaking, over the Catholic parishioners. We would not want to expound on this last issue, since this topic is rich, lengthy, exceeds the aims of this paper, and involves dogmatic issues.

VII. State Financial Support for Religion

Highlighting our thesis, the fact that the state financially supports religious confessions is not because they are religious, but because the social, moral, and cultural activity is beneficial to the Perúvian community. In general, the state supports the confessions through VAX payment exemption or facilitating religious or secular donations. There is even the possibility that certain donations can be exempted from the donor's income taxes. Secular support of religious schools is legal; even in mixed educational centers, in which the religious confession owns the property, its management, and charisma, teachers are paid by the state.

Regarding a maintenance subsidy for religious buildings with historical value, The General Law for National Cultural Patrimony, number 28296 of 21 July 2004, demands that the owners or holders of cultural patrimony keep and maintain from their own expense, under penalty, secular or religious patrimony, personal property, or real estate. Finally, based on the Alexandrian Bull in 1502, it is custom for the state to deliver a worship payroll to the hierarchy of the Catholic Church. This payroll is based on the agreement between the Holy See and the Perúvian Government on 19 July 1980. Arguably, this worship payroll turns the Catholic Church hierarchy into a sort of symbolic public officer, making the Catholic Church partially dependent on the state. Significantly, the payroll consists of public funds submitted to the control of Perúvian Public Administration. Many Perúvian parishioners oppose the payroll.

VIII. Civil Legal Effects of Religious Acts

In general, the secular law does not recognize any civilian consequences to actions taken within religious law; however, Article 360 of the current Civil Code states that "the regulations of the law on matters of divorce and legal separation do not go beyond its civil effects and leave intact the duties pertinent to religion." Part of the Perúvian Civil Code of 1852, this rule referred to the canonic marriage according to the Trent Council, then considered the only possible legal marriage. However, it has been fully preserved in the Civil Code of 1983. Beyond the civil divorce clause, the state respect for the validity of canonic marriage, which is everlasting, is evidenced by the fact that the bride and the groom are not considered newlyweds when they leave the Marriage Registry Office following the civil ceremony, but when they leave the church. In doctrine, there is no major reference to this curiosity and it now constitutes an opportunity for in-depth study. The jurisdiction of the religious courts was suppressed from the Perúvian Constitution in 1856. Finally, the secular courts may act upon a decision made by the religious court, but the law makes no reference to such action.

IX. Religious Education of the Youth

Regarding private schools, any religious confession is authorized to create and promote private schools, but state curricula must be followed for the diplomas to be acknowledged by the state. Additionally, private schools, must comply with minimum of hours of study, vacation times, languages, study levels, etc. Private schools may choose any other convenient system, but the degrees, diplomas, and certificates will lack official value. In public schools, religious education is mandatory and part of the official curricula, although parents may excuse their children and instead select courses of study, such as social studies, morality, and history of religions. The Bishop of the Catholic Church appoints teachers for Catholic courses; for all other confessions, and only when justified by the number of students, parents choose the teachers. In any case, religion teachers are paid by the state.

X. Religious Symbols in Public Places

All citizens have the unrestricted right to wear any kind of religious accessory or clothing in public. According to Perúvian law, which consecrates the fundamental right to religious freedom, with the only abstention of the government and official authorities to interfere in any confession, no laws regulate wearing religious clothes in public places. In any case, the fact that people wear religious garments in public ceremonies or official acts of specific confessions is a matter of tradition and not law.

XI. Freedom of Expression and Offenses against Religion

There is no protection against offensive expressions related to religion, regardless of the confession referred to. What is regulated substantively (by the Constitution, the Civil Code, etc) and procedurally (Appeal for Legal Protection) is the obligation to respect another's privacy, prestige, good name, mail, banking secrecy, etc. One issue that will likely enter religious freedom law in Perú is regulation against expressions that offend the religious creed, liturgy, and symbols.

RAUL C. PANGALANGAN

Religion and the Secular State: National Report for the Philippines

I. THE SOCIAL CONTEXT

According to census data from August of 2007, the population of the Philippines totals 88.57 million people[1] and is divided among the following religions:[2]

Roman Catholic	81%
Protestant	7.3%
Iglesia ni Kristo ("Church of Christ")	2.3%
Philippine Independence Church ("Aglipayan")	2.0%
Muslim	5.1%
Buddhist	0.1%

The predominantly Roman Catholic population is spread over most of the archipelago. However, the Muslims, which form the largest non-Christian group, are concentrated on the southernmost island of Mindanao (the island closest to Indonesia and Malaysia). The other Christian groups, specifically the Protestants, the *Iglesia ni Kristo*, and the Philippine Independence Church, comprise another 11.6 percent of the population, more. The *Iglesia ni Kristo* is an indigenous Christian church established in 1913 by a local preacher.[3] The Philippine Independence Church (*Iglesia Filipina Independiente*) was born during the Philippine Revolution for independence from Spain and was formally created in 1902 by a federation of Filipino labor unions.[4] The Pentecostal or charismatic movements has flourished among Christian Filipinos. A survey shows that 4 out of 10 Catholics, and 7 out of 10 Protestants, identify themselves as either Pentecostal or charismatic.[5] The two largest charismatic groups are the El Shaddai[6] and the Jesus is Lord Movement.[7] There are also indigenous peoples in the Philippines, the "non-Christian tribes" in the now-obsolete category formerly used by the national census office, which includes 110 ethno-linguistic groups[8] comprising some 8 million people.[9]

II. THEORETICAL AND SCHOLARLY CONTEXT

The first and most predominant model is the strict separation of church and state, enshrined in *all* the Constitutions adopted in the Philippines including the Malolos Constitution of 1899 that was adopted by the revolutionary government upon gaining

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1. National Statistics Office, Republic of the Philippines, *Quick Statistics*, http://www.census.gov.ph/data/quickstat/index.html (31 March 2010).

2. Pew Forum on Religion and Public Life, *Religious Demographic Profile (Philippines)*, http://pewforum.org/world-affairs/countries/?CountryID=163 (2 February 2010).

3. See http://www.gemnet.tv/index.html.

4. See http://www.ifi.ph/main.htm.

5. Supra, at n. 2.

6. *El Shaddai Online*, http://elshaddai-dwxippfi.webs.com (31 March 2010).

7. *Jesus is Lord Church Online*, http://jilwrldwide.org/v2/index.php (31 March 2010).

8. National Commission on Indigenous Peoples, Republic of the Philippines, *IP Group Profiles*, http://www.ncip.gov.ph/ethno.php (31 March 2010).

9. Id., at http://www.ncip.gov.ph/ethno_region.php (31 March 2010).

independence from Spain, the "organic acts" adopted during the period of American colonialism, and the three constitutions that have governed the country since its independence from the United States.

The Supreme Court made its strongest statement on the separation of church and state in 1978 in *Pamil v. Teleron*, in which the Court could not muster enough votes to strike down a 1917 rule that barred ecclesiastics from holding public office – whether appointive or elective—in municipal governments. This rule was clearly incompatible with the "no religious test" clause (supra, Question 3.b), yet the Court warned about the "diabolical union of church and state" that was the cornerstone of the prohibition, tracing its provenance back to the revolution for independence against Spain in 1896.[10]

The second model is the union of church and state. Today the formal primacy of strict separation is thinly veneered over in light of the pressure to at least acknowledge that the church plays a vital role in the secular life of the nation. This was historically expressed in the aborted attempt to establish Roman Catholicism as the official state religion under the Malolos Constitution and also in the establishment of an independent Christian church under the Filipino (as distinguished from the Spanish) clergy during the time of the revolution (today known as the Philippine Independent Church).

Yet, even today, the Roman Catholic clergy remains a force in the politics of the Philippines, for example: Manila Archbishop Jaime Cardinal Sin was a key figure in the two "People Power" uprisings, that of 1986, which ousted President Ferdinand Marcos, and that of 2001, which ousted President Joseph Estrada.

The post-Marcos Constitution of 1987 was drafted by a 50-person commission appointed by President Corazon Aquino, which included two Catholic priests, one Catholic nun, one Protestant minister, and one lay leader (the founder of the Opus Dei in the Philippines).

The well-organized Christian, non-Catholic groups have also flexed their political muscle and endorsed electoral candidates. The *Iglesia ni Kristo* is known to adopt "official" candidates and has delivered a solid vote for these candidates.[11] The El Shaddai too have adopted official candidates. This practice was challenged in the courts in *Velarde v. Society for Social Justice*,[12] but the case was thrown out on procedural grounds and never resolved on the merits.

The Philippines is also beset by two armed rebel groups, both of which have religious components. The first is a Maoist rebellion led by the Communist Party of the Philippines,[13] which has formed the group Christians for National Liberation along the lines of liberation theology.[14] The second is an Islamic separatist movement currently led by the Moro Islamic Liberation Front, which seeks a separate Muslim state for the Bangsa Moro People.[15] The third approach is the legalistic view that applies the "state-action requirement" and holds that the separation doctrine is a constraint solely upon the state (to

10. Pamil v. Teleron, G.R. No. 34854, 20 November 1978.

11. Social Weather Stations, *Basic Results of the SWS Exit Poll for the 1998 Presidential Elections*, http://www.sws.org.ph/may98-2.htm (31 March 2010).

12. Velarde v. Social Justice Society, G.R. No. 159357, 28 April 2004.

13. "Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL) between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines," *Sulong CARHRIHL*, 16 March 1998, at http://www.sulongnetwork.ph/resources.htm (31 March 2010).

14. Kathleen Nadeau, *Liberation Theology in the Philippines: Faith in a Revolution* (Praeger Publishers, 2002).

15. Abbas v. Commission on Elections, G.R. No. 89631, 19 November 1989 (upholding the 1976 Tripoli Agreement between the Philippine Government and Organization of the Islamic Conference in behalf of the Moro National Liberation Front); Province of North Cotabato v. Peace Panel on Ancestral Domain, G.R. No. 183591, 14 October 2008 (striking down the Memorandum of Agreement-Ancestral Domain between the Philippine Government and the Moro Islamic Liberation Front).

stop it from interfering with worship) and not upon the church (to stop it from interfering with the secular matters). This approach was expressed best in a recent statement by the Catholic Bishops' Conference of the Philippines. On 8 December 2009, in preparation for the presidential elections of May of 2010, the CBCP issued its *Catechism on Family and Life for the 2010 Elections*, urging the Catholic voters to oppose "artificial" contraceptives that were being promoted by a Reproductive Health bill pending in Congress, and said:

> The separation of Church and State *prohibits the State* from interfering in Church matters, and *prohibits the State* from having a State religion. It does not imply a division between belief and public actions, between moral principles and political choices. In fact, the freedom of religion upheld by our Constitution protects the right of believers and religious groups *to practice their faith and act on their values in public life*.
>
> The Constitution guarantees the right of each citizen to exercise his or her religion. Catholics who bring their moral convictions into public life do not threaten democracy or pluralism but rather enrich the nation and its political life.
>
> Every Catholic is both a faithful of the Church and a citizen of our beloved Philippines. The exercise of this faithful citizenship means that *when they go to the polls to vote they should not leave God outside* (emphases supplied).[16]

III. CONSTITUTIONAL CONTEXT

A. Political History with Regard to the Relations between State and Religion

Spanish colonial period (1565-1898). The Philippines was "discovered" by Spain in 1521 and became a Spanish colony in 1565. The revolution for independence erupted in 1896, and a new republic was proclaimed in June 1898. The conquest of the Philippines was seen as part of Spain's Catholic mission "to serve God in our Kingdom,"

> … that the *indios* may be instructed in the Sacred Catholic Faith and the evangelical law, and in order that they may forget the blunders of their ancient rites and ceremonies to the end that they may live in harmony and in a civilized manner ….[17]

Because the Philippines were located so far from the motherland, the colonial government also had to rely heavily on the religious authorities, who converted the natives to Catholicism and governed through a network of parishes and monastic orders. The proselytizing was so successful that by the time the Americans arrived at the turn of the last century, 91.5 percent of Filipinos were Christian and *all* of them were Roman Catholic. There was an explicit union of church and state, a union so pronounced that the revolution for independence was animated by both anti-colonial and anti-clerical ("anti-monastic") grievances.

Revolutionary Period 1896-99. The Catholic influence was so strong that the resulting Malolos Constitution still proclaimed the "Roman Catholic Apostolic religion [as] the

16. Catholic Bishops' Conference of the Philippines, *Catechism on Family and Life for the 2010 Elections*, 27 December 2009, http://www.cbcpnews.com/?q=node/12037 (31 March 2010).

17. Rubi v. Provincial Board, G.R. L-14078, 7 March 1919 (on the curtailment of rights of indigenous peoples, then referred to as "non-Christian tribes").

religion of the state"[18] and merely tolerated "other cults" so long as they were "exercised privately" and did not "endanger the security of the State."[19]

The separation of church and state was finally adopted—in a meeting ironically held inside a church—only by way of amendment, voting for which was twice caught in a deadlock and the tie had to be broken by the chairman: "The State recognizes the freedom and equality of all religions, as well as the separation of the Church and the State." Even more telling, however, the separation clause was immediately suspended—by motion of its own adherents—in order to preserve unity in the face of the impending war with the United States.[20]

Philippine-American War (1898-1902). The Spanish American War broke out in February 1898 with the sinking of USS Maine, and in May 1898, the American Admiral George Dewey defeated the Spanish armada in the Battle of Manila Bay. By December 1898, the United States acquired the Philippines from Spain under the Treaty of Paris, which provided "[t]he inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of religion."[21]

U.S. Colonial Period (1898-1946). The Americans governed its new colony via successive "organic acts" adopted by the U.S. Congress, all of which uniformly provided for the secular state using the language of the American Bill of Rights.

> ***The Philippine Bill of 1902*** stated:
> That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed.[22]
> ***The Jones Law of 1916*** reiterated these verbatim, and added the following: … and no religious test shall be required for the exercise of civil or political rights. No Public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or system of religion, or for the use, benefit or support of any priest, preacher, minister, or other religious teachers or dignitary as such."[23]
> ***In the Tydings-McDuffie Law of 1934***, which would eventually lead to independence for the Philippines, the following was added:
> Absolute toleration of religious sentiment shall be secured and no inhabitant or religious organization shall be molested in person or property on account of religious belief or mode of worship."[24]

Significantly, the American census of 1903 classified all Filipinos as either "civilized" and "wild" people. The civilized "were practically all adherents of the Catholic Church by 1903 Census definitions" (constituting 91 percent of the population) while "wild people"

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18. MALOLOS CONSTITUTION (1899), art. V, cited in Cesar A. Majul, *The Political and Constitutional Ideas of the Philippine Revolution* (1967), 137.
19. MALOLOS CONST. (1899), art. VI.
20. Cesar A. Majul, *The Political and Constitutional Ideas of the Philippine Revolution* (1967),142–45 ("To establish openly the separation of Church and State during these difficult times … may give cause for the withdrawal of the supporters of religion.").
21. Treaty of Peace between Spain and the United States (10 December 1898), Art X.
22. Philippine Bill of 1 July 1902, sec. 5.
23. Jones Law of 1916, sec. 3.
24. Act No. 127 (1934), sec. 2(a).

referred to "those who were Mohammedan in religion and were well known in the islands as *Moros*" (constituting 8.5 percent).[25] Indigenous peoples were classified as "non-Christian tribes," although the Supreme Court explained it had less to do with their religion and more with their level of cultural sophistication.[26] This historical anomaly has since been corrected in the 1987 Constitution, which recognizes the place of indigenous cultural communities, and the Indigenous Peoples' Rights Act.[27]

An Independent Republic (1946-present). There have been three constitutions that have governed the republic: the 1935 Constitution adopted under American tutelage and under which the country gained independence from the United States; the 1973 Constitution adopted under Marcos's dictatorship; and the 1987 Constitution adopted under Corazon Aquino and under the country is currently governed today. The constitutional separation of church and state has been preserved under all these constitutions and is most expansively expressed in the current Constitution of 1987.[28]

B. Current Constitutional Provisions and Principles Governing the Relations between State and Religion

The Philippines follows the American model of church-state separation and has adopted language and doctrine along the lines of free exercise and establishment clauses. The 1987 Constitution begins with directive clauses called the Declaration of Principles and State Policies, which proclaims the following in unmistakable terms: "The separation of Church and State shall be inviolable."[29] The separation is then secured through the Bill of Rights using language that tracks the First Amendment:

> No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.[30]

The Philippine Supreme Court has in several decisions bodily lifted the *Lemon v. Kurtzman*[31] test for the establishment clause. In the portion relating to legislative power, the following establishment clause is further applied:

> No public money or property shall be appropriated, applied, paid, or employed, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or system of religion, or of any priest, preacher, minister, other religious teacher, or dignitary as such, except when such priest, preacher, minister, or dignitary is

25. National Statistics Office, *Centennial Quick Stat*, http://www.census.gov.ph/data/pressrelease/cent-qs.html (31 March 2010).

26. Rubi v. Provincial Board, G.R. L-14078, 7 March 1919; People v. Cayat, G.R. L-45987, 5 May 1939.

27. Rep. Act No. 8371 (1997), affirmed by the Supreme Court in Cruz v. Secretary of Natural Resources, G.R. 135385, 6 December 2000.

28. See supra Section III *B.*

29. CONST. (1987), art. II, sec. 6.

30. CONST. (1987), art. III, sec. 5.

31. 403 U.S. 602 (1971). See Victoriano v. Elizalde Rope Workers Union, 59 SCRA 54 (1974). It cited Board of Education v. Allen, 392 US 236 (1968), in saying that "in order to withstand the strictures of constitutional prohibition, [the statute] must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion." See also Aglipay v. Ruiz, 64 Phil 201 (1937); Basa, et al. v. Federacion Obrera de la Industria Tabaquera y Otros Trabajadores de Filipinas, 61 SCRA 93 (1974); Anucension v. National Labor Union, et al., 80 SCRA 350 (1977); Gonzales, et al. v. Central Azucarera de Tarlac Labor Union, 139 SCRA 30 (1985).

> assigned to the armed forces, or to any penal institution, or government orphanage or leprosarium.[32]
>
> Charitable institutions, churches and parsonages or convents [and] mosques, … and all lands, buildings, and improvements, actually, directly, and exclusively used for religious, charitable, or educational purposes shall be exempt from taxation.[33]

Finally, in the article regulating education the clause on religious instruction says:

> At the option expressed in writing by the parents or guardians, religion shall be allowed to be taught to their children or wards in public elementary and high schools within the regular class hours by instructors designated or approved by the religious authorities of the religion to which the children or wards belong, without additional cost to the Government.[34]

C. Religion and Religion-State Relations Specifically Addressed in the Constitution

Yes, church-state relations are explicitly addressed and religious freedom is explicitly protected. For more information, please see the discussion above.

D. Preferred or Privileged Religion or Group of Religions

No, there is no constitutionally preferred or privileged religion. However, there are explicit concessions to certain religions. For more information, please see the discussion above. The Constitution has officially recognized the applicability of shari'ah laws and the jurisdiction of shari'ah courts. In response to the Islamic rebellion, the government has made concessions to the claims of the Islamic minority in Mindanao. The main concession are, however, political and geographic.

> There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.[35]

The constitution then expressly carves out exceptions to the principle of state neutrality to religion, in favor of the Muslim minority:

> The Congress shall enact an organic act for each autonomous region . . . . The organic act shall define the basic structure of government [and] shall likewise provide for *special courts with personal, family, and property law jurisdiction* consistent with the provisions of this Constitution and national laws (emphasis supplied).

This was implemented through a Code of Muslim Personal Laws of the Philippines[36] and Shari'ah courts[37] that provide personal jurisdiction of laws and courts based on religion.

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32. CONST. (1987), art. VI, sec. 29.2.
33. CONST. (1987), art. VI, sec. 29.3.
34. CONST. (1987), art. XIV, sec. 3.3.
35. CONST. (1987), art. X, sec. 15.
36. Pres. Decree No. 1083 (4 February 1977).
37. Batasang Pambansa Blg. 129 (The Judiciary Reorganization Act of 1980), sec. 45 (14 August 1981).

Several religious holidays are recognized as official holidays for the country: Maundy Thursday, Good Friday, All Saints Day, Christmas Day and New Year's Day, plus one Muslim holiday, *Eidul Fitr*.[38]

By way of comparison, the following are the other, purely secular holidays: Bataan Day (a historic date during the Japanese invasion in World War II), Labor Day, Independence Day, National Heroes' Day, Ninoy Aquino Day, Bonifacio Day and Rizal Day, the last three to remember heroes during the Marcos and the Spanish regimes.[39]

E. Reference to Religion as Foundation or Source of State Law

None. The Declaration of Principles and State Policies explicitly adopts the separation doctrine. Note, however, that the Preamble of the Constitution expressly refers to "Almighty God": "We, the sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society, and establish a Government that shall embody our ideals and aspirations … do ordain and promulgate this Constitution."

Also, the Supreme Court itself has adopted what it called the "Centennial Prayer for the Courts."

> *Almighty God*, we stand in Your holy presence as our Supreme Judge. We humbly beseech You to bless and inspire us so that what we think, say and do will be in accordance with Your will. / Enlighten our minds, strengthen our spirit, and fill our hearts with fraternal love, wisdom and understanding, so that we can be effective channels of truth, justice and peace. In our proceedings today, guide us in the path of righteousness for the fulfillment of Your greater glory. Amen.

This Prayer is supposed to be ecumenical ("finalized after patient and repeated consultations with major religious groups in the country: Catholic, Protestant, Muslim, Born-again and others"),[40] and was supposed to read by Judges in open court at the start of each session day.

F. Specific Mention of State Neutrality on Religious Issues or of the Principle of Equality When Dealing with Religions

Yes, see Section B. above, citing CONSTITUTION (1987) art. III, sec. 5.

G. State Cooperation with or Separation from Religion

Yes, church-state separation is mentioned in the directive principles. See Question No. 3.b above, citing CONSTITUTION (1987) art. II, sec. 5. However, there is no mention of church-state cooperation.

IV. LEGAL CONTEXT

A. Legislation and/or Case Law on Religion or Religious Freedom

Philippine statute and case law abound in church-state cases. In summary, these cases affirm the free exercise and establishment doctrines, but adapt them to Philippine specificities, mainly, that there is a Catholic majority in the country and that Catholicism has in many ways been "inculturated" and thus secularized.

38. Rep. Act No. 9492 (The Holiday Economics Law) (24 July 2006).
39. Id.
40. At http://cjpanganiban.ph/speeches/ang-pagiging-hiwalay-ng-simbahan-at-pamahalaan (31 March 2010).

The political participation of religious groups is expressly prohibited by both the Constitution and the Omnibus Election Code of the Philippines:

> … Religious denominations and sects shall not be registered…. [41] No religious sect shall be registered as a political party and no political party which seeks to achieve its goal through violence shall be entitled to accreditation.[42]

Religious groups are further banned from intervening in village-level elections[43]; from raising campaign funds, except "for normal and customary religious stipends, tithes, or collections on Sundays and/or other designated collection days"[44]; from donating campaign funds except for "normal and customary religious dues or contributions, such as religious stipends, tithes or collections on Sundays or other designated collection days."[45]

The Election Code also prevents ecclesiastics from "coercing of subordinates" to vote for or against any candidate.[46]

> Any public officer, or … *any head, superior, or administrator of any religious organization* … who coerces or intimidates or compels, or in any manner influence, … any of his subordinates or members or parishioners … to aid, campaign or vote for or against any candidate or any aspirant for the nomination or selection of candidates [or] who dismisses or threatens to dismiss, punishes or threatens to punish … *any subordinate member or affiliate, parishioner,* … for disobeying or not complying with any of the acts ordered . . . .

Survey of Case-Law on the Free Exercise Clause (in addition to those cited elsewhere)

In *Gerona v. Secretary of Education*[47], the Court upheld the state's decision to compel school children belonging to the Jehovah's Witnesses to take part in flag ceremonies, despite their protestations that this was contrary to their faith. It took the Philippine Supreme Court until 1993 to reverse itself in *Ebralinag v. Division Superintendent of Schools of Cebu*.[48]

In *American Bible Society*, the Court upheld the tax-exempt status of the sale of bibles. In *German v. Barangan*,[49] the Court disallowed an anti-Marcos protest rally disguised as a religious exercise, applying the test of good faith. In *Anucension v. National Labor Union*,[50] the Court exempted members of the *Iglesia ni Kristo*, whose religion prohibits them from joining other organizations, from the effects of a "closed-shop" clause in the collective bargaining agreement in their workplace.

Survey of Case-Law on the Establishment Clause (in addition to those cited elsewhere)

In *Aglipay v. Ruiz*,[51] the Court upheld the validity of a stamp commemorating the Eucharistic Congress to be hosted in Manila, saying that the revised design had shed off its explicitly religious tenor and shifted to a secular interest in promoting tourism. In *Garces v. Estenzo*,[52] the Court held that a village council had validly acquired the statute

41. CONST. (1987), art. IX.C, sec. 2.5.
42. Batas Pambansa Blg. 881 (3 December 1985), art. VIII, sec. 61.
43. Batas Pambansa Blg. 881 (3 December 1985), art. VI, sec. 38.
44. Batas Pambansa Blg. 881 (3 December 1985), art. XI, sec. 97.
45. Batas Pambansa Blg. 881 (3 December 1985), art. XI, sec. 104.
46. Batas Pambansa Blg. 881 (3 December 1985), art. XXII sec. 261.d.1 and 261.d.2.
47. Gerona v. Secretary of Education, G.R. No. 13954, 12 August 1959.
48. Ebralinag v. Division Superintendent of Schools of Cebu, G.R. No. 95770, 29 December 1995).
49. German v. Barangan, G.R. No. 68828, 27 March 1985.
50. Anucension v. National Labor Union, G.R. No. 26097, 29 November 1977.
51. Aglipay v. Ruiz, G.R. No. 45459, 14 March 1937.
52. Graces v. Estenzo, G.R. No. 53487, 25 May 1981.

of a saint because, despite the separation of church and state, the statue was part of a town fiesta that, despite its original religious character, had been secularized and simply become part of local festivities.

B. Bodies in the State Structure that Deal with Religious Affairs and Religious Communities

There are no government agencies that regulate religion. The Office of Muslim Affairs is the only official representation of a religious community in government. It is primarily tasked with preserving and developing the culture, traditions, institutions and well-being of Muslim Filipinos.[53]

Under the U.S. colonial government, there existed a Bureau of Friar Lands administered by the Department of Justice. When the United States acquired the islands from Spain, it inherited the problem of the concentration of land ownership under royal grants to the religious orders. Accordingly, the U.S. Congress authorized the government to "Purchase Lands of Religious Orders and Others and Issue Bonds for Purchase Price."[54]

C. Bilateral Formal Relations between State and Religious Communities

There are no formal relations between State and religious communities; however, large Catholic groups have performed secular functions. For example, the *Gawad Kalinga* is a nationwide Catholic lay society that assists in building low-income housing. This group and its parent organization, the Couples for Christ, were in fact recognized in a resolution issued by the Catholic Bishops' Conference of the Philippines.[55] Another example is seen in the election reform work of the *Parish Pastoral Council for Responsible Voting* (PPCRV), a national parish-based, non-partisan citizens' movement for responsible voting and clean elections.[56]

V. THE STATE AND RELIGIOUS AUTONOMY

There are three ways by which state authorities regulate the work of religious communities. The first is through the registration of churches as religious corporations under the Corporation Code of the Philippines.[57] The second is through the civil power to authorize ministers to solemnize marriages under the Family Code of the Philippines[58]:

> Art. 7. Marriage may be solemnized by [a]ny priest, rabbi, imam, or minister of any church or religious sect duly authorized by his church or religious sect *and registered with the civil registrar general*, acting within the limits of the written authority granted by his church or religious sect and provided that at least one of the contracting parties belongs to the solemnizing officer's church or religious sect ….[59]

The third is through controlling immigration and the entry of foreign missionaries.[60]

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53. Exec. Order No. 122-A as amended by Exec. Order No. 295.
54. Philippine Bill of 1902, arts. 63-65 (1 July 1902).
55. At http://www.gk1world.com (31 March 2010).
56. At http://www.ppcrv.org/global/index.php (31 March 2010).
57. Batas Pambansa Blg. 68 (1 May 1980), title XIII, ch. 2 (Religious Corporations).
58. Exec. Order No. 209 (6 July 1987).
59. Exec. Order No. 209 (6 July 1987), art. 7.2. See also Monsignor Jamias v. Director of Public Libraries, G.R. No. L-2133, 22 July 1948.
60. At http://www.chanrobles.com/philippineimmigrationlaws.htm (31 March 2010).

VI. RELIGION AND THE AUTONOMY OF THE STATE

The Catholic majority does not have any overt and official role in the secular governance of the country; however, it does hold immense influence over legislation. For example, abortion is a crime under the Revised Penal Code[61] and divorce is illegal. The Reproductive Health bill has been filed three times since 2001, and each time the bill has been successfully blocked by Catholic lobbyists. Likewise, as cited in the CBCP Catechism, the bishops call on the faithful to not vote for pro-reproductive rights candidates:

> The intention is not to tell Catholics for whom or against whom to vote. The responsibility to make political choices rests with each individual…
>
> [But] it would not be morally permissible to vote for candidates who support *anti-family policies, including reproductive health* . . . or any other moral evil such as abortion, divorce, assisted suicide and euthanasia. Otherwise one becomes an accomplice to the moral evil in question. (emphases supplied).
>
> Additionally, the Islamic minority is given some control over religious matters under the Code of Muslim Personal Laws,[62] which covers all laws relating to personal status, marriage and divorce, matrimonial and family relations, succession and inheritance, and property relations between and among Muslim-Filipinos. Futhermore,decisions by shari-a courts are binding in the same manner as regular court decisions. Thus, although there is no divorce under the general statute (Family Code of 1987), divorces decreed by the shari'a courts are considered valid and binding.

VII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

Philippine laws – apart from the limited exceptions mentioned earlier, e.g., tax exemptions, public holidays and exceptions for the Muslim minority – are entirely religion-blind and are thus neutral to the religious affiliation of persons. Also, as discussed above, they are regulated generically as corporate persons (though with a separate clause for religious corporations), as solemnizing officers for marriages, or as aliens (if a missionary is non-Filipino).

In regards to conscientious objectors, the Reproductive Health bill—perennially shelved by Congress under pressure from the Roman Catholic Church—contained a clause punishing medical professionals who refuse to render health care to certain patients (typically victims of botched abortions), but subject to a conscientious objector defense. The prohibition covers the:

> Refus[al] to extend quality health care services and information on account of the patient's marital status, gender or sexual orientation, age, religion, personal circumstances, and nature of work: *Provided*, That all *conscientious objections* of health care service providers based on ethical and religious grounds shall be respected: . . . *Provided, finally*, That the patient is not in an emergency condition or serious case . . . .[63]

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61. REV. PENAL CODE, art. 256, *Intentional abortion;* Art. 257, *Unintentional abortion;* Art. 258, *Abortion practiced by the woman herself of by her parents*; and Art. 259, *Abortion practiced by a physician or midwife and dispensing of abortives*.

62. Pres. Decree 1083 (4 February 1977).

63. *Reproductive Health, Responsible Parenthood and Population Development Act of 2007, House Bill 17, 14th Congress (2007-2010).*

Finally, the Supreme Court, in a recent landmark ruling, held that a court employee had not committed immoral behavior by contracting a second "union" because that union was moral by her religion, although it would have been illegal by secular law and by Catholic doctrine. *Estrada v. Escritor*[64]was an administrative disciplinary action against a court employee who had been estranged from her husband for more than twenty years and during that period began a new family with another man with the blessings of their church. The Court did not dismiss her from service, lest it condemn as immoral a practice by a minority religion, according to the standards of the majority religion: "Accommodation is distinguished from strict neutrality in that the latter holds that government should base public policy solely on secular considerations, without regard to the religious consequences of its actions."[65]

VIII. STATE FINANCIAL SUPPORT FOR RELIGION

State subsidy for religion is impermissible except for the traditional exception for chaplains in the military, prisons, orphanages, and leprosariums.[66]

IX. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

The Family Code recognizes marriages solemnized by religious ministers so authorized by their church and registered with the civil registrar.[67] Note, however, that in another marriage-related case, the Court upheld the state's power to license persons authorized to solemnize marriages, even if it would empower the state to inquire into the organization and doctrine of the church or sect. The Court held that the power to inquire was limited solely to distinguish and discriminate between determine whether the group was "a legitimately established religion or church," in order to block off "pseudo or spurious religious organizations which ostensibly appear to be dedicated to the practice of religion and the exercise of particular faith but which in reality are mere marriage agencies."[68] In Philippine politics, the litmus test of church-state separation is the ban on family planning programs. The constitution sets forth a delicate balance:

> The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. . . . [69]
>
> The State shall defend [t]he right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood . . . . [70]

The drafting history of this clause shows that its intention was to "prevent a Roe v. Wade" that will lift the ban on abortion, currently a crime under the Revised Penal Code.[71] At the same time, this text leaves room for a couple to decide how many children they should have and what birth control method they should follow. This is fundamentally important for the Philippines, with a huge population, high unemployment, and subhuman

64. Estrada v. Escritor, 408 SCRA 1, A.M. No. P-02-1651, 4 August 2003.
65. Estrada v. Escritor, 408 SCRA 121, A.M. No. P-02-1651, 4 August 2003.
66. CONST. (1987), art. VI, sec. 29.2.
67. Exec. Order No. 209 (July 6, 1987), art. 7.
68. People v. Fabillar, 68 Phil. 584, 587 (1939).
69. CONST. (1987), art. XI, sec. 12.
70. CONST. (1987), art. XV, sec. 3(1).
71. REV. PENAL CODE, art. 256–58.

levels of poverty. The City Mayor of Manila has issued an Executive Order[72] declaring that the city promotes responsible parenthood and upholds natural family planning. Although the Mayor does not prohibit city hospitals from prescribing the use of artificial methods of contraception, the result is that both public and private clinics, including those operated by NGOs, have desisted from dispensing family planning counsel and distributing condoms. The validity of this Order has been challenged in *Osil et al. v. City of Manila,*[73] which is still pending.

X. Religious Education of the Youth

Religious groups are free to establish private schools under secular law. In fact, the Constitution expressly recognizes the role of private schools, which in the Philippines are typically and predominantly religious in nature: "The State recognizes the complementary roles of public and private institutions in the educational system and shall exercise reasonable supervision and regulation of all educational institutions."[74]

In addition, they are tax-exempt.[75] Finally, these religious schools in fact enjoy special treatment in that they are exempt from the national ownership requirements in the Constitution:"Educational institutions, *other than those established by religious groups and mission boards*, shall be owned solely by citizens of the Philippines or corporations or associations at least sixty per centum of the capital of which is owned by such citizens."[76]

All educational institutions, religious or secular, are regulated by the state, the Department of Education[77] for elementary and high schools, and the Commission on Higher Education[78] for tertiary education. Finally, the Constitution carves out an exception to allow religious instruction in public schools under safeguards to avoid establishment clause problems.[79]

XI. Religious Symbols in Public Places

There is no law regulating religious symbols in public places, although Catholic artifacts are commonplace in government buildings.

XII. Freedom of Expression and Offenses against Religion

There are no laws specific to religious speech, but there have been two Supreme Court decisions on this matter. In *Iglesia ni Kristo v. Court of Appeals*, the Court upheld the power of a government regulatory board to regulate the TV programs on a religious channel but struck down as prior restraint the board's veto on "attacks" against other religions:

> [T]he so-called "attacks" are mere *criticisms* of some of the deeply held dogmas and tenets of other religions ….
>
> The respondent Board may disagree with the criticisms of other religions by petitioner but that gives it no excuse to interdict such

72. Exec. Order No. 003, Series of 2000 issued by the Office of the Mayor of the City of Manila on 29 February 2000.
73. Osil et al. v. City of Manila, Court of Appeals SP No. 1023311, 2007.
74. CONST. (1987), art. XIV, sec. 4.1.
75. CONST. (1987), art. VIII, sec. 28.3.
76. CONST. (1987), art. XIV, sec. 4.2.
77. Administrative Code of 1987, Exec. Order No. 292 (25 July 1987).
78. Rep. Act 7722 (Higher Education Act of 1994) (18 May 1994).
79. CONST. (1987), art. XIV, sec. 3.3.

> criticisms, however, unclean they may be. Under our constitutional scheme, it is not the task of the State to favor any religion by protecting it against an attack by another religion. Religious dogmas and beliefs are often at war and to preserve peace among their followers, especially the fanatics, the establishment clause of freedom of religion prohibits the State from leaning towards any religion. Vis-a-vis religious differences, the State enjoys no banquet of options. Neutrality alone is its fixed and immovable stance. [80] (emphasis in the original)

In *MVRS Publications v. Islamic Da'Wah Council of the Philippines*,[81] the Court threw out a complaint for damages arising from defamatory writings against the Islamic faith, making the foolish allegation that pigs were sacred in Islam. The Court held that an action for defamation requires that the victim be identified with specificity, and that the Council had failed to meet this test.

80. Iglesia ni Kristo v. Court of Appeals, G.R. No. 119673, 26 July 1996.
81. MVRS Publications v. Islamic Da'Wah Council of the Philippines, G.R. No. 135306, 28 January 2003.

ELENA MIROSHNIKOVA

National Report on the Political Aspects of Religion: Russia

I. SOCIAL CONTEXT

Religious associations are an important and active part of the modern Russian society. The status of religion and its role in the Russian society are deepening, especially in the last twenty years. There are currently religious organizations of over 66 denominations registered and functioning in the country.[1] The right to operate without hindrance applies not only to religious organizations registered according to the established procedure, but also to religious groups that are unregistered.[2] At least 10,000 religious associations, traditional and new, can now be found in Russia.[3]

Globalization changes things as well. Cultural and national particularities are melting away, so to speak, in many parts of the world. As at September 2008, 717 autonomous ethnic cultural organizations were registered in the country: 18 federal, 211 regional, and 488 local.[4] Religion in this situation acquires a new status; it becomes a sign of national and cultural identity, both for the main population and for immigrants. An analysis of the confessional orientations of the Russian population shows a greater commitment to Orthodoxy or other religious confessions than to belief in God. People who declare to be member of a confession (60.5 percent in 2000; 57.8 percent in 2001; 82 percent in 2002; 61 percent in 2003) are significantly more numerous than those declaring to believe in God (43.4 percent in 2000, 37.5 percent in 2001, and 45 percent in 2002).[5]

It is clear that religious self-identification focuses less on a particular religion than on culture, religious nationalism, and related themes (all of which of course are influenced by a particular religion). The main reason for the rise in religious belief is that people need national traditions, moral ideals, consolation in life's struggles, troubles and difficulties.

Table 1. Religious Denominations in Russian Population, 2008
(Source: U.S. State Department Report)

Population Total	142,000,000
Russian Orthodox	99,400,000
Muslim	14,200,000 – 22,720,000
Protestant	2,000,000
Buddhist	1,000,000
Roman Catholic	600,000
Jew	250,000

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1. See Appendix A.

2. United Nations Human Rights, Office of the High Commissioner for Human Rights, *Universal Periodic Review – Russian Federation*, 59 available at http://www.ohchr.org/EN/HRBodies/UPR%5CPAGES%5CRUSession4.aspx.

3. A. Sebentchov, *The Russian Legislation about the Religious Associations: The Condition and the Perspectives. S-Petersburg*, August 2009 available at http://www.rusoir.ru (*hereinafter* Russian Legislation).

4. United Nations Human Rights, Office of the High Commissioner for Human Rights, *Universal Periodic Review – Russian Federation*, 33 available at http://www.ohchr.org/EN/HRBodies/UPR%5CPAGES%5CRUSession4.aspx.

5. M.P. Mtchedlov, *Essays on Religious Studies: The Religion in the Spiritual and Public Life of the Modern Russia*, 81. (Moscow, 2005).

According to the Levada-Center, a highly respected nongovernmental sociological institution, in 2008 71 percent of Russians said they are Orthodox, 5 percent-Muslims, 1 percent-Catholics, 1 percent-Protestants, less than 1 percent- Jews and Buddhists, and 5 percent atheists.[6] Moreover, according to international research,[7] the Russian population can be broken down by religious affiliation as shown in Table 1, above.

For Islam, there is no one universal canon leader or group of leaders who have the same or similar position. Islamic central religious organizations (called The Spiritual Muslim administrations, or DUM), are less in number than the historical regional Islamic communities. Many of them compete by their influence on people. There is also the competition between the old and new Muslim leaders, which accelerated Islamic education in Arabic countries. Regions in which the Muslim population currently constitutes a religious majority include Chechnya, Tatarstan, Kabardino-Balkaria, Karachaevo-Tcherkessia, Dagestan, Stavropol, and Ingushetia. In recent decades the role of Islam in Russia has been on the rise and seems to have become a very important matter in social and political life. Islam stands for the principles of separation and secularism because it does not want State privileges flowing only to the ROC. Russian Islamic organizations oppose the teaching of "Basics of Orthodox Culture" in public schools, and they are against the idea of having ROC chaplains in the Russian Army. Some Islamic organizations have spoken against the presence of Orthodox symbols in the national coat of arms, national medals, and so on. The evolution of the religious situation in Russia is ongoing without any management by the government—the government itself is following this evolution. The Russian state has no published conception of state-church relations, no institutions which could research regularly the religious situation, and no effective mechanisms to influence the religious situation. Under these conditions, registered religious organizations, which represent the majority of the population, are the recipients of special government privileges. The privileges inure primarily to the Russian Orthodox Church. The Jewish population is not significant, but Jewish political and economical elites know the strength of the Jewish lobby in many other countries. Russia in turn respects the Jewish presence in Russia.[8]

The privileges are several: the willingness of state officials to respond to overtures from the traditional religions; invitations to participate in events on state and municipal levels; permission to be in schools and prisons; obtaining land for the construction of houses for worship, and so on. The privilege frequently is just ease in dealing with government officials; for non-privileged religious organizations it is often difficult to talk with officials. Many organizations experience difficulty in registering or in obtaining approval to construct or improve worship facilities; frequently they are denied for no particular reason at all. Sometimes officials look for violations where there is nothing to look for.

Despite the relatively low number of participants in NRMs (approximately 300,000 people) they are extremely significant, inasmuch as they are emerging and they already exist, reflecting and taking to their logical ends the spiritual ideas of the collective consciousness, sometimes even to the point of absurdity. Religious life in Russia today cannot be discussed without mentioning them.[9]

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6. At http://www.levada.ru, 13-03-2008.

7. U.S. Department of State International Religious Freedom Report 2008: Russia, available at http://www.state.gov/g/drl/rls/irf/2008/108468.htm; Religious Freedom in Russia available at http://www.hrwf.net. This data indicates, of course, that the two main religions in Russia are Orthodoxy and Islam.

8. A. Sebentcov, *The Religious Situation in Modern Russia*, 11–17, in *Religion in the Modern Society: Materials of the international conference, Moscow, Academy for Labor and Social Relations*, 2–3 February 2009.

9. Roman Lunkin, *New Religious Movements in Russia: Christianity and Post-Christianity in the Mirror of*

The religious social composition of Russia is relative stable. The number of registered religious organizations does not change much from year to year. There are not big changes in the legislation affecting religious organizations. The number of new religious movements does not increase very much. The religious organizations have found their place in the society; many of them have published their social conceptions.

II. Theoretical and Scholarly Context

The philosophical basic is the theory of Euroasia (Evrasijstvo). According to this theory Russia as a civilization has it is own special position in humankind and human history, like a bridge between Europe and Asia. Euroasia is a combination of Byzantine and Western legacies.

After the collapse of the USSR this theory became very popular in the framework of the influence of religion in the development of Russian society, especially for the ROC. In 2007 the ROC adopted the "The Russian doctrine," a national idea calling for "dynamic conservatism." This document (800 pages long) made clear the primary goal – "Russia as an Orthodox authoritarian empire."[10] Patriarch Kyrill is very active with the ideas of Russian Orthodox hegemony, a concept clearly alien to Western democratic notions. The main principle of this doctrine is the idea of one national religion, rather than society respecting the human rights of everyone. Orthodox sectovedy (anti-cultists), seek to use the law to give 'traditional' religions legal privileges. This initiative runs counter – of course – to the Russian constitution that officially mandates equality of the religions.

Actually, there is a discussion in Russia on notions like secularization, secularism, *laïcité*, secular intolerance, and so on. Secularism is not a synonym of atheism and should not be deemed such. The word atheism is repugnant to most religious people. But it is an inseparable part of freedom of conscience. To my mind it is best for the State to aim to protect freedom of conscience, not just freedom of religion. In this respect, freedom of conscience *includes* freedom of religion; the former term is broader because it protects nonreligious beliefs as well as religious ones. Such a policy – protecting freedom of conscience – is more objective and can help eliminate the preferential treatment of some religions. One main difference between the EU and Russia can be observed here. EU countries try to provide cooperation on the basis of neutrality, in what we might see as a direction to the left, towards secularity. In Russia, the cooperation moves towards the right, towards a confessional regime.

Under the separation model, the State is theoretically incompetent to judge which religions are legitimate and which ones are not. It is simply not the business of the State to make such determinations. Its goal is to safeguard human rights, including religious freedom, for all citizens, religious and nonreligious. In current Russian policy, however, we see something far different. As Alexander Solzenizyn said, "Russia is becoming free from secularity."[11]

It has to be noted that the terminology in the comprehensive provisions of the international documents show not only the diversity of the term "freedom of conscience," but several ways for its understanding: "freedom of thoughts, conscience and religion" and "freedom of religion or beliefs." The translation of the word "beliefs" into Russian sometimes results in a misunderstanding. It means at first: the religion. So it is a sort of the tautology. The absence of a single meaning is a fact and it shows that the idea of

New Gods and Prophets in Twenty Years of Religious Freedom 329–94 (Moscow, Carnegie Endowment, 2009).

10. At http://www.portal-credo.ru, 30.08 2007.

11. Moscow News, No.15 (28 April 2006).

freedom of conscience is starting to obtain some universal meaning – as a right of the freedom to one's *Weltanschauung's* choice, thus moving away from the narrow moral-psychological content. The main thing is to move toward a commitment to a broad array of human rights. To my mind, this expands freedom of conscience, including the religious and non-religious *Weltanschauung*, thus making it possible to understand the politicization of religion, clericalization, secular fundamentalism, and the privatization of religion.

On the legal level there are two more disputed topics: the dispute over foreign missionary activity, and dividing the religious organizations into traditional and nontraditional categories. The Department for Justice has been working on the first project about five years already. The problem is that the constitutional provisions on the right to freedom of expression protect missionary activity yet officials want to curb missionary rights.

The attempt to divide religions into traditional and nontraditional groupings was in the center of the project "About the Social Partnership." I was invited as an expert from the Center of Social Projection, Moscow (S. Sulakshin), the initiator of this project, which is sponsored by the foundation of Vladimir Jakunin, the Minister of Railways of RF, to examine this issue. Again, the issue is privilege for 'traditional' religions, at first ROC in seeming contradiction to what the Constitution requires.

III. Constitutional Context

Through most of its history, Russia lived under a State-Church model of close identification with Russian Orthodoxy. The status of religion also depends upon state–church relations and its development through history. In Russia the main principle historically is "symphony." It has had various forms during the history of Russia. The desired "symphony" between church and state in the Byzantine tradition can be seen in the spirit of mutual cooperation, mutual support, and mutual responsibility between church and state without serious encroachment by one into the internal affairs of the other. In a relationship of "symphony," the state seeks from the church a policy of general encouragement and support, as well as prayer for public prosperity and overall success, and the church seeks from the state conditions of peace and prosperity for the citizens, as well as financial support.

The status of religious freedom is especially germane to modern Russia because of the new issue and form in state-church relations. The Byzantine idea of "symphony" included the belief that the political power has to honor the true religion. Russia's religious tradition (State identification with Russian Orthodoxy) was broken during the Soviet period. A form of separation appeared during the Soviet era, but it was a hostile separation of religion *from* national life rather than a friendly separation *of* religion from State activity. Soviet policy marginalized religion, it did not embrace it. In 1970 only 10 percent of Russians claimed to be religious.

April 2006 was the 100th anniversary of the Russian parliament. The 1906 parliament's first project, remarkably, was to address religious freedom. The provisions of the document produced were quite democratic (equality of all religions, the right to change one's belief, the right to propagate one's religion and belief, etc.) The destiny of that project was, unfortunately, like the destiny of the first Russian parliament, short-lived. I would like to note that among the most important documents of the first State Duma after the fall of USSR in the early 1990s was the law concerning freedom of religions. In spite of so small an experience in parliamentary processes, Russia does have considerable experience in testing various state-church models. In the 20th-century, Russia experimented with three models: the integration model (established church), the

pluralism model (but only for a short period following the February revolution of 1917), and finally the separation model (a first phase during the atheistic Soviet period, and a second phase beginning in 1990, based on the Western model of ideological pluralism, freedom of conscience, and equality of all religions). Many other countries, of course, have had similar experiments with more than one of these models.

The Constitution of Russia includes the main features of separation: no established church, institutional separation, secularity of the state, equality of beliefs. This is the logical result of the historical process in Russia. The issues of religion and religion-State relations are specifically addressed in the Constitution. Freedom of religion and belief are protected by a number of articles in the Constitution of the Russian Federation, ratified on 12 December 1993:

Article 13

1. In the Russian Federation ideological diversity shall be recognized.
2. No ideology may be established as state or obligatory one.
5. The creation and activities of public associations whose aims and actions are aimed at a forced change of the fundamental principles of the constitutional system and at violating the integrity of the Russian Federation, at undermining its security, at setting up armed units, and at instigating social, racial, national and religious strife shall be prohibited.

Article 14

The Russian Federation is a secular state. No religion may be established as a state or obligatory one.

Religious associations shall be separated from the State and shall be equal before the law.

Article 15

4. The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

Article 19

The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances. All forms of human rights on social, racial, national, linguistic or religious grounds shall be banned.

Article 23

1. Everyone shall have the right to the inviolability of private life, personal and family secrets, the protection of honour and good name.

Article 28

Everyone shall be guaranteed the freedom of conscience, the freedom of religion, including the right to profess individually or together with any other religion or to profess no religion at all, to freely choose, possess and disseminate religious and other views and act according to them.

Article 29

Everyone shall be guaranteed the freedom of ideas and speech.

The propaganda or agitation instigating social, racial, national or religious hatred and strife shall not be allowed. The propaganda of social, racial, national, religious or linguistic supremacy shall be banned.

No one may be forced to express his views and convictions or to reject them.

> Everyone shall have the right to freely look for, receive, transmit, produce and distribute information by any legal way. The list of data comprising state secrets shall be determined by a federal law.
> The freedom of mass communication shall be guaranteed. Censorship shall be banned**.**
> **Article 30**
> 1. Everyone shall have the right to association, including the right to create trade unions for the protection of his or her interests. The freedom of activity of public association shall be guaranteed.
> 2. No one may be compelled to join any association and remain in it.

There is no preferred or privileged religion in the framework of the Russian Constitution. There is no reference to religion as a foundation or source of State law. There is no specific mention of Sate neutrality on religious issues, but there is a constitutional provision on the equality of all religions before the law.[12]

IV. LEGAL CONTEXT

The status of religion in modern Russia is increasing through different legal initiatives of the government. The improvement in this area is especially important for religious freedom. There is specific legislation on State-Church relations.

A. The 1997 Law "On Freedom of Conscience and Religious Associations"

In 2007 the federal law on "Freedom of Conscience and Religious Associations" reached its tenth anniversary. According to the official 2008 report of the Ombudsman of the Russian Federation, this law sought to protect freedom of conscience and is the principal point of dialogue between the Russian state and religious groups across Russian society. In 2008 a number of amendments to the law on freedom of conscience were enacted and will speed the licensing and accreditation of religious education organizations. These amendments allow these institutions to realize the education activities on educational standards, and the students will be able to obtain state diplomas. It is also remarkable to note that from 2008 there are no deferments of military service for the priests as for the other categories of citizens.

While the 1997 Law does reiterate the declaration of the Constitution that all religions are equal before the law and that they are free from interference from the state, the Preamble also makes mention of the "special contribution" of Orthodoxy to the culture and history of Russia.

The Law establishes three broad categories of religious communities: Religious Groups, Local Religious Organizations, and Centralized Religious Organizations. Different legal status and privileges are attached to each of them.

Religious Group: Religious groups have the right to conduct religious rituals, hold worship services, and teach religious doctrine. They are not registered with the government, and thus have no legal personality. In order for a Religious Group to advance into the next category of religious communities (i.e. to become a Local Religious Organization), it must exist as a Religious Group for at least 15 years.

Local Religious Organization: A Local Religious Organization consists of at least ten individuals over the age of 18 who are permanently residing in a given area. Local Religious Organizations are registered both federally and locally, and are thus granted

12. See art.14.

rights to the privileges and benefits which are not available to Religious Groups (i.e. to open bank accounts, to purchase or rent buildings for religious purposes, to enjoy certain tax benefits, etc.).

Centralized Religious Organization: According to Article 9 of the Law, a Centralized Religious Organization is created by combining at least three Local Religious Organizations.[13]

There are about 200 federal laws, which consider the issue of religious freedom. The main ones are the following.

B. The 2002 Law "On Fighting Extremist Activity"

This law gives authorities the power to criminalize a broad spectrum of religious speech, literature, and activities. In 2006, among other changes to this law, the definition of what exactly qualifies as extremist activity was broadened to include non-violent acts of civil disobedience. As a result, this law now defines extremist activity as "incitement to "racial, nationalistic, or religious enmity, and also social enmity."[14] This law has a very unclear definition of the term "extremism" and "extremist activity." There is no legal definition of the term "religious extremism" in this law either.[15]

C. The 2006 Law "On Introducing Amendments to Certain Legislative Acts of the Russian Federation" (NGO Law)

The 2006 NGO Law contains amendments to several existing pieces of Russian legislation. As the name implies, it does not exclusively address religious organizations, but rather many varying forms and types of organizations are included. Because of this, certain provisions found therein may be applied directly to religious activity. The legislation makes provision for over 20 types of non-profit organizations, including voluntary organizations, religious organizations and branches of international and foreign non-profit non-governmental organizations. There are currently over 217,000 registered non-profit organizations, of which 57 per cent are voluntary organizations and 11 per cent are religious organizations. The number of voluntary organizations is constantly rising. There are 248 branches and representative offices of international and foreign non-profit, non-governmental organizations functioning in the country.[16] Religious organizations are affected in that the law grants authorities the right to attend religious organization activities, perform a yearly review of the organization's conformity with its original goals laid out at the time the organization registered with the federal government, as well as to obtain the full names, addresses, and passport information of the members of the organization's governing body.

Additionally, Religious Organizations are required to report on funds received from foreign individuals or organizations. However, April 2007 amendments to the law significantly eased the reporting process for religious organizations.[17]

According to an amendment to the federal Law "On the Nongovernmental Organizations" from 17 July 2009 (No. 170), those religious organizations which have no foreign individuals among the establishers, no foreign members, and no participants, do not get foreign support and if their budget does not increase more than 3 million rubles,

13. F*reedom of Religion or Belief in Russia*, Human Rights Without Frontiers, available at http:// www.hrwf.org.

14. Forum 18 available at http://www.forum18.org/Archive.php?article_id=1287.

15. *The Right on Freedom of Conscience and Belief*, Report on the activity of the Ombudsman of Russian Federation in 2008, available at http:// www.rusoir.ru.

16. United Nations Human Rights, supra note 2 at 70, 73.

17. F*reedom of Religion or Belief in Russia*, supra note 13.

they are not on duty to file an annual report to the Department of Justice but can send in lieu thereof only a simple statement.

There are specific bodies in the State structure that deal with religious affairs and religious communities. They seek to ensure protection of freedom of religion and belief of individuals and communities.

1. The Prosecutor General of the Russian Federation

Each religious organization is subject to supervision and observance by the Prosecutor General's Office of the Russian Federation, as well as by the local administrative organ with which it was registered. These governmental bodies may take appropriate legal action, "in accordance with the laws of the Russian Federation," in the case of a violation of the Law.

2. Presidential Council for Co-operation with Religious Organizations

a. Ministry of Justice

Chairing the 11 March 2009 meeting of the Presidential Council for Co-operation with Religious Organizations, President Dmitry Medvedev supported the creation of a federal expert body in response to Council of Muftis chairman Ravil Gainutdin's complaints about what he sees as the unwarranted inclusion of Islamic literature on the List. Formed by a 31 July Justice Ministry order but announced only on 23 September, the Council for the Study of Informational Materials with Religious Content for the Identification Therein of Characteristics of Extremism appears to address Gainutdin's concerns, naming Islamic scholars such as Farid Asadullin, Council of Muftis vice-chairman, and Vitaly Naumkin, director of the Oriental Studies Institute at the Russian Academy of Sciences, as members. The deputy head of the 23-member group is Doctor of Juridical Sciences and Professor of Russian Academy for State Service Zalyznyj Alexander. Earlier, in March 2009, the Ministry of Justice reformed the Expert Council for Conducting State-Religious Studies, which has been granted broad powers of investigation over religious organizations and their literature. The membership and goals of this Council have been much criticized in Russian society. The Council consists of various "anti-sectarians," and is headed by Aleksandr Dvorkin, a controversial Orthodox scholar notorious for speaking out against "nontraditional" religions. The Council may deem the activities or literature of a given religious organization to be in violation of the Federal Constitution, or not in compliance with that organization's original declarations, and counsel the Ministry of Justice on the implementation of subsequent actions. The official tasks of the Council are:

(1) To ascertain the religious character of the religious organization on the basis of its charter documents, the information about the basics of its religious teachings and corresponding practices;

(2) To verify and assess the reliability of the information contained in the documents of the religious organization in question, concerning the basics of its religious teachings;

(3) To verify the conformity of its forms and methods of activity as laid out at the time of registration with its actual forms and methods of activity.

Chaired by prominent anti-cultist Alexandr Dvorkin, the Expert Council for Conducting State Religious-Studies Expert Analysis has so far issued only one conclusion, confirming the authenticity of a registration application by adherents of the Yezidi faith (a uniquely Kurdish ancient faith).

b. Ombudsman of RF

The number of grievances filed with the RF pertaining to religious freedom or belief

is not large – about 5 percent of the whole content to the Ombudsman of RF. But it is also not small, because virtually every complaint is a claim of a larger group of believers. The context of the complaints is stable also; about half of the complaints pertain to difficultly obtaining new passports, pension cards and other state documents, which have the special Code, so-called "strich Code." Approximately 20 percent of the complaints are for defamation and governmental roadblocks to enjoyment of religious activities. Almost 15 percent pertain to building permit refusals or denials for specific uses of buildings for religious purposes. About 5 percent complain of police violence and 3 percent are grievances pertaining to imposed religious instruction in the instruction in public schools.[18]

A letter written by Vladimir Lukin, Ombudsman for Human Rights in the Russian Federation, dated 16 April 2009, (Letter No. VL 12 187-37) expresses the kinds of concerns that take place in various regional departments of the prosecutor's office. Mr. Lukin writes: "Despite the equality of all religious organizations provided for by Article 14 of the Russian Federation Constitution, the opinion of 'traditional' religious confessions is considered by the organs of the prosecutor's office to be a factor that defines the relationship of the State to other confessions."[19] In other words, officials have been known to give more credence to the opinions of "traditional" religious leaders than to provisions of Russian law when implementing the 2002 Law.

3. The Commission on the Questions of the Religious Associations by the Government of RF

Officially, Russia has now adopted the separation model, but unofficially it practices a cooperation model, with elements of the integration model as well, allowing for privileges for the ROC through the agreements on cooperation. And such a policy is typical not only in the regions of Russia, but also with the federal government as well. Russia's commitment to the separation of Church and State depends, as it happens elsewhere, on the degree to which governmental affairs are grounded in, or look to religious texts and personnel for direction.

While the constitution calls for separation of State and Church, there are bilateral formal relations between State and religious communities – so called agreements (Soglashenija). There are more than 2000 covenants, mostly with ROC and different Ministries, including Ministry for Inner matters, Ministry for Education, for Health, Social Care, Russian Railways, etc. The legal status of these agreements is disputed because there are no legal provisions about this form of cooperation in the Constitution and no issues specifically addressed in the Russian legislation on state-church relations.[20]

My view is that Russia should use the project of the federal law on the social partnership as a basis for the draft on state-church covenants, similar to the practice in Germany. It is necessary to work on the legal status of the state-church covenants and to involve them in cooperative efforts between State and Church.

V. THE STATE AND RELIGIOUS AUTONOMY

According to the Russian Constitution and the 1997 Law on Freedom of Conscience and Religious Associations", the state does not interfere in the religious life of the citizen, or in the education of children by their parents; the state guarantees the secular character

18. *The Right on Freedom of Conscience and Belief*, supra note 15.

19. F*reedom of Religion or Belief in Russia*, supra note 13.

20. *See also* E. Miroshnikova, "Civil religion: Revival or Rejection" in *State-Church Relations in Europe: Contemporary Issues and Trends at the Beginning of the 21st Century*, 381–82 (Bratislava, 2008).

of education in public schools; and, moreover, religious organizations are not to assume state functions.[21]

The state grants to religious organizations tax exemption and other kinds of privileges; extends financial support for various purposes, including renovation of buildings (many of which are memorial and cultural treasures); and assists in various ways confessional educational organizations. One disputed question is the content of the Preamble of the Law "On Freedom of Conscience and Religious Associations." The preamble references four religions – Russian Orthodoxy, Judaism, Islam, and Buddhism – which are called an "inalienable part of the historical legacy of people of Russia." In effect, the Preamble grants "traditional" status to four religions without any legal basis for doing so. Clearly, since Russian Orthodoxy is first named, Russian officials are committed to raising the status of the Orthodox Church.

In practice "nontraditional" religions are viewed by many government officials as sects, which leads to negative conclusions about their activities. The view of the Ombudsman of RF is that Russian legislation should define terms like 'sect, destructive sects, totalitarian sects', etc, which theoretically would minimize discrimination against certain unpopular groups, but at present there are no such definitions, so the discrimination against nontraditional groups continues.[22]

According to the Law on Freedom of Conscience and Religious Associations the state is to allow religious organizations to purchase real property to be used for religious activity.[23] According to the Land code of RF the state is also to permit religious organizations to construct religious buildings.[24] A new draft law on the transfer of property of religious significance to religious organizations would put an end to many property rights disagreements. Currently, religious organizations are granted the right to use such property, but are not granted full ownership. This new law would transfer ownership to religious organizations of all religious property currently in their use. If agreed to, the law would make the ROC one of the country's largest landowners. But this effort will not be easily achieved. Because of the history of state-church relations in Russia, especially in the framework of the secularization during the period of Ekaterina II, there are no clear answers on who actually owns some properties. Also, other Orthodox churches, such as the Old Believers and ROAC, might have competing claims.

VI. RELIGIOUS AUTONOMY AND STATE AUTONOMY

According to the constitutional principle of separation, religious associations are to be established and realize their activity in the framework of their own dogmas and administration; to administer themselves according their own rules; and to refrain from participating in politics. The religious associations have a right to announce religious holidays as nonworking days (public holidays) in the comprehensive regions. The Russian federal government observes Russian Orthodox Christmas as a national holiday. A number of Russian regions with a Muslim majority population—namely Tatarstan, Kabardino-Balkaria, Karachaevo-Tcherkessia, Dagestan, Stavropol, and Ingushetia—officially celebrate the Muslim holiday of Kurban Bayram on 8 December 2008.

Religious ministers (Orthodox and Muslim) today increasingly become members of important nongovernmental bodies, like the Society Chamber. It is a fact for the central body in Moscow, as well as for the regions of Russia.

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21. Art. 4 §§ 2, 3.
22. *The Right on Freedom of Conscience and Belief*, *supra* note 16.
23. Art.21 § 3.
24. Art.30 § 3.

The ROC maintains a strong political presence, as well as a heavy influence on Russian society. The close relationship of the ROC and the Russian State are often criticized by human rights activists and various religious organizations. The ROC becomes increasingly politicized. The emphasis on the dignity of the human person appears in June 2008 on the High Council of ROC in the Conception of ROC on Dignity, Freedom, and Human Rights. This document is based on the Declaration on Human Rights of the II World (universal) Russian Peoples Council (Moscow, 6 April 2006) on the Dignity of the Human Person. It is especially important because of the turning point in history represented by the idea of human dignity.

The ROC often speaks about the values that should not be deemed lower than human rights, e.g.: belief, morality, sacred (holy) things and Mother-country. It is good when the ROC tries to find its own position in the secular sphere of human rights. But it is not helpful when the ROC attempts aggressively to enforce this position on the citizenry. The ROC refuses the positive experiences of modern western civilization. This conception is an attempt to change the priority of individual human rights and to give first place to collective rights. The ROC thinks it is necessary to develop restrictions on individual rights to preserve social peace. This is a vital question in modern world, especially in the context of the fight against world terrorism. But the ROC is wrong to attempt to position itself for greater privileges than other religious institutions, which is what it seems to be doing in this whole discussion.

The ROC and its active members are very insistent on the idea of new national holidays. Some politicians and leaders of Russian patriotic Orthodox organizations in Moscow want to celebrate the Day of Russia on 21 September (in the Orthodox calendar the Day of God's Mother) instead of 12 July; 21 September also happens to be the day of the Kulikov battle in 1380 against the Tatars-Mongols in which the Russians won a great victory (to this day many Tatars do not accept their defeat). The ROC has also attempted to alter the calendar used by Russia in order to advance its own influence. In April 2008 the Duma abrogated the project of a special law having to do with changing the Russian calendar. The authors of that project, sponsored by the ROC, wanted to go back to the Julian calendar, which was used in Czarist Russia, when the ROC was a state religion.

Especially important is the role of Patriarch Kyrill, the new Patriarch of ROC, in the context of the ROC as the main religious organization in Russia. He is a strong, well educated, and creative person. He is a politician first, then a priest and theologian. He is a leader who thinks as a strategic leader, and is not satisfied with tactics only. He can become a national leader of the whole nation in time. Patriarch Kyrill understands without doubt that in the modern secular Russia it is impossible to reconstruct the former Byzantine legacy. But he notes that "symphony" as a principle between state and church must be primary. Such cooperation he calls a 'Solidarity dialogue'. Indeed it is a form of the theory of "societates perfectae," the coordination theory with a high level of autonomy from the state. Indeed Kyrill is very active as a leader of the main church in the structuring of church connections to the state. He was the sole religious leader present at a meeting of all rectors of universities of Russia in April 2009 in Moscow; he sat near President Medvedev on the presidium of this very high secular event, using the event to speak about the necessity of a spiritual education for Russia's young people.

VII. Legal Regulation of Religion as a Social Phenomenon

There is no special federal law in Russia that calls for the regulation of religion as a Social Phenomenon. The regulation of religion takes place mostly in the framework of state law. The state is generally cooperative with religion. The law allows religious cemeteries. There is the federal law "On the burial and funeral matter" from 1996, which

includes Article 15 about the places for the religious cemeteries. There are no legal provisions about the slaughtering of animals. The State does not maintain any record of the religious affiliation of individual citizens.

There are exemptions from the law on basic of conscientious objection. The Constitution of RF contains other various provisions that affect religion, namely in Article 59: "Defense of the Fatherland shall be a duty and obligation of citizens of the Russian Federation. A citizen shall carry out military service according to the federal law. A citizen of the Russian Federation shall have the right to replace military service by alternative civilian service in case his convictions or religious belief contradict military service and also in other cases envisaged by the federal law."

Despite evident progress, the procedure for forming the legal foundations of a religious denomination and of religious associations' activities in Russia is still rather difficult. The heightened emotional sensitivity to the given subject lends a certain acrimony to discussions on the matter that, in turn, gives rise to more complications than any other questions regarding human rights and freedoms.[25]

There are many instances of religious communities encountering difficulties in the registration process As a result, a number of religious organizations which were denied registration have appealed to the European Court For Human Rights (ECHR). The ECHR has ruled in favor of religious organizations and ordered the Russian government to pay reparations, which it generally has done. However, as of May 2009 there had only been one case (the State allowed Salvation Army to re-register in April 2009 in the city Moscow after being ordered to do so by Russian Constitutional Court in 2002) "in which the Russian state has taken *remedial* action as required by the ECHR."[26]

VIII. STATE FINANCIAL SUPPORT FOR RELIGION

This topic unites three topics: property that carries religious goals, the memorials of culture, and charity. There is finally underway in Russia the process of cultural memorials being designated as either federal property or regional property. A special federal law is needed in this area. Today the main parts of memorials of religious culture are federal property. The state gives from the federal budget every year only limited sums for their restoration.[27]

Russian officials are committed to raising the status of religious organizations, especially Orthodox churches. In recent times, for example, the government has given four times the amount of money for religious monuments as for secular memorials. One of the biggest projects is the New Jerusalem monastery. It was constructed in the 17th century close to Moscow. Patriarch Nikon, who oversaw the project, was an important person in the famous split between the Russian Orthodox Church and the special leader of the ROC. In the Soviet era the monastery was made into a museum. During the Second World War it was demolished by the Nazis. In 1959 improvements were made to remake the structure into a monastery. In 1995 the monks began living there again. In 2008 President Medvedev signed a decree which has the goal of reviving this historic monastery within 5-7 years.

The importance of grace activity is noted in the Conception of the economic development of RF up to 2020 (the order of the Government of RF от 17.11.2008 № 1662-r). This order encourages grace activity by the citizens and associations. In the

25. A. Pchelintsev, *Critical Problems of Freedom of Religious Freedom and the Activity of Religious Associations* in Twenty Years of Religious Freedom, 70–130 (Moscow, Carnegie Endowment, 2009)..

26. F*reedom of Religion or Belief in Russia*, supra n. 13.

27. Russian Legislation, supra n. 3.

summer 2009 a special dispensation was adopted for the support of charitable activity in RF (the order of the Government from 30.07.2009 # 1054-r). This conception gives to the municipalities the right to lease apartments to nongovernmental associations for charitable activity without compensation and without competition.

Among others ideas of this conception is an opportunity to form and to add the target capital of the nongovernmental organizations due sacrifice of the stock and estate property. This idea can help to solve the problem of financial support of religious organizations. The Ministry for Economic Development is working on a law to increase the number of grace associations, including religious ones, and to obtain tax exemptions for them.

In summer 2009 President Medvedev endorsed the idea of increasing support for chaplains in the Russian Army. There are presently about 2000 priests working in the army as volunteer chaplains. In 1996 only 36 percent of soldiers and officers identified themselves as religious, in 2008, 63 percent. The President's plan is to increase the number of chaplains serving by 250, and their salary will be similar to the salary of the deputy of the commander on the educational job (more than 20,000 rub). The institution of the chaplains will be introduced in three stages: at first in the Russian military centers outside of Russia, then in the special divisions, then in the central administration of the Ministry for Defense. All traditional religions will be represented.[28]

The Russian government supports Islamic education. This aim is unique because Russia seeks to create an alternative education to radicalism. In 2008 the state gave 800 million rubles for Islamic education.[29] There is a special Foundation to realize this activity: The Foundation for the Support of Islamic Culture. An adviser to President Medvedev is one of the members of the Board.

Finally, there are indirect forms of support permitted to religious organizations (tax exemption, funding of secular non-profit organizations controlled by religious organizations). Government entities can also extend financial support to private schools proved the aid funds only secular functions. It is permitted the financial support for the secular aspect of non- governmental schools on the federal and regions levels. (There is no term "religious private schools" in the Russian legislation). The state cannot allocate funds from general tax revenues to support particular religious organizations or activities such as clergy salaries or worship services.

IX. Civil Legal Effects of Religious Acts

The secular law does not recognize the jurisdiction of religious courts. In spite of few cases in principle the secular law does not deal with the internal issues of the religious communities, secular courts can not enforce decisions adopted by religious courts or hierarchical bodies.

In 2009 amendments were added to the federal law "On the Defense of the Competition." These amendments gives now the opportunity not to take part in the competition calling for the transfer of immovable property into use for social activity. The legislation covers religious and educational organizations.

In the city Suzdal (central Russia), according to the decision of a district court, some properties of disputed ownership must first be transferred to the state before they can be deeded to religious organizations.[30] In sum, there will be many challenges to ROC efforts

28. A.E. Sebentchov. supra n. 4.

29. Interfax 01-07-2008, available at http://www.interfax-religion.com.

30. Portal credo, http://www.portal-credo.ru, 30.09.2009. Appeal of the clergy, monastics and laity of the parish of St. Olga, Diocese of Suzdal, Russian Orthodox Autonomous Church, to the World Community of the

to reclaim many church properties. Since the collapse of the Soviet Union, many groups have experienced difficulties reclaiming religious properties from the state. Many groups also face problems in the form of continued government land and property seizures. In these matters, the ROC appears to have met with greater success and fewer difficulties than other religious organizations.

It is increasing the problem of the transmission of the property of some state museums into the property of religious organizations, mostly ROC MP, such as in the cases of the Kremlin in Rjazanj and the monastery in Solovky).

X. RELIGIOUS EDUCATION OF THE YOUTH

According to the Law on Freedom of Conscience and Religious Associations and the 1992 federal Law "On education" (art.1, p.5, art.2), religious education is not the task of the state, but of the family with the support of the comprehensive confession. The main principle of the state policy in the education area is the secular character of education in public schools; accompanied by freedom and pluralism in education.

Although Article 14 of the Constitution of the Russian Federation establishes the state as independent of any religion, and ensures that no one religion will be favored by the state, five regions in Russia have a mandatory class on Russian Orthodox Culture in public schools, with several more offering an elective course of the same topic. Overall, 70 percent of Russian schoolchildren receive some sort of Orthodox instruction in their courses.[31]

Additionally, the Russian Orthodox Church (ROC) continues to be allowed access to public school buildings for conducting religious education classes after hours.

In other regions with a Muslim majority of citizens (e.g. Chechnya), similar courses are offered in Islamic culture, although these are elective and not obligatory.[32]

The goal of the Ombudsman of RF on this topic is to include voluntary religious instruction in the curriculum of public schools, since obligatory instruction can be perceived as a violation of constitutional principles and legal provisions of RF.[33]

The Ministry of Education of RF has an agreement with ROC thru the special protocol of 19 March 2009. On 2 August 2009 a meeting was held between President Medvedev and the main religious leaders of RF. The official order of the president of RF, to be implemented in the public schools of 18 regions of RF, and in all of Russia by 2012, allows students and parents to select mandatory instruction from any of the following three emphases:[34]

1. The basics of Orthodox Culture, the basics of Islamic culture, the basics of Buddhism culture, the basics of Jewish culture.
2. The basics of world religious cultures.
3. The basics of secular ethics.

There is now a vibrant discussion about the religious sphere of education. Theological education at institutions of higher learning is also an issue. Theology has not

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Free World and its Committees involved with defending the freedom: "A difficult situation has developed today for the Russian Orthodox Autonomous Church in the Russian Federation, which must be brought to the attention of the entire world community. Day by day, the pressure and persecution by those in power has grown stronger and become more pronounced. This alarming and unfortunate situation, into which our Orthodox Church has fallen, has forced us to turn to you for help."

31. Alexander Verkhovsky & Olga Sibireva, *Restrictions and Challenges in 2008 on Freedom of Conscience in Russia*, SOVA Center, available at http://www.sova-center.ru.

32. E.Miroshnikova, *supra* note 14.

33. *The Right on Freedom of Conscience and Belief*, *supra* note 16.

34. D.A.Medvedev, The order of the President of Russian Federation No. Pr-2009, 2 August 2009.

been include in the list of sciences to get the Ph.D. Theologians can obtain this degree in the framework of Religious Studies, however.

To my mind, the international experience in religious education shows that the compulsory character of religious instruction in public schools is not the main way to foster respect to religion and morality. The education of children in one religion is the main risk of the family itself and the people's chosen religions. It is important to provide education about religion as a phenomenon of the world culture. As for the public schools, they should provide knowledge about the history of the main world religions, but not prefer any religion over others.

From 2008 the confessional educational organizations obtained the right to be accredited and to give state diplomas. Grade transfers are also possible among private and state institutions. Although the 1997 Law "On Freedom of Conscience and religious Associations" does allow religious groups to worship together without registering and without formal legal status, the law is unclear as to exactly what type of religious activity could be conducted without a license. After several "nontraditional" denominations were dissolved or received threats of liquidation from local authorities for holding religious classes without a license, some clarity was given when the Russian Supreme Court ruled in 2008 that a license is needed only when it is "accompanied by confirmation that the student has attained levels of education prescribed by the state." The decision of Supreme Court of RF on Smolensk Sunday School acknowledged the constitutional right for this activity for religious associations.[35]

XI. RELIGIOUS SYMBOLS IN PUBLIC PLACES

Russian citizens are free to wear religious symbols in public places (in schools, hospitals, courtrooms, public offices). This has not been the problem it had been in other nations, such as France.

There is no law governing the institutional use of religious symbols in public facilities. The large number of religious symbols in the public space is not necessarily a sign of a confessional State, nor do constitutional positions favoring separation guarantee separation in social life. In the main, it is impossible to put religion outside of public life. In Russia there are many religious symbols in public institutions: a number of official holidays have a religious meaning; there are icons in the State offices, chapels in the State universities, factories, and airports; covenants have been concluded between religious organizations and governmental institutions, and so on. The new national anthem, while retaining the old music, has new words and they include the sentence "the nation, protected by God."

The citizens are free to wear religious symbols in public places. At least there are no legal provisions yet which regulate these matters. Nonbelievers generally dislike religious symbols. They sometimes complain to the courts about the national anthem and its reference to God. In 2007 a group of Russian academics, with Nobel Prize Winner V. Ginsburg among them, wrote a famous letter to President Putin expressing their disagreement with religious symbols and the increasing clerical influence in public institutions, especially in public schools.[36] They argued that policy should accept and respect nonbelievers, thus not using religious symbols in public institutions.

Recently another problem concerning religious symbols became apparent. The Human Rights Center of the World Russian Folk Council – the organization of the ROC –

35. Religion and Law, Moscow, No.3, 3 (2008).

36. See http:// www.rusoir.ru; see also E.Miroshnikova, *Textbook on the State-Church Models in the Modern World*, see http.www.biblioclub.ru/catalog/118.

is upset about the absence of regulations in the sphere of religious fraud. Recently, many swindlers all over Russia, masking their true identity by wearing priestly garb, have been asking for contributions for churches and monasteries, or they use the icons, candles and other religious symbols for the "treatment" of illnesses, etc.[37] This kind of activity, however unsavory, evidences the importance of religious symbols in modern Russia.

A notable expression of these tensions has taken the form of a conflict between culture and Church. Orthodox icons are obvious religious symbols, but they are also cultural symbols, the property of the whole nation. A recent Russian case is instructive. The beautiful icon "Trinity" by Andrey Rublev is considered widely to be a national treasure. It has been displayed in the Tretjakov Gallery for the last 100 years. Its age and importance would seem adequate reasons to leave the icon untouched, but ROC asked permission to exhibit it for 3 days in a famous monastery during an Orthodox holiday. We see here a battle between culture and religion for this icon, another sign of the absence of the law governing the institutional use of religious symbols in public places.

So, the influence of secularization is very strong. Secularization is not likely to diminish. Yet religious symbols might be a way of accommodating religion in a secularized world. We are witnesses today to new forms of public religion. Hegel's dialectic: thesis, antithesis, synthesis, applies here. In this context I understand religion as thesis, secularization as antithesis, and civil religion as synthesis (religion–secularization-civil religion). Civil religion (CR) might be part of the answer. CR means a common unity on religious bases, not one belief for everybody.

Civil religion is fundamental both to fostering religious pluralism and to providing public policy with a moral foundation. Unfortunately, many citizens in Russia exhibit little tolerance and respect for those who are outside the Orthodox tradition and have differing beliefs. CR in the Russian context might be either a revival or a rejection of older religious ideas. It might also be a little of both, but whatever it is, I hope it will be fundamentally a tool to unite the nation, to give a moral ground for governing the country and for embracing religious pluralism. As a civil covenant on religious values CR, will bring us towards social cooperation for the commonweal in the framework of the law, towards strengthening the nation and towards giving an ethical dimension to public policy.

XII. Freedom of Expression and Offenses against Religion

Several laws are germane in the realm of religious expression:

Article 20.29. Code of Administrative Offences of the Russian Federation. Production and Distribution of Extremist Materials

Article 5.26. Violation of Legislation on Freedom of Conscience, Freedom of Religion and Religious Association) include special features of the legal setting on religious freedom.

The **Criminal Code of the Russian Federation** has the special provisions on freedom of conscience and religious freedom (**Article 136**. Violation of the Equality of Human and Civil Rights and Freedoms; **Article 148**. Obstruction of the Exercise of the Right of Liberty of Conscience and Religious Liberty; **Article 244**. Outrages upon Bodies of the Deceased and Their Burial Places; **Article 282**. Incitement of National, Racial, or Religious Enmity).

As part of the 2006 Law on Public Associations, public officials may annually attend a meeting of each organization in order to determine whether or not said organization is acting in compliance with its charter.

37. See http://www.newsru.com; 2008-10-22.

In 2007, the ECHR unanimously ruled against the Russian government in a case brought by the Christ' Grace Church of Evangelical Christians in Chekhov (see ECHR court case number 10519/03, *Barankevich v. Russia*). In 2002, a town council and court refused the group permission to hold an outdoor service, stating that since "the Church of Evangelical Christians practices a religion that is different from the religion professed by the majority of the local residents," a public religious service could cause discontent among other religious organizations in the area and threaten public order. The ECHR ruled that the local government officials had violated the church members' religious freedom and ordered reparations in the sum of $9,000.[38]

Articles 13 of the 2002 Law on Fighting Extremism provides for the creation of a list of extremist materials that shall be banned in the Russian Federation. The list is composed of materials which courts (both high and low-level) have deemed extremist. One of the disputed problems of religious freedom is the inclusion of the religious literature into the federal list of extremist materials (documents). As of 1 August 2009 there were 403 materials,[39] with most theological entries – the inclusion of which is also disputed –being Islamic.[40] While many materials legitimately violate Article 29 of the Federal Constitution, in that they propagate "social, racial, national or religious hatred and strife", others, such as Muhammad ali Al-Hshimi's "The Personality of a Muslim" (#73 on the list), are generally accepted as non-confrontational. Several religious bodies, including the Council of Muftis, have expressed concern that the list is at times unjustly used as a means of suppressing the freedom of expression of particular religions. Although certain threats, particularly those posed by Chechnya, to Russia's security from domestic terrorism are genuine, State and local government officials often illegitimately apply the 2002 "Law on Fighting Extremist Activity" against non-confrontational Islamic literature, activities, and organizations.

Leaders of Russia's "nontraditional" religions, including Seventh-day Adventists, Pentecostals, the Old Believers, Baptists, and various Islamic groups, have all criticized the extensions of the Council's powers and its new membership (A.Dvorkin), urging the disbanding of the Council and the resigning of Minister of Justice Konovalov, who ordered the expansion and appointed it's members. As of December 2006, Jehovah's Witnesses maintained 407 registered Local Religious Organizations. From 2007 to 2009 Jehovah's Witnesses in various regions across the country were served with over 45 warnings "on the impermissibility of carrying out extremist activity." No clarification of what was meant by "extremist activity" was given, and no individual member or registered organization has thus far been charged with specific violations of the law.

In May 2009 the European Federation of Research Centers for Information about Sects (FECRIS) held a conference in St. Petersburg entitled "Totalitarian Sects and the Human Right to Secure Existence," during which speakers and participants discussed current European efforts to combat the influence and growth of "totalitarian sects" (among which Jehovah's Witnesses was specifically named). The conference was organized mainly by Mr. Dvorkin, vice president of FECRIS, and was attended by numerous Russian government officials, most notably Minister of Justice Aleksandr Konovalov. The conference represents the fact that Russian officials have confined themselves to the idea that the Jehovah's Witnesses is a "totalitarian sect" which must be suppressed.

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38. F*reedom of Religion or Belief in Russia,* supra n. 13.

39. See http://minjust.lgg.ru/ru/activity/nko/fedspisok. The 432 titles on the Federal List of Extremist Materials as of 23 October typically suggest extreme nationalist or anti-Semitic content

40. Human Rights Without Frontiers Newsletter, *"Religious Intolerance and Discrimination"– RUSSIA: Jehovah's Witnesses to be banned?* 26 October 2009.

Officially, except in cases involving the distribution of banned material, Russian legislation does not outlaw missionary activity. In 2007 the Moscow City Duma removed "religious proselytizing in public" from its list of administrative offences in the new Moscow City Code. In practice, however, proselytizers of various religions report encountering opposition to their efforts. In October 2007, Russia introduced new visa rules. They included changes to the status of foreign religious workers/missionaries holding humanitarian visas. Prior to the changes, foreign religious workers could obtain one-year, multiple-entry visas for conducting religious activity in the country. After the changes, foreign religious workers may obtain humanitarian visas for a maximum of 180 days. However, only 90 of the 180 days may be spent in the country, necessitating periodic travel out of the country. These restrictions, although not specifically aimed at religious workers, had the effect of burdening religious groups that rely on foreign religious workers. The Roman Catholic Church, which relies almost exclusively on priests from outside the country, and the Church of Jesus Christ of Latter-day Saints (LDS Church), with more than four hundred foreign missionaries, have been particularly hard hit by this provision.

In the last few years, a number of communities of faith or belief have challenged Russian court decisions at the European Court in Strasbourg. Russia has lost in a number of cases but has failed to implement the judgments. From 2 to 5 June, the Committee of Ministers of the Council of Europe held its second special "human rights' meeting" in 2009 to supervise the implementation of the European Court decisions. By then, four "religious" cases in Russia had still not been implemented and were to be examined:

1. **Moscow Branch of the Salvation Army v. Russia** (judgment of 05/10/2006, final on 05/01/2007) and **Church of Scientology Moscow v. Russia** (judgment of 05/04/2007, final on 24/09/2007). These cases concern the refusal to re-register the applicant associations, resulting in their loss of legal status (violation of Article 14 read in light of Article 9).

2. **Kuznetsov and others v. Russia** (judgment of 11/01/2007, final on 11/04/2007) and **Barankevich v. Russia** (judgment of 26/07/2007, final on 26/10/2007). These cases concern interference with a religious event organized by members of the Chelyabinsk community of Jehovah's Witnesses (Kuznetsov case) found by the Court not to be prescribed by law (violation of Article 9) and the ban imposed on a service of worship planned by the "Christ's Grace" Church of Evangelical Christians in a town park (Barankevich) (violation of Article 11 interpreted in the light of Article 9).[41]

The specific nature of religious associations and activities should not be interpreted to mean that religious groups are subject to tougher restrictions than everyone else. In reality, however, we often see that investigation and prosecution of actual or alleged offenses differ from the normal law enforcement practices whenever religion is involved. For example, the Russian authorities are now trying to prohibit one brochure of Falun Gong for criticizing the Chinese government and Communist Party, even though everyone else is free to do so. Or whenever a court bans an organization for extremism, only in cases involving religious organizations may the court refuse to publicize the reason for the judgment, as it was the case when the Russian Supreme Court banned Tablighi Jamaat this July. This is a one reason the presence of nongovernmental organizations is so important; they try to improve religious freedom for all people

In conclusion, the recommendations to OSCE member states provides an excellent framework for protection of religious freedom.[42] First, refer all decisions to ban certain

41. E. F*reedom of Religion or Belief in Russia,* supra n. 13.

42. SOVA Center for Information and Analysis, *Intervention for Working Session 2 – "Fundamental Freedoms I,"* 29 September 2009, http://www.osce.org/documents/html/pdftohtml /39909_en.pdf.html.

theological texts or certain religious organizations and groups to the Supreme Court. Ensure maximum publicity of such proceedings due to their particular sensitivity and implications for the freedom of conscience. Second, eliminate selective enforcement of laws against incitement to hatred with respect of religiously motivated statements. Finally, review and update domestic laws against incitement to hatred in order to ensure freedom of expression related to religion.

Appendix A – Religious Associations Registered in Russia
Source: Russian Ministry of Justice, http://www.minjust.ru, 01 July 2009

Russian Orthodox Church	12,843
Russian Orthodox Autonomy Church	44
Russian Orthodox Church in foreign	26
True Orthodox	35
Russian Orthodox Free Church	7
Ukraine Orthodox Church (Kiev Patriarchat)	10
Old Believer	283
Roman Catholic Church	230
Greek Catholics	4
Armenian Apostolic Church	74
Islam	4,017
Buddism	203
Jews	297
Evangelical Christians-Baptists	883
Christians of Evangelical Belief	285
Evangelical Christians	677
Evangelical Christians in Apostolic Spirit	26
Christians of Evangelical Belief (Pentecostals)	1,339
Church of Full Evanlije	35
Evangelical Christians-Sobers	5
Church of the Seventh-Say Adventists	603
Lutherans	226
New Apostolic Church	70
Methodists	111
Reformed Church	5
Presbyterian Church	176
Anglican Church	1
Jehovah's Witnesses	409
Mennonites	7
Salvation Army	10
Church of Jesus Christ of Latter-day Saints	51
Unification Church (Mun)	7
Church of Mother of God "Derzavnaja"	22
Molokans	23
Church of the Last Testament	6
Church of Christ	19
Jewish Christians	2
Non-denominational churches	15
Scientology	1
Hinduism	1
Krishna Society	75
Bahaism	17
Daosism	4
Assyrian Church	3
Sikhs	1
Shamanism	16
Spiritual Unity (Tolstovzy)	1
Paganism	6
Others	102
In all	**23,313**

FRANCIS LYALL

Religion and the Secular State in Scotland

I. INTRODUCTION

The history of the relationship between religion and the state in Scotland is complex.[1] Scotland is part of the United Kingdom of Great Britain and Northern Ireland. United with England for many purposes since 1707, Scotland has its own legal system, and, since 1999, a devolved legislature has sat in Edinburgh. The Scottish Parliament has jurisdiction in all matters except those reserved to the Westminster Parliament by the Scotland Act of 1998. Formally speaking, we have no "U.K. Constitution." No single or small group of documents, authoritatively promulgated or otherwise adopted, provides a statement, or even guidance, as to the framework of government in Britain, or as to the mutual relationships between the branches of government. Nonetheless, our constitution is to be found in legislation, case law and practice and constitutional law is studied in our universities. The U.K. accession to what is now the European Union means that the rules of that organization also play a role. Last, the U.K. has ratified the 1951 Convention on Human Rights and decades later incorporated much of that Convention and portions of its Protocols into U.K. law by the Human Rights Act also of 1998.

II. CHURCHES AND FAITHS

A. The Church of Scotland

The main church in Scotland remains the Church of Scotland – the "Kirk," as it is commonly known. It is the only church that has specific top-level statutory recognition. Reformed in 1560 by a "bottom-up" movement within the Kirk itself,[2] the position of the Kirk was finally secured just prior to the union of Scotland and England in 1707. Confirmation of the Church of Scotland as Presbyterian and of its Faith as expressed in the Westminster Confession of Faith of 1643, was given by the state by the Confession of Faith Ratification Act 1690, c. 7.[3] In the negotiation of the Union of the Scottish and English Parliaments, the status and governance of the Kirk were not negotiable.[4]

In 1843 the Kirk split in what is known as the Disruption. The points at issue were whether the Kirk could determine the creation of new parishes without the intervention of

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1. Lyall, F., *Of Presbyters and Kings: Church and State in the Law of Scotland*, Aberdeen: Aberdeen UP, 1980; Burleigh, J.H.S., *A Church History of Scotland*, Oxford: OUP, 1960.

2. The English Reformation was a messy affair. In England, the Reformation of 1533 was, to a degree, top-down, the result being that the English church was less thoroughly reformed. What was at stake was "who is the head of the church?" rather than the belief system that the church espoused. Due attention was not given to matters of belief until the drafting of the Thirty-nine Articles of Religion (1563, but in final form only in 1571).

3. For intervening history see Lyall, supra n. 1.

4. See The Protestant Religion and Presbyterian Church Act 1705, c.50 appointing the Scottish Commissioners to negotiate with England excluded the "worship, discipline and government of the Church of this kingdom as now established" from their remit. The Protestant Religion and Presbyterian Church Act 1706, c. 6 (the "Act of Security") ratified the 1690 Confession of Faith Ratification Act, and both these Acts were inserted into the legislation implementing the Treaty of Union of both Parliaments, the Union with England Act, 1706, 1707 c.7 (Scotland), and the Union with Scotland Act, 1706, 6 Anne c.11 (England). See generally, Lyall (1980), supra n.1, at 21–22.

the state, whether the Kirk alone could determine who might be a member of a presbytery, and on the question of the appointment of a minister to a congregation. These had resulted in a series of court cases, but the government of the day refused to change the law when the decisions went against the argument of the Kirk. Those who left the established Kirk in 1843 formed the Free Church of Scotland, a Presbyterian denomination which has been subject to further schism. In 1847 a number of smaller mainly non-Presbyterian churches and denominations formed the United Presbyterian Church. That church and the bulk of the Free Church united to form the United Free Church of Scotland the bulk of which united with the Church of Scotland under a Basis and Plan of Union in 1929. To facilitate that union the state recognized as lawful "Articles Declaratory of the Church of Scotland in Matters Spiritual" by the Church of Scotland Act 1921. These Articles, negotiated between the two uniting churches, remain major constitutional documents of the Kirk, the Westminster Confession of Faith being acknowledged as being its principal subordinate standard of belief, the Word of God being primary. The Kirk is therefore acknowledged by the state by statute and has an independent jurisdiction of its belief, governance and discipline.[5] For decades the General Assembly of the Church of Scotland was influential and spoken of as being the intra-Scotland forum for the expression of Scottish concerns. With the establishment of the Scottish Parliament in 1999, that position has declined, if not reversed.

While the affairs of the Kirk are generally protected from interference by the civil arm, the Kirk has adapted its procedures to conform to the requirements of civil law. Notably by the Act III, 2001, "Anent Discipline" (as amended), the function of complaint, investigation, prosecution and judgement in cases of discipline have been separated.

A new development has been as to the status of Christian ministers. For many decades it was considered that minsters were 'employed by God' not by the congregation they served or the Kirk general and that therefore ordinary employment law did not apply. However, in Percy v. Church of Scotland Board of National Mission [2005] UKHL 73 it was held that an "Associate Minister" whose employment and duties had been very clearly specified had a contract of employment, and therefore access to the Employment Appeal Tribunal system to allege discrimination against the Kirk.[6] This case may have reverberations not only for the Kirk, but for other churches and religious organizations which hitherto have had a similar view of ministers. The Percy case is Scottish, but in that the judgements of the House of Lords refer to many English cases, it is clear that a similar result may come in England.

B. Other Churches and Faiths

As indicated above, there are a number of churches, some Presbyterian in organization, other than the Kirk. There is also now a strong Islamic presence, with a lesser Hindu and Sikh presence. The Scottish Episcopal Church is a remnant of the church which the Stuarts sought to impose in the Seventeenth century. Roman Catholicism was severely affected by the Scottish Reformation. It was re-introduced (or was re-emergent) in the Nineteenth century, the Roman Catholic Relief Act of 18xx, being a major step in the UK as a whole and the Roman Catholic hierarchy in Scotland was reconstituted in 18xx. Roman Catholicism in Scotland was boosted by emigration from Ireland particular into central Scotland and remains a significant force. All churches other than the Kirk, remain in law private unincorporated associations, their property being held by trustees. Only the Kirk has formal statutory recognition as a body and its decisions are not subject

5. Cf. infra n. xx and accompanying text.
6. See infra n. 21.

to review in the other civil courts since its courts are of equivalent status.[7] However, at formal state occasions there is now usually an attempt to be inclusive of many Christian denominations and all major Scottish faiths, including Islam. It remains to be seen how the Coronation of the successor to Queen Elizabeth II will be organized.

Non-Kirk religious bodies are considered private associations whose proceedings will not be subject to judicial review by the civil courts unless they contravene basic principles such as natural justice.[8] Their property may, however, otherwise be subject to contention in the civil realm and they are open to the normal procedures in respect of Employment Law, unfair dismissal and the like.

III. Property

In Scotland property may be owned by an individual or by a legal person (an incorporated entity or a partnership). Property is otherwise held by trustees on the terms and conditions on which the trust was constituted. The famous case is that in which the minority of the Free Church, unwilling to enter the union with the United Presbyterian Church to form the United Free church was held entitled to retain the whole assets of the Free Church.[9] What is important is the terms on which the property is held. The terms of that trust will generally be enforced.[10] What may happen if the Kirk splits over homosexuality remains to be seen.[11]

IV. Education

The Kirk was important in the provision of education and the administration of poor relief, its parishes being in effect the units of local government until mid-Victorian times.[12] However, after a civil school system was established by the Education (Scotland) Act 1872, its influence declined. Other private schools continue to exist. However, over time the Roman Catholic Church found the expense of maintaining its own schools prohibitive and, in 1918 another Education (Scotland) Act permitted the Catholic schools to be incorporated into the state system but with the Catholic Church having a major voice in the appointment of teachers and the running of "their" schools. This remains the legal position, although recently it has been criticized as discriminatory against teachers not of the Roman Catholic persuasion. We await a court case to clarify this area.

V. Charitable Activity

Charitable activity has always been a religious duty for most faiths. Thanks to several instances of fraud and embezzlement by the trustees of certain charitable bodies, Scottish charity law was revised. Now the Charities and Trustee Investment (Scotland) Act 2005 (2005 asp.10) of the Scottish Parliament has tightened the requirements on all bodies seeking or receiving charitable status with attendant tax and other benefits, including the churches and other faith groupings. These requirements as to statement of purposes,

7. *Logan v. Presbytery of Dumbarton* [1995] S. L. T. 1228; *Wight v. Presbytery of Dunkeld and the General Assembly of the Church of Scotland* [1870] 8 M. 921.

8. *Brentnall v. Synod of the Free Presbyterian Church of Scotland* [1986] S. L. T. 471.

9. *Bannatyne v. Overtoun* [1904] 7 F. (HL) 1; [1904] 12 S. L. T. 297; [1904] A.C. 515. In fact the property involved was so vast that the rump of the Free Church could not administer it, and by a Commission established under the Churches (Scotland) Act, 1905, the property was divided between the two denominations.

10. *Free Church Continuing v. Free Church* [2005] S.C. 396; [2005] CSOH 46*; Smith v. Morrison* [2009] CSOH 113. But see supra n. 9.

11. Cf. infra n. 15.

12. Under the *First Book of Discipline* (1560) the parishes of the new Kirk set up local schools and paid for the schoolmaster. *See* J.K. Cameron, ed. *The First Book of Discipline*, Edinburgh, 1972.

disclosure of assets and their use, and independent certification of accounts applies to all charities. Some would see this as a secular intervention in the concerns of religious bodies, but there is a strong argument for the Act as deterring the exploitation of donors to the benefit of unscrupulous operators using "religion" as a convenient prompt towards generosity. Considerable taxation and other reliefs are afforded to religious bodies so long as they conform to the requirements for charitable status.[13]

VI. Human Rights and Secularism

Within the past decade secular/humanist voices have become clamant, attacking religious-based concepts. This has produced a willingness by non-religious persons to demand changes in the law to eliminate discrimination in favour of religion, and to require the acceptance of life-styles previously unacceptable (in formal law at least).[14]

Within the Kirk there has been recent debate which continues. The introduction of the Civil Partnership Act 2004 led to a call to allow ministers to conduct a service of blessing for such partnerships without being subjected to discipline for contravening church doctrine. This was voted down by presbyteries. However, in 2009 the settlement of a homosexual minister was allowed, and the matter has been sent to a Special Commission which will report in 2011.[15] Some have said that the Kirk may then split once again, the rift between the traditional view and those of others being fundamental. If so, property questions will arise.[16] In the meantime by Act V, 2007, "Anent Discrimination" the Kirk has banned discrimination within its operations, including on grounds of homosexual orientation, but not on ground of homosexual practice. The Episcopal Church of Scotland appears to be more tolerant.

The UK was influential in the drawing up of the 1951 Convention on Human Rights. However it was not until 1998 that much of the Convention and portions of its Protocols were incorporated into UK law by the Human Rights Act. The Act contains a "safeguard" for religious belief. Section 13 of that Act allows a court deciding a case with a religious element to take into account the importance of the freedom of thought, conscience and religion of a religious organization.[17] What this means remains obscure. Elements of the 1951 Convention had already been acted on. Discrimination on various grounds, sexual, racial and disability, was attacked over the years, and is now largely consolidated in the Equality Act 2006 which brings together much of the equality statutes and consolidates the agencies that formerly policed that legislation. Religious discrimination was (and is) of course a potential ground of discrimination or complaint particularly in the area of employment. Section 15 allows for religious belief in the case of organizations, but only in their doctrine, membership and practice, not where they are in effect acting as secular businesses. However, it will come as no surprise to find that the question of homosexuality has emerged as a point of difficulty, given the traditional attitude taken by Christian denominations. Accordingly in the Equality Act (Sexual Orientation)

13. In *Gallagher v. Church of Jesus Christ of Latter-day Saints* [2008] UKHL56; [2008] 4 All ER 640, a Mormon Temple was held ineligible for rating relief though allied premises were, because the actual Temple was not open for public access.

14. Notwithstanding the law, the history of the Victorian and later eras show a tacit acceptance at least in the higher echelons of society of a variety of life-styles dis-conform to the religious norm.

15. Cranmer, F. "Human Sexuality and the Church of Scotland: *Aitken et al. v. Presbytery of Aberdeen*" (2009) 11 *Eccles. L.Rev*. 334, 334–39.

16. See supra n. 7–8.

17. Human Rights Act 1998, c. 42, s. 13. Freedom of thought, conscience and religion: (1) If a court's determination of any question arising under this Act might affect the exercise by a religious organization (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right. (2) In this section "court" includes a tribunal. Id.

Regulations (2007 SI 1263) Regulations 14.3 and 4 protect freedom of doctrine and allows a religious organization to restrict its membership or participation in its activities where this is an outcome to its doctrine. Again, however, this does not apply in commercial activities of religious organizations, and, in an extension to previous law Regulation 14.2 specifically disapplies these exemptions in relation to education.

New questions may arise as to "religious belief." In two very recent English cases involving the Equal Opportunities Tribunal system, it has been held that a strongly held belief in environmental conservation can qualify as a "belief" protected by the law.[18] Further in another case as yet unreported, involving a police training officer, it was stated that spiritualism and consulting the dead "could be construed as being religious beliefs" under Employment Equality (Religion or Belief) Regulations Act 2003.[19] Apparently in the 2001 UK Census revealed that 390,000 people entered "Jedi" as their religion.[20] Some curious cases may eventuate from the broadened scope of "belief" not recognized by the state.

Finally I refer back to the Percy case, in which an allegation of discrimination has also been responsible for a major breach in the Kirk's status as a separate jurisdiction.[21]

18. *Grainger Plc v. Nicholson* [2009] UKEAT 0219/09/ZT (explaining that an asserted belief in man-made climate change and the alleged resulting moral imperatives arising from it were capable of constituting a philosophical belief for the purpose of the Employment Equality (Religion or Belief) Regulations 2003).

19. The [London] Times, 13 Nov 2009, *available at* http://business.timesonline.co.uk/tol/business/law/article6914978.ece.

20.http://news.bbc.co.uk/1/hi/uk/2757067.stm. As to the distribution see http://www.statistics.gov.uk/census2001/profiles/rank/jedi.asp/.

21. See supra n. 6.

SIMA AVRAMOVIC

Understanding Secularism in a Post-Communist State: Case of Serbia

I. ACT ONE: RESTRICTION

For more than fifty years during the communist regime after World War II, secularity issues were not seriously discussed and elaborated in Serbia, or in other countries of the former socialist (communist) Republic of Yugoslavia. It was an ideological, rather than a legal, theoretical, or academic, matter, which was understood one-sidedly as a plain justification to remove all elements of religious life out of the public sphere. Its legal expression, the principle of separation of State and Church, was promulgated as a fundamental constitutional rule shaping religious freedom issues in the country.[1] However, it was understood and interpreted not merely as a strict division of the two spheres, but as a kind of hostile separation. The overall social atmosphere was one of state atheism. As a consequence, different forms of repression, pressures and animosities were frequently directed against churches, religious communities, and their representatives and believers. Religion was labeled by the dominant Marxist ideology as "the opiate for the masses" and was considered dangerous for the society. Victors' justice has led to confiscation of church property, prosecution and discrimination of priests and believers, and constant control of religious life and activities of religious organizations by the communist regime. Any comprehensive or dissonant discussion on the legal position of churches and religious communities, the importance of religion and religious feelings, or claims for right to religious freedom expression are usually labeled without hesitation as conservative, anachronistic, clerical, and contrary to socialist values.

II. ACT TWO: REVIVAL

However, after the democratic changes and delayed fall of communism in Serbia in 2000, the issue of secularity was reopened. Reaction toward long-lasting pressure on religion and belief has given ground to an opposite extreme: as in many other ex-communist countries, in the first decade after the decline of socialism, a kind of revival of religion came to pass. "New believers" appeared, religious practice intensified, presence of religion and religious topics in media became popular, while the social impact of churches and religious communities significantly increased. Approximately within the same time, not only in the ex-communist regions, religion encroached upon the "public" consciousness in ways which two decades ago might have seemed implausible.[2]

Intensive activity at the state level was also evident in Serbia. Religious instruction was introduced in public schools when the Government of the Republic of Serbia passed the *Decree on organization and realization of religious instruction and of an alternative*

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1. Art. 174 paragraph 2 of the Constitution of the Socialist Federal Republic of Yugoslavia of 1974, as well as the later art. 41, paragraph 2 of the Constitution of Serbia of 1990, were using the same neutral phrasing with a *prima facie* positive tone: "Religious communities shall be separated from the State and shall be free in the conduct of religious affairs and performance of religious rites." Worth noticing is also that the very word "church" or "churches" was not used all through the constitutional texts.

2. M. Davies, "Pluralism in Law and Religion," in *Law and Religion in Theoretical and Historical Context* 72 (P. Cane et al. eds.) (2008).

subject in elementary and high schools in July 2001.[3] The Decree was used as an interim legislation to enable religious instruction in public schools to start in the 2001/2002 school year for members of "traditional" Churches and religious communities, relating to the first-year elementary school pupils and those in the first year in high school. In 2002, two laws were passed in the Parliament, similarly regulating religious instruction in public schools on a long term basis, effective to date.[4]

Along with religious instruction legislation, a new law on religious freedom was in preparation, which was finally enacted after April 2006 (mainly due to a few controversial points such as requiring a number of followers for religious organizations to register , "sects" issue, legal position and privileges of the Serbian Orthodox Church and other traditional churches and religious communities, etc.).[5] Also, a few amendments on different laws on social security and health protection have guaranteed legal rights to the clergy for the first time (particularly social rights, such as medical, social and pension insurance of priests and clerics, monks and nuns, which may be funded from the state budget). Other amendments gave tax exemption to churches and religious communities and media laws gave considerable privileges to religious organizations. Another example is the law on restitution of church confiscated property that was adopted in 2006.

When the first and the strongest wave of "re-religionization" of the society had passed, the new Constitution of Serbia of 2006 introduced a bit different tone. The attitude towards religion got its expression through a few innovative norms, stating that "The Republic of Serbia is a secular state (par. 1); Churches and religious communities shall be separated from the state (par. 2); No religion may be established as state or mandatory religion (par. 3)."[6] Those were quite innovative clauses for Serbia: the principle of secularization was explicitly proclaimed, the word "church" was mentioned in the

3. Official Gazette of the Republic of Serbia, No. 46/2001 of 27 July 2001. According to the Decree, parents and other legally recognized representatives decide whether their children will attend religious instruction in primary school or not. Pupils in secondary schools (starting with the age of 14 or 15) decide for themselves on religious instruction class enrollment. Attendance is mandatory for the current school year. If the pupil does not attend religious education, he or she shall instead attend classes in a new subject named "civic education." Pupils may also opt out all together. Classes in religious instruction or civic education are scheduled only once per week. Pupils are not to be graded in the same way as they are for other subjects, but will be given only a descriptive mark that does not affect their final grade point average.

4. *Law on amending the Law on Elementary School* (Official Gazette of the Republic of Serbia, No. 22/2002 of 26 April 2002) and *Law on amending the Law on High School* (Official Gazette of the Republic of Serbia, No. 23/2002 of 9 May 2002). The main modification was that religious instruction and alternative subject have obtained the status of elective courses. Pupil has to choose one of the two subjects but cannot opt out all together. The subject is laid down within the curricula of elementary (eight years) and high schools (four years). Evaluation of pupils is descriptive, differently than in other subjects, and the marks do not influence pupil's average grade. Classes are held once a week (36 hours per year). Issues of constitutionality and social justification of religious instruction in public schools in Serbia attracted quite a vivid discussion, see more M. Draškić, "Pravo deteta na slobodu veroispovesti u školi" [Right of children to religious freedom in the school], *Anali Pravnog fakulteta u Beogradu – Annals of the Faculty of Law in Belgrade (Anali PFB)* 1-4/2001, 511–23; S. Avramović, "Pravo na versku nastavu u našem i uporednom pravu" [Right to religious instruction in our and Comparative Law], *Anali PFB* 2005/1, 46-64; S. Avramović, "Right to Religious Instructions in Public Schools," *Annals of the Faculty of Law in Belgrade – International Edition* 1/2006, 4–17; M. Draškić, "O veronauci u državnim školama, drugi put" [On religious teaching in public schools, the second time], *Anali PFB* 2006/1, 135–51; S. Avramović, "Constitutionality of Religious Instructions in Public Schools – Res judicata," *Annals of the Faculty of Law in Belgrade – International Edition* 2/2007, 181–87. My reaction to the first text by Prof. Marija Draškić (now the Judge of the Constitutional Court of the Republic of Serbia) was published with a considerable delay due to change of the journal's editorial board and late appearance of the volume, although the manuscript was accepted at the beginning of 2003.

5. *Law on Churches and Religious Communities*, Official Gazette of the Republic of Serbia, No. 36/2006. For analysis of the controversies related to enactment of the Law (contributions in Serbian) and for English translation of the Law, see S. Avramović, *Prilozi nastajanju državno-crkvenog prava u Srbiji – Church-State Law in Serbia*, Pravni fakultet Univerziteta u Beogradu, Belgrade 2007.

6. CONSTITUTION OF SERBIA of 2006, art. 11.

Constitution of Serbia for the first time after the World War II,[7] and the establishment clause was set up as never before. Nevertheless, the actual trend of religious revival was still ongoing, although it lost a bit of its strength and scope.

III. ACT THREE: REACTION

As a sound reaction to unconstrained revival of religion and its wide inclusion in a public sphere, many voices were raised in Serbia against that tendency, mainly by different NGOs and individual intellectuals, often with a sharp tone of accusation for "clericalization of the society." Politicians were hesitating to oppose the prevalent social attitude toward expanding religious feelings in order not to harm their electoral chances, while the Church officials have recognized for the first time an opportunity to have a say and to raise their voice in social matters. The conflict on secularity issues with the civil sector was inevitable.

Unsurprisingly, the response of human rights activists was mainly vested into the veil of secularism. The argument was based first upon the fact that the Constitution provides for the secular state, usually with no further elaboration, with a simple claim that the principle of secularization is endangered. This leaves a lot to be understood without any additional explanation, although the very notion of secularism is not well-comprehended by ordinary people and not well-researched in the Serbian doctrine. The school of thought behind the constitutional provision reasoned that it is enough to call upon the secularity principle, and that the outcome goes without saying – no interference of religious organizations in a public sphere is allowed and no impact of religion in social issues is acceptable. Any public statement of the church authorities or of individual priests in social issues, legislation or other actual problems (particularly on birth rate, abortion, homosexuality, drug abuse, etc.) was considered and attacked as clerical and illegal, being in opposition to the constitutionally recognized secularism. A kind of secular fundamentalism appeared in response to this definition of secularism.

Unfortunately, secularism is a very complicated, controversial, complex, and vast term and notion.[8] In a society with very limited knowledge and academic examination of so complex a concept and of its different aspects, two extremely hostile attitudes with a

7. The first constitution which changed the long-term practice to avoid mentioning churches was the one of the Federal Republic of Yugoslavia of 1992 (enacted after the dissolution of the Federal Republic of Yugoslavia, when the new country comprised Serbia and Montenegro). In its Article 18 it was stated that "Church and state shall be separate" (¶ 1) and that "Churches shall be free and equal in conducting religious affairs and in the performance of religious rites" (¶ 2). However, the only change in wording of the new constitutional norm, in comparison with the previous communist Constitutions, was the use of the word church/churches, while the overall formulation remained the same, with addition of the word "equal."

8. Etymology and the concept of this French word encompasses today a basic idea that the State should act in the best interest of the whole people, in a common interest, without paying attention to any specific group particularly connected with specific religious conviction. Although secularization can be therefore simply understood as a process in which religious institutions and religion lose their social significance, there is a variety of approaches in the literature, as it includes many more concrete consequences, such as the loss of property and the political power of religious subjects, a shift from religious control to secular control, a decrease in the amount of time, energy, and other means that people devote to supernatural things, and the replacement of religious commandments by demands corresponding to strictly rational, empirical and technical criteria, as defined in B. Wilson, *Religion in Sociological Perspective* 149 (1992). Many important books revealed numerous controversies on that topic in France itself, see for example J.-P. Costa–G. Bedouelle, *Les laïcités à la française* (1998); E. Poulat, *La solution laïque et ses problèmes*, (1997); J.-P.Durand, *Droit civil ecclésiastique français en 1997-1998*, 5 *European Journal for Church and State Relations* 61 (1998). For a very interesting and accurate view of secilarization in France today, see J. Robert, *Religious Liberty and French Secularism*, 2003 *BYU L.Rev*. 637 and J. Baubérot, *Secularization and Secularism from the View of Freedom of Religion*, 2 *BYU L. Rev*. 451 *(*(2003). *See also La laïcité à l'épreuve* (dirigé par J. Baubérot), Paris (2004), and particularly *Laïcité et sécularisation dans l'Union européenne* (A. Dierkens & J-Ph. Schreiber eds.) (2006).

poor foundation have inevitably come to tough confrontation. The argumentation *pro et contra* has basically rested and remained at ideological, rather than thoughtful, theoretical ground. Legitimate fear of religious exaggeration gave birth to a specific comeback of socialist argumentation, although it was dressed in minimalistic and European shoes.

An extra problem is that Europe is not a one-faceted secular area, and a variety of different models of state and church relations are coexisting, including the state church system. In countries where division of Church and state was proclaimed as a constitutional principle, like in Serbia, there is also a variety of forms of this idea, ranging from the strict to the cooperationalist model of separation.[9] Therefore, any claim that secularism is a part of "European values," receives an immediate type of response – yes, but what kind of secularity? Is a secular state the one which mentions religion and God in its constitution, which practices parliamentary prayers, where the state participates in collecting church taxes, where religious oath is an obligatory part of political or judicial process, etc.? And, inevitably, the modern slogan "post-secularism" emerges in this context (although there is generally a very poor understanding of its meaning). Infinite disputes do not seem to announce any solution of the conflict and controversies are alive in public discourse.

IV. ACT FOUR: LEGAL BATTLE

A. Scene One: Religious Instruction in Public Schools

As a consequence of completely different interpretation and understanding of secularism, two particular controversial topics have been challenged at the Constitutional Court of Serbia. The first was about constitutionality of religious instructions in public schools, and the second about categorization of churches and religious communities into three different groups. The first issuehas been resolved, but the second is pending.

The case considering constitutionality of religious instructions in public schools was started in 2003 by two NGOs (Yugoslav Committee of Lawyers for Human Rights from Belgrade and Forum Iuris from Novi Sad). Basic arguments were grounded on principles settled by the International Covenant on Civil and Political Rights and the Declaration of the Rights of the Child, claiming that provisions of the two Laws on Education, by introducing religious instruction in public schools,[10] violate the right to freedom of thought, conscience and religion, and the right not to be compelled to make a statement regarding one's religious conviction (non-statement principle). It was also stated that religious instruction in public schools may not be a mandatory subject; nevertheless, an alternative course was offered as a choice (civic education), and that selection of the one or the other by the pupil (older than 14) or by their parents (younger than 14) endangers the said freedom. It may, as the applicants have claimed, lead to illegitimate discrimination, cause serious unfavorable consequences and infringe on secular society.

In response, the Government of Serbia stressed that religious instruction in public schools is, according to the Laws, set up as an elective subject, along with civic education, and no one is forced to opt for religious instruction; the curriculum, syllabus, and the content for religious instruction is constructed in cooperation of the state, churches, and religious communities and confirmed by the Ministry of Education[11]; opting for one of

9. On different models of Church and state relationships, see, e.g., in G. G. Robbers, *State and Church in the European Union* 324 (1996).

10. *Law on Amending the Law on Elementary School* (Official Gazette of the Republic of Serbia, No. 22/2002 of April 26, 2002) and *Law on Amending the Law on High School* (Official Gazette of the Republic of Serbia, No. 23/2002 of 9 May 2002).

11. In order to avoid sound objections that improper religious instructions in public schools may confront

the two subjects does not necessarily mean statement of one's religious conviction; and the provisions are in accordance with the international conventions.

After the public hearing held by the claimants, representatives of NGOs, and experts from the academic community in June 2003, the Constitutional Court of Serbia brought the decision on 4 November 2003 rejecting the claim to declare that relevant provisions of the two laws are not in accord with the Constitution of the Republic of Serbia.[12] Through this decision, the issue of compatibility of religious instruction in public schools and the principle of secularity was legally saved.

However, after the ruling of the Constitutional Court, due to evident importance of the issue and to constant public controversies, the Government and the Ministry of Education paid considerable attention to the implementation of the law and the organization of religious instruction in public school, to prevent any further possible objections that secularization principle is endangered through the law's implementation.

Particular concern was paid to the activity of the Commission of the Ministry of Religious Affairs for Religious Instruction, which was formed according to the law to follow-up and manage the organization of religious instruction classes. It gives representatives of the State (Ministry of Education and Ministry of Religion) and of the seven traditional religious organizations the assigned right to offer religious instruction in public schools. The Commission revises and approves all the textbooks, which are written by authors from the mentioned confessions. Not a single manual for religious instruction in any religion can be published and enter the circulation without consent of the six other churches and religious communities, as well as of the State representatives. In that way, full consensus considering the content and form of religious instruction in the country has to be achieved between the State and all the seven churches and religious communities, comprehending nearly 95 percent of the total population in Serbia.[13] There is no privilege for the predominant Serbian Orthodox Church in that respect, although basic confessional and religious instruction is a multi-denominational subject. Also, in order to organize religious instruction in accordance with the cooperative and multi-denominational approach, a kind of control is established by a possibility that the school pedagogues and authorized representatives of the religious communities are entitled to visit classes of religious instructions at any time.[14]

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pupils and cause animosities instead of better understanding of different confessions, from the very beginning (2002) a particular body – the Commission of the Ministry of Religious Affairs for Religious Instruction was formed according to Serbian legislation (by a government Decree). It comprehends representatives of the State (Ministry of Education and Ministry of Religion) and of the seven traditional religious organizations with the assigned right to offer religious instruction in public schools.

12. The ruling was published in the Official Gazette of the Republic of Serbia, 119/03 of 4 December 2003.

13. Out of total number of 7,498,001 inhabitants, the last religious picture of Serbia, according to the census of 2002, is:

Orthodox Christians	6,371,584	84.97%
Catholics	410,976	5.48%
Muslims	239,658	3.19%
Protestants	80,837	1.07%
Jews	785	0.01%
Oriental cults	530	0.007%
Other religions	18,768	0.25%
Believers of no confession	437	0.005%
Atheists	40,068	0.53%
Unanswered	197,031	2.62%
Unknown	137,291	1.83%

14. Religious instruction is taught by priests and laypersons who have certain level of education in religion (theological education at university level in secondary schools, theological higher school education in elementary schools), while the Ministries of Education and Religion have organized additional training seminars

Therefore, due to careful organization and constant supervision of religious instruction in public schools, both by the state and by religious organizations, the prevailing public opinion (including that of the civil sector) that opposes the principle of secularity seems not to be as robustly confronted as before. The idea that having proclaimed separation of Church and State, European legal systems regularly do not conceive a vast gap between the two, including hostility and suspicion, but cooperation, slowly prevails in the country. The separation does not mean an impossibility to perform common tasks and functions, and does not assume absolute lack of any relations. It seems that the modern comprehension of religious neutrality of State gradually replaces an echo of the old Marxist mantra that "religion is the opiate of the masses." A certain level of cooperation between the state and religions is necessary, as S. Ferrari points out: "Cooperation is the keynote to today's relationship between Church and State in the European Union and, after the fall of the communist regime, all over Europe."[15] Religious instruction in public schools is a representative example of benevolent neutrality, and it is present in more than 40 European countries, being organized naturally through different models.[16] Shortly, contemporary theory and European legal practice do not envisage separation of Church and State as a mutual ignorance and avoidance of any contact, or even as a kind of confrontation of the two, as it had been the case in former communist states. On the contrary, it comprehends a necessity of their cooperation in issues of common interest, like in Germany.[17] The joint action of State, churches and religious communities is in attendance in different matters all over Europe, including organization, and often financing of religious instruction in State schools. And it has not been perceived as in opposition to a secular state.

The recent development in Serbia (June 2009) is agreement that representatives of seven churches and religious communities have acquired with the Ministry of Education representatives about the curricula in the final classes of elementary and grammar schools. Following suggestions from the Toledo Guiding Principles,[18] but also due to internal inputs, they agreed that starting with the 2009/2010 school year, teaching "about" religion (study of religions) will be a part of the course. In that way, both elements of confessional and cognitive religious contents will be included in the Serbian educational system.

Hopefully, it will altogether diminish vast debates if the very existence of religious instruction in public schools violates in itself the principle of state neutrality and secularism, at least when religious instruction is not a mandatory course. As long as nobody is forced against his will to follow classes in religion and has a choice, the cooperational approach is an exact expression of proper separation of state, churches, and religious communities.

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for those teachers. They get position on annual contractual basis, although the possibility of more permanent position is discussed in the latest draft law. They are selected by the churches and religious communities, and appointed and paid by the Ministry of Education. According to the Ministry of Education data in 2004 there were approximately 1500 teachers altogether (1200 Orthodox, over 200 Catholic, 50 Slovak Evangelical, 40 Muslim, 19 Reformed Church, 5 Evangelical Christian Church of Augsburg Confession, one Jewish). In Belgrade area there are nearly 200 teachers in Serbian Orthodox religious instruction (mainly young persons): only about 10 of them are priests (cca. 5%), while about 90 are women teachers (cca. 45%).

15. S. Ferrari, "The Pattern of Church and State Relations in Western Europe," Fides et Libertas, *The Journal of the International Religious Liberty Association* 59-60 (2001).

16. For more on that, see recent contribution by S. Ferrari," L'enseignement des religions en Europe: un aperçu juridique," in *Des maîtres et des dieux. Ecoles et religions en Europe* 31 (J.-P. Willaime & S. Mathieau eds.) (2005); J.-P. Willaime, "Different Models for Religion and Education in Europe," in *Religion and Education in Europe* 57 (R. Jackson et al. eds.) (2007).

17. See more in "A. Frhr. v. Campenhausen," in *Der heutige Verfassungsstaat und die Religion*. Handbuch des Staatskirchenrechts der Bundesrepublik Deutchland I 47–84 (1994) .

18. *Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools*, OSCE/ODIHR (2007).

B. Scene Two: Classification of Churches and Religious Communities

More complicated is the issue of religious institutions categorization performed in Serbia by the above mentioned Law on Churches and Religious Communities of 2006. The Law recognizes seven traditional churches and religious communities: the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Evangelical Church, the Reformed Christian Church, the Evangelical Christian Church, the Islamic community, and the Jewish community. The 2005 Law on Finance also recognizes only these seven religious groups and grants them tax exemptions. The same case was with the above mentioned laws concerning religious instructions in public schools, providing state funding for the seven religions. It gave pretext for the new case at the Constitutional Court of Serbia, challenging provisions of the Law on Churches and Religious Communities of 2006. The case is still pending. Applicants are three churches (the Christian Baptist Church Belgrade, the Protestant Evangelist Church Belgrade and the Protestant Evangelist Church Leskovac) and two NGOs (Center for Tolerance and Interreligious Relations, Belgrade, and Coalition for a Secular State, also from Belgrade).

The claimants argue that categorization into two groups (traditional churches and religious communities, and confessional religious communities)[19] is discriminatory and unconstitutional, as it violates principle of equality and, in the last consequence, by giving state privileges to the selected religions. Some of the claimants make concrete objections that by mentioned classification the state takes burden of financing religious education in public schools for selected religions, grants them tax exemption, creates differences in the registration procedure, etc., creating different and unequal treatment. Some of them argue that the classification is not only threefold, but that it, in fact, comprises four types of religious organizations (churches, religious communities, confessional communities, and other religious organizations) with different legal status.[20] They consider the following: the notion of "traditional" churches and religious communities is unconstitutional; such notions "introduce state religion or state religions," which violates the secularity principle; the classification is not only unconstitutional, but harmful for the Serbian Orthodox Church as it is placed in the same group with religious organizations which have nothing in common in historical or canonic sense; the law has no preamble, avoiding to define its basic principles (including secularization); Articles 17-25 on registration issues are not in accordance with international principles, as any census or evidence of believers performed by the state violates religious rights and freedom; the norm in Article 24 stating that property of religious association which is deleted from the Register will be treated in accordance with the regulation on citizens' associations is also contested; Article 7 is

19. Art. 10: "Traditional Churches are those which have had a historical continuity within Serbia for many centuries and which have acquired the status of a legal person in accordance with particular acts, that is: the Serbian Orthodox Church, the Roman Catholic Church, the Slovak Evangelical Church (a.c.), the Christian Reformed Church and the Evangelical Christian Church (a.c.). Traditional religious communities are those which had a historical continuity within Serbia for many centuries and which have acquired the status of a legal person in accordance with particular acts, that is: the Islamic Religious Community and the Jewish Religious Community." Art. 11: "Confessional communities are all those Churches and religious communities whose legal position was regulated on the grounds of notification in accordance with the Law on Legal Position of Religious Communities ("The Official Gazette of the Federal National Republic of Yugoslavia," No. 22/1953) and with the Law on Legal Position of Religious Communities ("The Official Gazette of the Socialist Republic of Serbia," No. 44/1977)."

20. The problem arises out of the Art. 4 stating that "Holders of religious freedom according to this Law are traditional Churches and religious communities, confessional communities and other religious organizations (hereinafter: Churches and religious communities)." However, it seems quite clear that the ratio of the norm was not classificatory, but nomotehnical attempt to use notion "churches and religious communities" to denote as a generic term all kinds of religious organizations in the Law.

unconstitutional, as it provides for the state assistance in implementation of legal acts issued by churches and religious communities;[21] it is against the constitution to guarantee to the priests immunity from prosecution for their acts performed during religious services;[22] the provision that the state may finance social rights of the priests[23] is unconstitutional, as it allegedly violates principle of secularization and discriminates other professions, and in particularly the atheists; etc. Argumentation of the claims is not profoundly developed, but generally points to very delicate problems.

Every single contested issue deserves serious attention and elaboration. Nevertheless the variety of subjects, the crucial point of controversy appears to be the position of the "traditional" churches and religious communities and their privileges, particularly the objections on inequality in the registration procedure.

Response by the Government to the Constitutional Court of Serbia is not yet available. However, it is possible to predict that the main line of reasoning will follow what has been offered in different occasions by the state officials or church authorities in public debates, and at round tables or scholarly discussions considering the new Law on Churches and Religious Communities. It will probably comprehend three chief fields: comparative legislation, theoretical and doctrinarian foundations, and case law.

1. Comparative Legislations

The matter of distinction among religions (traditional and others) was raised for the first time in public, as well as at the Constitutional Court of Serbia, in connection with the privileged funding of religious instructions in public schools for traditional religious entities. The objection of secularity was also closely attached in public discourse to that issue. However, it is not only a Serbian matter. Silvio Ferrari has rightly stated that in countries with confessional religious education different models are possible.[24] In some of them, religious instruction is organized and controlled by religious communities charged with the training and selection of educators, the drafting of curricula, and the approval of materials (Austria, Belgium, Cyprus, Spain, Greece, Malta, Poland, Portugal, Czech Republic). In some countries (Hungary, Italy, Latvia, Lithuania, Germany, Finland), state and religious communities cooperate in the abovementioned tasks, usually requiring a certification by the religious communities for religious instruction issues. Serbia evidently belongs to that category.

But, in all those cases a common, general problem appears: "Confessional religious instruction is subject in organizational and economic respect to the state (which remunerates instructors and provides localities and school time). The problem is that this state organization is selective and that only certain religions may be taught. Thus, the question of the selection criteria poses itself."[25] In other words, it seems that it is not illegitimate to comprise in legislation a certain kind of differentiation, at least if it is based

21. "For the enforcement of final decisions and judgments issued by competent bodies of Churches and religious communities the state shall, upon their request, provide appropriate assistance in accordance with law."

22. Art. 8, ¶ 4: "Priests and religious officials shall not be responsible before public authorities for their acts in performing religious services."

23. Art. 29, ¶ 1-2: "With the aim of improving religious freedom, with the consent of Churches and religious communities, funding of health, pension and disability insurance of priests and religious officials, may be provided for in the budget of the Republic of Serbia, in accordance with law. If the funding is provided for in the budget of the Republic of Serbia, the Government shall determine respective amounts for the realization of social rights of priests and religious officials, equally and proportionally to the number of believers of each Church and religious community, according to the latest census conducted in the Republic, in which process the principle of positive discrimination may be applied to Churches and religious communities with a small number of believers."

24. Silvio Ferrari, L'enseignement des religions en Europe: un aperçu juridique, *in Des maîtres et des dieux. Ecoles et religions en Europe* 36 (J.-P. Willaime & S. Mathieau eds.) (2005).

25. *Id*.

upon rational and non-discriminatory criteria, due to the fact that it is evidently not possible to organize the state paid religious instructions for one and all.

However, it is not only a matter of religious instruction in public schools where the traditional religious organizations have a favorable status. The second, more complex field is that of registration. Only traditional religious groups are entitled to the *ex lege* legal status provided in Article 10. The Ministry of Faiths, responsible to keep the Register of churches and religious communities, is supposed to enter them into the Register upon their application without any further examination, so that they acquire legal subjectivity by notification. On the other hand, other religious organizations may acquire their legal personality through the procedure set by the Law (registration system).[26] In that way traditional religions are charged to be privileged at least in the two issues (religious instruction and registration), and the claim of inequality looks very plausible. What answers are to be expected then?

The first argument will probably be that privileged status has likewise been given in comparative legislation to the so-called state or national churches in many EU and other European countries. The state religion system may look like in that respect more discriminatory, although it is usually not the case. As for the criticism on classification into traditional and non-traditional religions in Serbia and its consequence to registration issues,[27] the answer may also be that specific treatment of some churches and religious communities is well known in comparative European legislations on religion, labeling particular religions as traditional, recognized, historical,[28] or similar, and granting them certain privileges.

The Austrian "three tier system" set up by legislations on registration of 1874, 1998 and 2002, distinguishes three different types of religious legal entities.[29] The first, and the

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26. Article 18: "For the entry of Churches and religious organizations into the Register, a notification is filed to the Ministry containing:

1) name of the Church or religious community;

2) address of the seat of the Church or religious community;

3) name, surname and capacity of the person authorized to represent and act on behalf of the Church or religious community.

Religious organizations, excluding those mentioned in Article 10 of this Law, for the entry into the Register need to file an application with the Ministry, containing the following:

1)decision by which the religious organization has been established, with names, surnames, identification document numbers and signatures of founders of at least 0,001% adult citizens of the Republic of Serbia having residence in the Republic of Serbia according to the last official census, or foreign citizens with permanent place of residence in the territory of the Republic of Serbia;

2) statute or another document of religious organization containing: description of organizational structure, governance method, rights and obligations of members, procedure for establishing and terminating an organizational unit, list of organizational units with the capacity of a legal person and other data relevant for the religious organization;

3) presentation of the key elements of the religious teaching, religious ceremonies, religious goals and main activities of the religious organization;

4) data on permanent sources of income of the religious organization."

27. The criticism is coming not only by some NGOs and independent intellectuals, but also from the Venice Commission, expressed in the Comments on the Draft Law on Churches and Religious Communities of the Republic of Serbia (by Belgian expert Louis-Léon Christians) of April 2006, see http://www.venice.coe.int/docs/2006/CDL(2006)030-e.asp. However, the overall tone of the Comments on *Registration and basic rights* is more positive, of course with a number of concerns left ("The legal condition of the Orthodox Church has been revised …. The number of believers is lower than previously …. The general applicability of art. 1, 2, 3 of the new draft has significantly improved the previous one on this topic.").

28. In Hungary, only the four "historical" religious groups (Roman Catholic, Reformed, Lutheran, and Jewish) receive 93 percent of state financial support provided to religious groups. Only those religious organizations also receive tax breaks.

29. More on that, see H. Kalb, R. Potz, & B. Schinkele, *Religionsrecht* 93-135 (2003) , as well as R. Potz, "State and Church in Austria," *State and Church in the European Union* 396-401 (G. Robbers & Baden-Baden eds.) (2005).

most privileged group are "recognized religions," having a public law status as a public corporation ("Körperschaft"). As of 1998,[30] in order to acquire that status, the religious organization must have at least 2 percent of the population (about 16,000 believers), and at least 20 years of existence in the country (at least 10 years of that as a registered confessional community – belonging to the second tier).

There are also three more demands that can be quite voluntarily evaluated by the state: that they use the finances for religious purposes; that they have a positive attitude towards state and society; and that they make no forbidden disturbance of the relationship to other churches. In that way, a very exclusive group of religions was set up, with quite a lot of privileges granted by legislation. The second group of religious entities, introduced by the Law of 1998, are labeled as "confessional communities," having a form of private law entities. They can be registered if they have at least 300 believers of Austrian residence, and they have a limited number of rights and privileges. They have a formal chance to acquire the status of recognized religions, but due to the strict requirements, the list is *de facto* closed. The third group is "religious associations" with no legal recognition and registration, so that they cannot be involved in legal transactions, but they may apply to acquire the status of confessional communities.

The "three tier system" is applied in Romania as well, in accordance with the recent law on religions of 2006.[31] It differentiates recognized religions ("recognized cults"), religious associations with private law status, and religious groups without legal entity position. Recognized religions are provided for by the law itself, while the second category – religious associations – must have at least 300 believers to be registered. In order to climb up to the level of recognized religion, religious association has to perform registered religious activity for at least 12 years in the country, and to have at least 22,000 believers, i.e., 1 percent of the total population. It also means, as in the case of Austria, factual impossibility for religious associations to join the first group.

A specific kind of "three-tier system" is used in Russia. The Law on Freedom of Conscience and Associations of 1997 introduces three categories of religious communities (groups, local organizations, and centralized organizations) with different levels of legal status and privileges. "Religious groups" are not registered and consequently they do not have the legal personality. "Local religious organizations" can be registered as such if they have at least 10 followers, and are either a branch of a "centralized organization" or has existed in the locality as a religious group for at least 15 years. Finally, the top groups are "centralized religious organizations," which can be registered by combining at least three local organizations of the same denomination, resulting in practice with much higher requirement number than the simple mathematics may suggest (30 in theory).

The Czech Republic adopted a new law in 2002,[32] introducing a new system of registration which establishes a "two tier system" (similarly as in Serbia). To be registered in the lower, the first organizational level, religious organization is supposed to have at least 300 Czech residents, if its activity is in compliance with the usual formal limitations and some (rather strict) conditions concerning the public order and security.[33]

The second, privileged organizational level offers to religious organizations a bundle of special rights, including the state funding. But the status may be achieved only if they have been registered at the "first level" for at least ten years, published their annual report for at least ten years, fulfilled their obligations towards the state and others, and have

30. Bundesgesetz über die Rechtspersönlichkeit von religiösen Bekenntnisgemeinschaften, Nr. 19/1998.
31. Law on Religious Freedom and the Common Regime of Religious Communities, Act No. 489/2006.
32. Law on Churches and Religious Societies, Act No. 3/2002.
33. J. R. Tretera, "State and Church in Czech Republic," in *State and Church in the European Union* 46 (G. Robbers & Baden-Baden eds.) (2005).

signatures of at least 1 percent of Czech residents, i.e., at least 10,000 followers.

In the Slovak Republic, according to the 2007 Registration Law, in order to be registered it is necessary to obtain at least signatures of 20,000 members – citizens or permanent residents – who must submit an "honest declaration" attesting to their membership, knowledge of articles of faith and basic tenets of the religion, personal identity numbers and home addresses, and support for the group's registration.[34] The explanatory documents of the law claim that religious minorities who do not satisfy the requirements may register under the law governing citizens associations.[35]

Worth mentioning is also the example of Belgium, where the Government grants special, "recognized" status to Catholicism, Protestantism (including evangelicals and Pentecostals), Judaism, Anglicanism (separately from other Protestant groups), Islam, and Orthodox (Greek and Russian) Christianity. Only representative bodies for these religious groups receive subsidies from the Government. The Government also supports the freedom to participate in secular organizations.[36] Although Belgian law recognizes a theoretical equality between all religions, "one cannot deny that some receive different treatment from others. Several religions have obtained official recognition by, or by virtue of, a law. The main basis for such recognition is the social value of the religion as a service to the population."[37]

Let us finish the overview with a paradigmatically secular European country. It seems evident that even in France, *laicité* (or secularism) does allow for differences in status of religious communities. "Despite the principle of non-recognition of churches, religious groups are subject in French law to some special rules."[38] Religious associations (*associations cultuelles*) are capable of receiving the property of the former public church establishments suppressed in 1905, and have benefited progressively from advantages under tax law. After World War I, a new specific form of religious organization was set forth for the Catholic Church, which could establish Diocesan associations (*associations diocésaines*) under a special set of model provisions. The *Conseil d'État* recognized this special status as being in conformity with French law. In recognition of the new religious groups asking for registration as religious associations, French courts, and the *Conseil d'État* in the first place, have not recognized as "religious" every group which tries to present itself as such, so that possibility to be registered as religious association is quite distinctive.[39] Historical context is definitely very important criteria in categorization and registration of religious groups in France.

Many more different classifications of churches and religious communities are offered in comparative European legislations. Many countries have different requirements for allocating certain privileges or a particular status to specific religious organizations.

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34. Registration of religious groups is not required, but only registered religious groups have the legal right to build places of worship and conduct public worship services and other activities. Registered groups receive government benefits. Along with the dominant Catholic Church, religious instruction in public schools are state paid for other 11 churches and religious communities.

35. However, the nongovernmental organization (NGO) Human Rights Without Frontiers claimed that the act governing registration of citizens associations specifically excludes religious organizations and churches. Additionally, a separate instructional document that the Ministry of Interior issues to potential applicants confirms that it will reject an application from a religious group, http://www.state.gov/g/drl/rls/irf/2008/108471.htm.

36. See http://www.state.gov/g/drl/rls/irf/2008/108437.htm.

37. R. Torfs, "State and Church in Belgium," in *State and Church in the European Union* 9 (G. Robbers ed.) (2005).

38. B. Basdevant-Gaudemet, "State and Church in France,"in *State and Church in the European Union* 162(G. Robbers ed.) (2005).

39. Id.

Therefore, the real issue is not if it is acceptable to lay down differences in principle or not, as it may allegedly violate equality and secularity, but if criteria for the selection are rational, sound, fair, realistic and more or less objective.

Selection criteria for classification of religious organizations come out most sharply in the registration context, and the discrimination issue may be at stake above all at that point. Considering the comparative patterns mentioned above, it seems that the Serbian registration demands (as the only selection criteria) are not more burdensome than in some other EU or other European countries. The registration requirement number of 0.001% is evidently much more liberal. Therefore, the differentiation of traditional churches and religious communities, whose legal status is guaranteed *ex lege*, does not harm, by itself, the right of other religious groups to be registered.[40] Also, it seems clear that the solution set up by Serbian legislation does not establish state churches, and that it does not violate the principles of equality and secularism.

2. Theoretical and Doctrinary Foundation

The issue of equality of religious groups and its violation by ranking or by establishing particular rights for some of them was often elaborated in legal doctrine. The prevailing attitude is that equality of religious organizations does not mean that they are all the same and identical, but that it comprehends adequate exercise of rights guaranteed by legislation. Equal treatment in legal practice and doctrine is not identical treatment, but a more sophisticated treatment in accordance to the specificities of the issues at stake. It seems to be in accord with the ancient legal proverbs of Roman natural philosopher Pliny the Elder that *nihil est tam inaequale, quam aequitas ipsa* – "nothing is so unequal like equality itself." Equality among religious groups therefore means adequate use of all the rights in an equal way, within the limits of common sense and legislation.

Or, to put it in words of Gerhard Robbers:

> Non-discrimination prohibits unequal treatment without valid reasons. Equal treatment does not mean identical treatment. In regard to the constitutional side of religious freedom this is already being expressed in the recognition of the identity of religious constitutions and in the respect for religious diversity. It is the very motto of the Union 'United in Diversity' that coins the understanding of equality and non-discrimination within the Constitution for Europe. It so matches with the common constitutional traditions of the Member States and international instruments. Equality within non-discrimination means to treat equal what is equal and to treat unequal what is unequal according to the amount of inequality. Whenever there are valid reasons the Union can and must distinguish. There is no discrimination when there is a valid reason for different treatment.[41]

A few other important contributions by German authors claim that parity and equality guaranteed by constitutional and legislative norms does not mean absolutely identical position in accomplishment of religious rights.[42] "The idea of equal rights makes possible

40. Of course, important issue is implementation of the Law. After the Law was passed, the Ministry of Religions has refused to register some religious groups (Jehovah's Witnesses, Montenegrin Orthodox Church and a few others), while the Serbian Baptist Union has started a case at the Supreme Court as they decided not to apply for registration, but to challenge the law. However, possible difficulties in application of the Law do not justify the claim that the norm granting special position to traditional religious entities is unconstitutional.

41. G. Robbers," Living Values: The Constitution for Europe and the Law on Religion," *in Religion and society: emerging questions* 19-32 (2005).

42. M. Heckel, "Die religioinsrechtliche Parität," *Handbuch des Staatskirchenrechts der Bundesrepublik*

a system of adequate attribution of positions. Equality does not mean identity, but adequacy, appropriate rights and positions. From the perspective of equality differences are possible as long as they are legitimate. Differences have to be based on legitimate reasons." And, also: "To safeguard religious liberty, the correct paradigm is equal rights, not identical rights. The paradigm of identical rights cannot appreciate the societal function of a religion, its historical impact, or its cultural background. Identical rights would preclude a multitude of manifestations of positive religious freedom. For instance, if an identical right to sit on youth protection boards was granted to each and every religious denomination, any utility of these boards would be crushed by their enormity."[43]

As long as other churches and religious communities may enjoy full religious freedom without any limitations, the very existence of special status guaranteed to traditional religious groups does not necessarily cause problems for minority religions. Finally, as to the claim that the very use and the very notion of traditional churches and religious communities is discriminatory by itself, and that it leads to violation of secularity principle, the General Comment No. 22, paragraph 9 to Article 18 of the International Covenant on Civil and Political Rights issued on 30 July 1993 could be quoted as a guideline: "The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including Articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers."[44]

3. Case Law

At the national level, an important argument will probably be that the Constitutional Court of Serbia has already decided in 2003 that selection of seven traditional churches and religious communities to have the state paid religious instruction in public schools is not discriminatory and does not violate the principle of equality of religious communities.[45] It was stressed in the decision that contested provisions do not deprive any of the religious communities to organize religious instructions on their own, but they also do not impose burden to the state to finance religious instruction for all and every religious community. Although the ruling was issued in the case concerning religious instructions context, the Constitutional Court has clearly stated that designation of seven religious organizations is not to be perceived as discriminatory and unconstitutional. Therefeore, the *res judicata* objection in the actual case may become a very powerful strategy.[46] At the international level, distinction between different religious groups and their different treatment is not prohibited if it is well founded, as stated recently in the International Court of Human Rights judgment:

Deutchland, I, 589-622 (1994); "Das Gleichbehanlungsgebot im Hinblick auf die Religion," *Handbuch des Staatskirchenrechts der Bundesrepublik Deutchland*, I, 623-650 (1994).

43. G. Robbers, *Religious Freedom in Germany*, 2001 *BYU L. Rev*. 666. In the same time, "it is absurd to suggest that formal equality means actual equality. Similarly, the fact that the state does not officially prefer one particular religion over another (and underlines this with a myriad of doctrines, decisions, and rules) does not mean that there is no substantive preference." M. Davies, "Pluralism in Law and Religion," *Law and Religion in Theoretical and Historical Context* 79 (P. Cane et al. eds.) (2008).

44. General Comment No. 22: The right to freedom of thought, conscience and religion (art. 18), 30/07/93.

45. Decision of the Constitutional Court of Serbia on constitutionality of the *Law on amending the Law on Elementary School* (Official Gazette of the Republic of Serbia, No. 22/2002 of 26 April 2002) and *Law on amending the Law on High School* (Official Gazette of the Republic of Serbia, No. 23/2002 of 9 May 2002), Official Gazette of the Republic of Serbia, 119/03 of 4 December 2003, 15.

46. On that point, see more S. Avramović, *Constitutionality of Religious Instructions in Public Schools* – res judicata, *Annals of the Faculty of Law in Belgrade* 181–87(2007).

> 96. The Court reiterates that Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of that Article (see "*Case relating to certain aspects of the laws on the use of languages in education in Belgium*" (merits), judgment of 23 July 1968, Series A no. 6, § 10, and *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV). A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Van Raalte v. the Netherlands*, judgment of 21 February 1997, *Reports* 1997-I, § 39).[47]

In other words, any kind of different treatment is not necessarily considered to be discriminatory, if it is based upon objective and reasonable justification. In search for criteria that are in compliance with that logic, the Serbian legislation has avoided those which were often utilized in comparative European legislation, such as long presence (how long?) or number of followers (how high?).

In granting "traditional" status to some churches and religious communities, the Serbian legislature has leaned upon more or less objective and reasonable criterion. It is connected to the legal status of religious organizations and legal situation before the World War II, which was violently changed during the communist regime. Allegedly, a kind of *restitutio in integrum* principle was applied, being based upon idea of restoration of the status which was historically acquired by religious groups (including the right to the state paid religious instruction in public schools), having been lost due to communist deprivation. Restitution of the lost rights to religious organizations is considered to be at the same footing as the right to restitution of property through denationalization of assets.[48] Only those religious groups who have been deprived of some rights are eligible to ask for what has been taken from them. This is why every single church and religious community to whom the law grants position of "traditional" one, is mentioned in a separate article, with precise reference to the previous legislation having been devoted to every one of them.[49] As some religious groups have objected or have pretended to be

47. Religionsgemeinschaft der Zeugen Jehovas and others v. Austria, Application no. 40825/98, judgment of 31 July 2008.

48. Before the Second World War the mentioned seven churches and religious communities had, according to pre-war legislation, *ex lege* legal personality, as well as the right to state paid religious instruction. Those criteria may seem more objective and reasonable than quite voluntary ones like "long-lasting" presence or number of followers.

49. Art. 11 regulates the *Serbian Orthodox Church* position as following: "The continuity of legal personality acquired by virtue of the Document on Spiritual Authority (Decree of the National Assembly of the Principality of Serbia of May 21, 1836) and of the Law on the Serbian Orthodox Church ("The Official Gazette of the Kingdom of Yugoslavia," No. 269/1929) is recognized to the Serbian Orthodox Church. The Serbian Orthodox Church has had an exceptional historical, state-building and civilization role in forming, preserving and developing the identity of the Serbian nation." Art. 12 takes into account the *Roman Catholic Church*: "The continuity of legal personality acquired by virtue of the Law on the Concordat between the Kingdom of Serbia and the Holy See (Decision of the National Assembly of the Kingdom of Serbia of 16 July 1914, "The Serbian Gazette," No. 199/1914) is recognized to the Roman Catholic Church." Art. 13 is about the *Slovak Evangelical Church (a.c.), the Reformed Christian Church*, and *the Evangelical Christian Church (a.c.)*: "The continuity of legal personality acquired by virtue of the Law on Evangelist-Christian Churches and Reformist Christian Church of the Kingdom of Yugoslavia ("The Official Gazette of the Kingdom of Yugoslavia," No. 95/1930) is

included into the category of traditional ones, during the drafting process they were all called upon to submit the proof whether their position was regulated before World War II by a separate law or not.

Of course, that kind of historical reasoning may also be contested, but in comparison with criteria applied in some other European legislations, it gives more solid ground for the conclusion that the criterion is more objective and that the norm is not discriminatory. As Ferrari has rightly stated, any criteria for selection of religious groups may cause an objection.[50] It may only be disputable if they are set forth clearly, being firmly and appropriately established in reasonable justification, enabling in the same time all other religious communities to enjoy the same rights. The only decisive point is whether all religious groups are free to exercise all the rights and freedoms without limitation and obstacles. Different legislative position of particular traditional churches and religious communities will not in that case result in discrimination.

V. ACT FIVE: EXPECTED EPILOGUE

Although solutions in Serbian legislation have not received proper attention in comparative literature, there are two main streams in its evaluation by the scholarly public. At one hand there is a sharp criticism, particularly on registration issues, expressed even before the draft law was adopted. The text of Austrian lawyer Reinhard Kohlhofer has a significant title: "Away with legal discrimination – Serbia shouldn't follow Austria."[51] On the other hand, the author responsible for the analysis of the Serbian legislation within the REVACERN project, Annamária Csiziné Schlosser, is of opinion that in the Serbian legislation influence of the Austrian model in registration issues is weaker than in the case of the new laws in Romania and the Czech Republic.[52] Also, she asserts that "If we consider the two main requirements of the Venice Commission against registration systems, i.e. 'The registration system should not become a requirement for basic rights of religious freedom and the registration system has to be non discriminatory' - the procedural rules of the law on providing legal status law seems to fulfill them." Finally, according to that evaluation, "The new law is a great result of the Serbian legislation despite the critics, and it is also a great step towards legal security and the equality of churches." But, a very important warning follows: "From the aspect of human rights, the application of the law and the further laws on churches cause and will probably cause more difficulties than the new law itself."[53]

Nevertheless, the issue of traditional churches and religious communities is still disputable and open. The expected ruling of the Constitutional Court of Serbia may fundamentally change achieved results. By eventual acceptance of the claim that the

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recognized to the Slovak Evangelical Church (a.c.), Reformed Christian Church and Evangelical Christian Church (a.c.)." Art. 14 regulates position of the *Jewish Community*: "The continuity of legal personality acquired by virtue of the Law on Religious Community of Jews in the Kingdom of Yugoslavia ("The Official Gazette of the Kingdom of Yugoslavia," No. 301/1929) is recognized to the Jewish Community." Finally, Art. 15 defines the status of the *Islamic Community*: "The continuity of legal personality acquired by virtue of the Law on Islamic Religious Community of the Kingdom of Yugoslavia ("The Official Gazette of the Kingdom of Yugoslavia," No. 29/1930) is recognized to the Islamic Community."

50. Ferrari, supra note 24

51. R. Kohlhofer, "Commentary: Away with Legal Discrimination - Serbia Shouldn't Follow Austria," Forum 18 News Service: http://www.forum18.org/Archive.php?article_id=403 (2004-09-02).

52. A. Csiziné Schlosser, "Legal Status of Churches and Religious Communities in Serbia according to the New Law (with a comparative analysis)," REVACERN - Religions And Values: Central And Eastern European Research Network 2007-2009, http://www.revacern.eu/exchange-programme/ep-2-final/EP2%20%20schlosser.pdf.

53. Id. at 12.

distinction among traditional and other churches is unconstitutional and that it violates principles of equality and secularization, the whole concept of the law would collapse, including the established practice of religious instruction in public schools for traditional religions, introduced by the democratic Serbian government led by assassinated prime minister Djindjic. It would by all means provoke a harsh reaction by majority of the voters. Reality of traditional religions, without any legislative preference for the dominant Serbian Orthodox Church among them seven (although it encompasses about 85 percent of the total population), and particularly performance of the state paid religious instruction in public school for traditional religions, is strongly planted in the social perception and public discourse as a legitimate one.

After the decades of religious restriction, revival and reactions to overstated expression of religion, there is a hope that the ruling of the Constitutional Court of Serbia has a chance to promote a new phase – the one of religious tolerance, and a new way in conceptualizing secularism in Serbia. It would include prevention of any kind of religious discrimination and full respect for religious freedom, but also a more modern understanding of secularity principle, fostering legitimate participation of churches and religious communities in public life, with appreciation for the historical context, social peculiarities, and realities in the country.

MICHAELA MORAVČÍKOVÁ

Religion, Law, and Secular Principles in the Slovak Republic

I. THE SLOVAK REPUBLIC
BRIEF RELIGIOUS DEMOGRAPHIC CHARACTERISTICS

The Slovak Republic is a young, independent state that came into existence on 1 January1993 after a peaceful division of the Czech and Slovak Federative Republic. Its total number of inhabitants is 5,379,445. In the most recent census, taken in 2001,[1] 84.1 percent of the resident population professed allegiance to a state-recognized church or religious society: 68.9 percent of the population declared their affiliation to the Roman Catholic Church, 4.1 percent to the Byzantine Catholic Church (Greek Catholics), 6.9 percent to the Evangelical (Lutheran) Church of the Augsburg Confession, 2.0 percent to the Reformed Christian Church, and 0.9 percent to the Orthodox Church.

Numerical representation in other small churches could be expressed in hundredths of percents.[2] 12.96 percent of the population declared themselves as being "without confession," and 2.98 percent of respondents did not answer the religious affiliation question at all. 6,294 persons[3] claimed membership in churches and religious societies not recognized by the state; from this number,[4] 1,212 citizens declared their affiliation to Islam, which statistically represents 0.022 percent of the population of the Slovak Republic. The representatives of the Islamic organizations in Slovakia estimate the number of Muslims at 5,000, among them being about 150[5] converts of Slovak nationality, the rest coming from other countries.[6]

II. THEORETICAL AND SCHOLARLY CONTEXT

Constitutional state-church relations are part of European history, either maintained or abolished,[7] and this is also true for Slovakia. During the "Velvet Revolution" of 1989, the demonstrating people in the streets demanded, *inter alia*, the separation of church and state. The point was, first of all, to try to eliminate the state supervision over the churches that had been stipulated by law and carefully carried out in practice during the era of the Communist dictatorship. After the state supervision over churches, including *numerous clauses* for the clergy, state consent to the execution of pastoral service, total economical subordination of churches etc., had been abolished, a debate on the position of religion in

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1. It took place according the Act 165/1998 Z.z. on Census of Population, Houses and Apartments in 2001. "Zb." or since 1993 "Z.z." are abbreviations for "Zbierka zákonov", i.e., Collection of Acts.

2. From the total number of inhabitants of the Slovak Republic, 5,379,445, there are also 7,347 Methodists, about 20,630 Jehovah´s Witnesses, 3,562 Baptists, 3,217 members of the Brethren Church, 3,429 Seventh Day Adventists, 3,905 members of the Apostolic Church, 1,733 Old Catholics, 6,519 members of the Christian Congregations, 1,696 Hussites, and 2,310 Jews.

3. It is 0.11 percent from the total number of all inhabitants/believers.

4. Cf. Moravčíková, M., Cipár, M. *Religiozita na Slovensku II*. Bratislava: Ústav pre vzťahy štátu a cirkví,

2003, 110.

5. Čikeš, R. Registrácia cirkví a náboženských spoločností verzus náboženská sloboda. In Moravčíková, M., Lojda, M. (eds.) *Islam v Európe*. Bratislava: Ústav pre vzťahy štátu a cirkví, 2005, 15.

6. Cf. Moravčíková, M. Religious Education and Denominational Schools in the Slovak Republic. In ASLAN, Ednan.

(Hg.) *Islamische Erziehung in Europa/ Islamic Education in Europe*. Wien-Köln-Weimar: Böhlau Verlag, 2009. p. 457-473.

7. Davie, G. *Vyjímečný případ Evropa. Podoby víry v dnešním světe*. Brno: Centrum pro studium demokracie a kultury, 2009, 15.

society began. This debate has been in progress up to the present, however, mainly in the sphere of practical policy and in the media. The legal and political theory is more or less limited to the description and categorization of state-church relations in Slovakia in an international context. The persisting economical connection to the state budget, the contractual state-church relations, and distinguishing between registered and non-registered churches have been sporadically evaluated as a regulation of religious life and anachronistic state policy, primarily by sociologists. E.G. Tížik, when relating to the latest development in Slovakia, speaks not only about desecularization, but also *delaicization*.[8] Also in Slovakia, like in other spheres of modern world, we can perceive the growth of the political impact of religion and the formation of public religion. Reflection of these processes is influenced to a large degree by the Communist "heritage" and the hostile attitude of some scientists, to some degree the non-clarification of terms, mainly mistaking of the state neutrality for state atheism, as well as romantic conceptions of one nation and one religion.

III. Constitutional Context

Religion has always played an important role on the territory of the contemporary Slovak Republic. Christianity used to be a welding element in Central Europe and contributed significantly to the spiritual shaping of this geographical area of unusual diversity, in spite of many reprisals, which its (not only) institutionalised forms had gradually experienced in various state formations. The fundamentals of the Slovak law defining the relations of the state towards religion had been laid many centuries ago. Worth mentioning is Methodius's *Nomocanon*, dating back to the period of the Great Moravian Empire, or *Corpus Iuris Hungarici* from the era of the Kingdom of Hungary, which also comprised *Corpus Iuris Canonici*, applicable both to the state and church; the practice and laws of the Austrian Monarchy must also be considered.

In the 18th century, the ruling Habsburg Dynasty started to exercise its dynastic absolutism as enlightened absolutism. This was also manifested by the change in its approach to the state Catholic Church. The earlier partnership was replaced by absolutist interferences of the State in the life of the Church. Maria Theresa introduced state supervision over the administration of church and monastic property. Revenue of church foundations was predisposed to the benefit of the army and public schools. Joseph II sought to affect the church life as well, and he even issued regulations concerning liturgy matters. He abolished contemplative monasteries and direct effect of canonical regulations on the secular sphere.

The Patents of Tolerance by Joseph II were a notable achievement. They, however, enabled only a partial and limited religious tolerance and preserved the privileged status of the Catholic Church. The Patent of Tolerance of 1781 granted free exercise of religion to the Evangelical Church of the Augsburg and Helvetic Confessions, the Jewish Religious Community and the Orthodox Church.

The emancipation of individual churches was accomplished between 1848 and 1918. The model of absolutist state guardianship of churches was substituted by a system of parity and equality. The Constitution of 1848 guaranteed the freedom of religion and conscience and the autonomy in church and property matters. While, up to then, official registers had been run by Catholic parish offices only, new decrees of the Ministry of Interior enabled non-Catholic churches to also run registers. The process of emancipating the Catholic Church and the Protestant churches began. The process included the Concordat of 1855, by which the Catholic Church gained considerable autonomy in

8. Cf. TÍŽIK, M. Vplyv právnej regulácie na rozvoj náboženského života v SR. In *Sociológia*. No 1/2005, XXXVII, 59- 89.

dealing with its own issues, as manifested for example by the sovereignty of the Catholic Church over matrimonial matters of its members. In 1870, the Concordat was, however, denounced by the Austrian State as result of the acceptance of the dogma of Papal infallibility by the First Vatican Council.

In 1874, the Government adopted the law on regulation of external relations of the Catholic Church, which re-organized the relations between the Apostolic See and the Austrian Monarchy. The parity relation between the Catholic Church and the State was generally adopted, and the same stand was also taken towards Non-Catholics. Full emancipation and parity of the Protestant evangelical churches followed up the Vienna discussions in 1849–59. Discussions resulted in the so-called "Protestant" Imperial Patent of 1861. The right to receive state subsidies was one of the attributes of this equality. In 1861, temporary constitutions of Protestant churches were endorsed.[9] Orthodox Christians became emancipated in Non-Hungarian countries by the 1781 Tolerance Patent.[10] Gradual emancipation of the Jewish Religious Community was completed by the adoption of the National Basic Law of 1867. The National Law of 1890 "on external relations of the Israelite Religious Community" is also of importance, since it represented a fundamental legal regulation of this community for several decades.[11]

The Austrian Basic Law of 1867 anchored many modern guarantees of freedom of religion and conscience. It also regulated the exercise of religion by churches and religious societies, which were not legally recognized. The Interconfessional Law of 1868 renewed the validity of civil law in matrimonial matters and regulated the relation between churches and schools. This law also regulated the rules of conversion from one church to another and the religious affiliation of children. Every citizen older than fourteen years was granted religious freedom. The Law of 1870 imposed the obligation to run official registers on political bodies and regulated the status of citizens without religious affiliation.

An important milestone was the 1874 Law on Contributions to the Religious Fund and the so-called *congrua laws*. Since the land religious funds were not sufficient to provide priests with the *congrua* (maintenance), according to this law, these funds were subsidised partially from state and partially from church resources. This law was basically in force during the whole period of the Austro-Hungarian Monarchy, and Czechoslovakia, as a successor state, adopted this law too. In 1874, the law regulating the recognition of churches and religious societies was adopted.

The establishment of the independent Czechoslovak Republic was accompanied with dynamic – even dramatic – state-church relations; however, in principle the legal status of churches and religious societies was not affected. The initial scepticism, mainly on the side of the Catholic Church, was followed by Modus Vivendi signed with the Holy See in 1928 that in fact preserved the previous state. As for the financing of churches, principles of the period of the Austrian Monarchy were valid, and amended several times. The Bull of Pope Pius XI is noteworthy for defining the borders of the Catholic dioceses in the former Czechoslovakia so as to align them with national borders and to ensure that no part of the territory falls under the religious jurisdiction outside the territory of the Republic. After the Second World War and the re-establishment[12] of the Czechoslovak Republic, the course of events headed towards suppression of the natural influence of

9. Augsburg and Helvetic Confessions

10. In Kingdom of Hungary, they were recognized in the past already, and that in different ways: In the Directive of 1864 they were called Greek-Eastern Churches.

11. Tretera, J.R., Přibyl, S. *Konfesní právo a církevní právo*. Praha: Nakl. J. Krigl, 1997. http//www.prf.cuni.cz/spolky

12. The so-called "War Slovak State" (1939-1945) was established on 14 March 1939 as Hitler's satellite. In the Preamble of its Constitution it defined itself as a Christian state.

churches in the public life, and the whole process culminated in *coup d'état* by the Communist Party in 1948. Hence, the current development of state-church relations was forcibly terminated, and it was restored only after November 1989. Under the communist rule, the religious life – as well as churches themselves – was forcibly and systematically suppressed. This corresponded with the status of churches and religious societies, which existed as subordinate subjects without possibility to freely govern their cult or social and charitable activities. On the other hand, churches at least became a limited area of activities independent of communist power until November 1989.[13]

During the existence of the Czechoslovak Socialist Republic in the years 1948–89, two constitutions were in force. The first was the Constitution of ČSSR from May 9, 1948,[14] and the second was the 1960 Constitution of ČSSR,[15] which was significantly amended by the constitutional Act 143/1968 Zb. on the Czechoslovak Federation. The first one concentrated all the features and contradictions of the period of its origin. First of all, it was due to the press of the Communist Party of Czechoslovakia for Marx-Leninist orientation, thus formally following in the 1920 Constitution of the Czechoslovak Republic in several matters. Particular institutes of the Constitution were, however, assigned class contents. Several postulates of democracy expressed in the Constitution were, however, often violated or not respected in a particular social and political practice. The freedom of conscience and belief was proclaimed in Articles 15-17, and the freedom of assembly and association in Article 24. Churches and religious societies have not been mentioned in the Constitution explicitly.

In the Constitution approved on 11 July 1960, the postulates of Marx-Leninism on state and law were already manifested in all its provisions in full measure. It declaimed the victory of Socialism and the fulfilment of People´s Democracy. It stipulated the principle of the leading role of the Communist Party of Czechoslovakia. Thus, the law order also protected *de iure* the state power from the citizens and not *vice versa*. The religious societies were related only by Article 32, which already in its first section provides that "freedom of religion is granted," and in the second section declares that "religious faith or belief cannot be the ground for anybody to refuse his civil duty imposed by the law."[16] The content of the second section referred first of all to the impossibility to refuse the compulsory military service and to replace it by a civilian service.

The 1960 Constitution was radically changed after 1989; it had been in force until the common state ceased to exist on 31 December 1992. On 9 January 1991, the Federal Parliament passed the constitutional Act 23/1991 Zb., which thus declared the Decree of Fundamental Rights and Freedoms a constitutional Law of the Federal Assembly of the Czech and Slovak Federative Republic.[17]

The 1992 Constitution of the Slovak Republic[18] follows the ideas and the spirit of these documents: the Universal Declaration of Human Rights from 10 December 1948, the Charter of Fundamental Rights and Freedoms fifty-nine principles and agreements on the integration process in Europe, principles of cooperation by the spirit of the equality of states, etc. The 1992 Constitution of the Slovak Republic acknowledges in its preamble the spiritual heritage of Cyril and Methodius and the historical legacy of the Great Moravian Empire. In Chapter One of the Constitution of the Slovak Republic (General

13. Moravčíková, M., Cipár, M. *Cisárovo cisárovi. Ekonomické zabezpečenie cirkví a náboženských spoločností.* Bratislava: Ústav pre vzťahy štátu a cirkví, 2001, 57ff.

14. No. 150/1948 Zb.

15. The Constitutional Act 100/1960 Zb. – the Constitution of the ČSSR as subsequently amended.

16. Cf. TRETERA, J. R. *Stát a církve v České republice.* Kostelní Vydří: Karmelitánské nakladatelství, 2002. 50-52.

17. POSLUCH, M., CIBULKA, L. *Štátne právo Slovenskej republiky*. Bratislava: Manz, 1994, 34ff.

18. No. 460/1992 Zb. as implemented in Constitutional Act 244/1998 Z. z., Constitutional Act 9/1999 Z. z., Constitutional Act 90/2001 Z. z., Constitutional Act 140/2004 Z. z., Constitutional Act 323/2004 Z. z.

Provisions) in Article 1 (1) the basic principle is to be found: "The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound by any ideology or religion."[19] Article 24 of the Constitution guarantees freedom of thought, conscience, religion, and faith. This right includes the right to change religion or faith. Everybody has the right to refrain from a religious affiliation. Every person has the right to express freely his or her own religious conviction or faith, either alone or in association with others, privately or publicly, by worship, religious services and ceremonies, or participate in religious instruction.

1. Freedom of thought, conscience, religion and faith shall be guaranteed. This right shall include the right to change religion or faith and the right to refrain from a religious affiliation. Every person shall be entitled to express his or her opinion publicly.
2. Every person shall have the right to express freely his or her own religious conviction or faith alone or in association with others, privately or publicly, by worship, religious services or ceremonies and participation in religious instruction.
3. Churches and ecclesiastical communities shall administer their own affairs. All ecclesiastic authorities and appointments, religious instruction, establishment of religious orders and other religious institutions shall be separate from the State authorities.
4. The rights under sections (1) to (3) of this Article can be legally restricted only as a measure taken in a democratic society for the protection of the public order, health, morality, and rights and freedoms of other people.[20]

Article 24 is part of Chapter Two of the Constitution of the Slovak Republic, and it regulates the fundamental rights and freedoms. It contains general provisions, fundamental human rights and freedoms, political rights, rights of national minorities and ethnical groups, economical, social and cultural rights, right to environmental protection and cultural heritage, right to judicial, and other protection. The fundamental rights and freedoms create the most extensive part of the Constitution of the Slovak Republic, which follows from the necessity to enshrine the regulation of these rights in the Constitution directly, and is one of the most characteristic features of constitutions of democratic countries.

IV. Legal Context

Principal questions of status and activities of churches and religious societies in the Slovak Republic are regulated by Act 308/1991 Zb. on the freedom of belief and the position of churches and religious societies as subsequently amended. The issue of financing churches and religious societies has been regulated by Act 218/1949 Zb. on the economic security of churches and religious societies by the State as amended by the Act 16/1991.[21]

The Act 308/1991 Zb. on the freedom of belief and the position of churches and religious societies, as amended by the Act 394/2000 Z. z. and the Act 201/2007,[22] assumes the provisions of Article 24 of the Constitution and specifies them. It stipulates

19. See http://www-8.vlada.gov.sk/index.php?ID=1378

20. See http://www-8.vlada.gov.sk/index.php?ID=1379

21. Cf. Moravčíková, M., Cipár, M. *Cisárovi cisárovo. Ekonomické zabezpečenie cirkví a náboženských spoločností.* Bratislava: ÚVŠC, 2001, 57-81.

22. The Act 201 from 29 March 2007, amending and supplementing the Act 308/1991 Zb. on the freedom of belief and the position of churches and religious societies as amended by the Act 394/2000 Z. z.

that confession of religious belief must not be the reason for restriction of constitutionally guaranteed rights and freedoms of citizens, first of all of the right to education, to work and free choice of employment and access to information. It also stipulates that the believer has the right to celebrate festivals and services according to the requirements of his or her own religious belief, in accordance with generally binding legal rules.

The Act 308/1991 Zb. on the freedom of belief and the position of churches and religious societies considers a voluntary association of persons of the same belief, in an organization with own structure, bodies, internal regulations and services, to be a church or religious society. Churches and religious societies are legal entities and can associate freely. They may create communities, religious orders, associations, and similar institutions.

Churches and religious societies are special types of legal entities taking advantage of a special status (according to Article 24 of the Constitution) and also other rights awarded to legal entities in general. It is a case particularly of inviolability of privacy, of protection of property, name and inheritance, of inviolability of letters, freedom of movement and residence, freedom of expression and right to information, right to petition, right to assemble and associate, the right to judicial and legal protection etc.

According to the Competency Law regulation, the central state authority in the matters of churches and religious societies is the Ministry of Culture of the Slovak Republic. The State neither interferes in church activities, nor regulates them methodically. The Ministry of Culture, particularly via its Church Department passes generally binding regulations on the position and activities of churches and religious societies, carries out tasks connected with the preparation of the draft budget for churches and religious societies within the State Budget, coordinates the proceeding of churches and religious societies in settling financial relations with the State Budget, allots financial resources of the State Budget that are intended for churches and religious societies and the charity, and oversees their effective and economical use. It also finances geodetical work related to the fulfilment of the law on the reduction of some property damages inflicted on churches and religious societies, carries out church registration and keeps files of legal entities deriving their legal personality from the registered churches.

The Institute for State-Church Relations, a state organization within the establishing authority of the Ministry of Culture of the SR, deals, first of all, with analyses of the church policy, traditional and new religiosity, the issue of religious freedom, statistical survey, and other research subjects related to religiosity and church life.

V. Bilateral Formal Relations between State and Churches and Religious Societies

The possibility to conclude agreements with the State was granted to churches and religious societies by the Act 394/2000 Z.z. amending the Act 308/1991 Zb. on the freedom of belief and the position of churches and religious societies. The Catholic Church and eleven other churches made use of this possibility.

An important highlight in the Slovak church policy and the international law was the signing of the Basic Treaty between the Holy See and the Slovak Republic.[23] The National Council (the Parliament) granted its consent to the Basic Treaty on 30 November 2000 (Resolution of the National Council of the Slovak Republic no. 1159). It is a political, international treaty of presidential type. As for the content, it comprehensively regulates the relations between Slovakia and the Holy See. It was signed on 24 November 2000 and came into force upon the exchange of ratification instruments in the Vatican on 18 December 2000.

23. Published on 23 August 2001, under no. 326/2001 Z. z. (part 136).

On 11 April 2002 the President signed the Agreement between the Slovak Republic and the Registered Churches and Religious Societies in the Slovak Republic no. 250/2002 Z. z., which had been granted prior consent by the Government and the National Council. Although of different nature, the wording of this Agreement is almost identical with the Basic Treaty between the Slovak Republic and the Holy See.

The Basic Concordat between the Slovak Republic and the Holy See has settled, inter alia, that the parties would conclude four other partial treaties.

The first one, the Treaty between the Slovak Republic and the Holy See on Pastoral Care for Catholic Believers in the Armed Forces and Armed Units of the Slovak Republic no. 648/2002 Z. z., came into force on 27 November 2002.[24] On the basis of this Treaty, the Ordinariate of Armed Forces and Armed Units was established, having the status of a diocese, and the Ordinary was appointed, having the status of a bishop.[25] The Treaty regulates the pastoral care for Catholics in Armed Forces, Police Corps, in the Unit of Penitentiary Guard and Railway Guards, and for persons deprived of freedom by a decision of a State authority. Similar is the Agreement between the Slovak Republic and Registered Churches and Religious Societies on Pastoral Care for Believers in Armed Forces and Armed Units of the Slovak Republic no. 270/2005 Z. z. The Central of the Ecumenical Pastoral Care in the Armed Forces and Armed Units of the Slovak Republic was officially opened by a ceremonial service on 10 March 2007. It is the supreme body of the second structure of pastoral care in the armed forces and armed units and a parallel structure of the Ordinariate.

Another important source of confessional law is the Treaty between the Slovak Republic and the Holy See on Catholic Upbringing and Education no. 394/2004 Z. z. The similar Agreement between the Slovak Republic and Registered Churches and Religious Societies on Religious Upbringing and Education no. 395/2004 Z. z. was adopted by the Slovak Government by the resolution no. 794 on 21 August 2003 and subsequently by the National Council. The wording of this Agreement considers the specifics of the eleven registered churches and religious societies and ensures their statuses equal of those of the Roman Catholic Church and the Greek Catholic Church in establishing church schools and in providing religious education.[26]

The Basic Treaty between the Slovak Republic and the Holy See has anticipated the making of two further, so called partial treaties, and we can presume that also the other registered churches would be interested in making analogous agreements. It´s a case of the right to exercise objections in conscience according to the doctrinal and ethical principles of the Catholic Church, and the financial support of the Catholic Church, as anticipated by articles 7 and 20 of the Basic Treaty between the SR and the Holy See.[27]

VI. Legal Regulation of Religion as a Social Phenomenon

The State recognizes only churches and religious societies that are registered. According to the Act 308/1991 Zb. as subsequently amended, the registration body is the Ministry of Culture of the Slovak Republic. The preparatory body of a church or religious society may apply for registration if it can prove that at least 20,000 adult persons – citizens of the SR who are domiciled within the territory of the Slovak Republic – claim

24. The President of the Slovak Republic signed the Concordat on 11 October 2002, and the instruments of ratification were exchanged in the Vatican on 28 October 2002.

25. The Ordinariate has both canonical and state legal subjectivity. The Ordinary is appointed by the Holy See, he is member of the Bishops´ Conference of Slovakia and organisationally is included in the Armed Forces of the Slovak Republic.

26. Čeplíková, M. *Štát, cirkvi a právo na Slovensku. História a súčasnosť.* Košice: UPJŠ, 2005, 139.

27. Cf. *Moravčíková, M., Riobó Serván, A.* Acuerdos entre la República Eslovaca y la Santa Sede. In Revista General de Derecho Canónico y Derecho Eclesiástico del Estado 21, 2009.

membership of the church or religious society.[28] The application for registration must also contain basic documents of the church or religious society to be founded, as well as affirmations of at least 20,000 adult members, who are domiciled within the territory of the SR and are citizens of the Slovak Republic, that they claim allegiance to the church or religious society, support the proposal for its registration, are its members, know its basic articles of faith and its doctrine and are conscious of rights and freedoms following from the church or religious community membership.[29]

In the period between coming into force of the Act 308/1991 Zb. on the freedom of belief and the position of churches and religious societies, and coming into force of the Act 201/2007 Z.z., i.e. until 1 May 2007, only those religious societies were registered that reached the stipulated membership minimum of 20,000. It was expressed by signatures on a petition attached to the basic documents of the church to be founded, which could be signed – according to the then valid legislation, when the details of the registration of churches and religious societies were regulated by the Act 192/ 1992 Zb. on the registration of churches and religious societies – not only by members of the church to be grounded, but also by supporters of its registration.[30] In this way, registration was achieved by the Religious Society of Jehovah's Witnesses (registered in 1993), the Church of Jesus Christ of the Latter-day Saints (registered in 2006), the Bahá´í Community in the Slovak Republic (registered in 2007).[31] Besides, in 2001 the New Apostolic Church was registered additionally, after it had submitted relevant documents about the State consent to the performance of its activities on the territory of the Slovak Republic before coming into force of the Act 308/1991 Zb.

At present there are 18 churches registered in the Slovak Republic: the Apostolic Church in Slovakia, the Brother´s Unity of Baptists in the Slovak Republic, the Bahá´í Community in the Slovak Republic, the Church of the Seventh-day Adventists, Slovak Association, the Brethren Church in the Slovak Republic, the Church of Jesus Christ of the Latter-day Saints, the Czechoslovak Hussite Church in Slovakia, the Evangelical (Lutheran) Church of the Augsburg Confession in Slovakia, the Evangelical Methodist Church, Slovak Area, the Greek Catholic Church in the Slovak Republic, the Christian Congregations in Slovakia, the Religious Society of Jehovah's Witnesses, the New Apostolic Church in the Slovak Republic, the Orthodox Church in Slovakia, the Reformed Christian Church in Slovakia, the Roman Catholic Church in Slovakia, the Old Catholic Church in Slovakia, the Central Union of Jewish Religious Communities in the Slovak Republic.

Terms of registration of churches and religious societies in the Slovak Republic have been an issue frequently discussed mainly due to the relatively high membership minimum. The reason for a severe polemic and criticism is usually the confrontation of several times lower membership conditions with countries of larger populations. Difference between registered and established or recognized churches represents a significant factor, which is to be found in countries with low or symbolic membership conditions. There is no such division in Slovakia and each registered church or religious

28. Art. 11 of the Act 201/ 2007 Z. z.: The majority of registered churches and religious societies evidently do not fulfil the relatively high membership condition. These churches and religious societies were registered under the provision of the Law stipulating that churches and religious societies, already pursuing their activities either under the Law or on the basis of State consent by the date of the Law coming into force, are considered as registered. The majority of churches and religious societies in the Slovak Republic work on the basis of deemed registration.

29. Art. 11d of the Act 201/ 2007 Z.z.

30. Cf. Reply of the Ministry of Culture of the SR to the request for information on the basis of the Information Act 211/2000 Z. z. (MK – 65/2001 – IZ from June 7, 2001), according to which "laws regulating the registration of churches and religious societies do not stipulate the motivation of persons when signing the signature sheet declaring their affiliation to a church or religious society, therefore it need not mean their membership according to the internal statutes of the given church or religious society."

31. http://www.culture.gov.sk/cirkev-nabozenske-spolocnosti/neprehliadnite/spravne-konania

society gains, immediately after its registration, access to all the rights and benefits equally to other registered churches, which can be termed "historical churches."

VII. State Financial Support For Religion

After 1989 new legislation enabled churches and religious communities to have full internal self-government, but it did not eliminate their direct financial dependence on the state.

Act no. 218/1949 Zb. on financial provision for churches and religious communities, as much amended, eliminated a discriminatory approach and state control over the churches, but still maintains a paternalistic approach to the churches in the field of finance. By means of the Act the communist state imposed a unified form of direct state subsidy on churches and religious communities. The subsidy should have superseded the whole spectrum of individually differentiated traditional sources of income. In the period between 25 February 1948 and 1 November 1949 when the Act no. 218/1949 Zb. came into force, a crucial part of the churches' productive property was nationalized without redress, particularly by means of a unilateral implementation of the Acts on land and agrarian reforms. Restitution of church property is one of the processes enabling churches to start working towards economic independence.

On the basis of Federal Act no. 298/1990 Zb. on the regulation of some property relations of monastic orders and congregations and the Olomouc archbishopric as spelt out in Act no. 338/1991 Zb., some property of monastic orders and congregations was returned. In the territory of the Slovak Republic, 95 monasteries were involved. Act no. 282/1993 Z.z. on the mitigation of some of the legal injustices to property caused to churches and religious communities enabled some ownership rights to be restored. This related to movable and immovable things of which churches and religious communities were dispossessed on the basis of decisions of state bodies, civil law and administrative Acts issued in the period between 8 May 1945 – 2 November 1938 in the case of Jewish communities – and 1 January 1990. The Act stipulated that proceedings relating to the surrender of immovable things be exempt from administrative and court fees, and compensation for costs connected with the geographical location of surrendered real estate must be provided by the State. Act no. 97/2002 Z.z. amending Act no. 282/1993 Z.z., added to the property to be restored lands that are the part of the forest land in national parks.

At present, on the basis of Act no. 218/1949 Zb. and its amendment by Act no. 522/1992 Zb., the State must provide churches and religious communities with funds for payment of their clergy stipends (including contributions to social and health care funds and the employment fund), if churches and religious communities so request. Churches and religious communities that were provided with personal benefits for their clergy up to 31 December 1989 are not obliged to do this. The classification and levels of clergy stipends are regulated by SR Government decree.[32]

The State contributes to the operation of the headquarters of registered churches and religious communities. The Ministry of Culture SR is the administrator of the financial support assigned in the national budget by the National Council SR for churches and religious communities. Through the church department it remits assigned funds to each church headquarters on a monthly basis.

All proceeds of church collections, income for church activities, and regular contributions of registered churches' and religious communities' members are tax exempt. The value of gifts provided for humanitarian, charitable and religious purposes of the

32. Government Order SR no. 578/1990 Zb. as amended by Government Order no. 187/1997 Z.z.

churches and religious communities registered by the State may be deducted from the taxable income of natural persons and legal entities to the amount stipulated by the Act. Lands forming one functional unit with a building or part of a building which is used for the performance of religious ceremonies, and with the whole or part of a building which serves as offices for persons commissioned for church administration, are exempt from land tax. Lands where cemeteries are founded are also exempt from land tax. Buildings and those parts of them used exclusively for the performance of religious ceremonies or as the offices of church administrators are exempt from the tax on buildings. Legacies and gifts earmarked for the development of registered churches and religious communities[33] are exempt from inheritance tax. Under conditions stipulated by Ordinance no. 17/1994 Z.z., religious objects and gifts for churches and religious communities are exempt from import duty.

On the basis of Section 48 of Act no. 366/1999 Z.z. on tax on earnings, as amended by later regulations, each taxpayer is entitled to remit, through the tax administrator, a sum of money equivalent to 2 percent of his or her income tax to one of the specified legal entities[34] among which are agencies of churches and religious communities. In addition to this, churches and religious communities as well as entities with legal personality derived from them, may apply for various grants and subsidies. Churches may apply for grants towards the preservation and recovery of cultural landmarks that are in their ownership as well as for social, charitable, educational and cultural projects.

Since 2000, work has been in progress towards the goal of a new model of financial provision for churches and religious communities. In 2001 the Ministry of Culture submitted a Bill on financial provision for churches and religious communities. The Bill preserves the principle of the existing model, but with the difference that financial provision takes into account the number of members of each church and religious community and specific conditions of their activity in relation to their size. The Bill passed through the legislative process up to being discussed by the National Council SR plenary. However, it was removed from the agenda on the proposal of one of the deputies, and up to now it has not been put back. A broad consensus of churches and religious communities, political parties, and other involved society constituents, seems to have foundered again.

VIII. Civil Legal Effects of Religious Acts

In the Slovak Republic, matrimony is entered into by the declaration of a man and a woman before a State authority or an authority of a church or religious community that they enter the marriage publicly, solemnly, and in the presence of two witnesses. If it is a church ceremony, it must be solemnized by a person authorized to perform ecclesiastical functions or a minister of that religious community, and a church form of service must be used. According to the Act on the Family no. 94/1963 Zb., as implemented in later regulations, the church authority must deliver a certificate of the marriage to a body authorized to administer registration in the district where the wedding was held.

Issues of marriage according to canon law are regulated by Section 10 of the Basic Agreement between the SR and the Holy See. If a marriage fulfils the conditions stipulated in SR law, it has the same legal status and effects as a civil marriage taking place within the territory of the Slovak Republic. The same provision is found in Section 10 of the Agreement between the SR and registered churches and religious communities.

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33. Act no. 366/1999 Z.z. on taxes on earnings, Act no. 317/1992 Zb. on real estate tax, Act no. 318/1992 Zb. on inheritance tax, donation tax and transfer tax and real estate transfer.

34. Apart from the facilities of registered churches and religious communities, these include civic associations, foundations, non-investment funds, non-profitable organisations providing generally beneficial services, organisations with an international element, and the Slovak Red Cross.

IX. RELIGIOUS EDUCATION OF THE YOUTH

According to the Constitution of the Slovak Republic, everyone has the right to education. School attendance is compulsory. Its period and age limit are stipulated by law.[35] Citizens have the right to free education at primary and secondary schools and, based on their abilities and society's resources, also at higher educational establishments. Schools other than state schools may be established, and instruction in them provided, only under conditions defined by law. Such schools may charge a tuition fee.

According to the Article 24 of the Constitution, churches and religious societies "organize the teaching of religion" and, according to Act no. 308/1991 Zb. on the freedom of religious faith and the position of churches and religious societies in wording of later regulations, believers have the right to be educated in a religious spirit and – on fulfilment of conditions established by internal rules of churches and religious societies as well as by generally binding legal regulations – to teach religion.

This issue is amended in more detail by the Basic Treaty between the Slovak Republic and the Holy See,[36] and the Agreement between the Slovak Republic and the Registered Churches and Religious Societies[37]; the contracting parties refer to a more detailed amendment in special agreements. The right to religious education is guaranteed also by Act no. 29/1984 Zb. on the system of primary and secondary schools (the School Act) in the wording of later regulations. Persons appointed by churches and religious societies may teach religion at all schools and educational institutions, which are part of the educational system of the Slovak Republic.

Act no. 596/2003 Z.z. on state administration in education and educational self-government determines the competence, organization and function of administrative bodies of state administration in the educational system, towns, municipalities and self-government bodies in education, and defines their duties in the field of state administration competencies in education. It determines the network of schools and educational institutions, decides on the location of a school, school facility, or a vocational education center in the network, possible changes, and excluding a school from the network. The Act designates the bodies authorized to establish schools, educational institutions or centers of vocational education. Such bodies are: towns, municipalities, regional boards, registered churches or religious societies, other corporate bodies or individuals.[38] Education provided at denominational or private schools is adequate to the education provided at other schools. The aim of denominational and private schools or educational institutions is to provide, in addition to quality education and training, alternative content, methods, and formats in education and training. Establishment of these schools allows parents to apply their right to choose a school or educational institution for their children according to their belief and conscience, as well as it creates a competitive environment for higher motivation to improve the educational system.[39]

Churches and religious societies have the right, for educational purposes, to establish, administer and employ primary schools, secondary schools, universities and educational institutions in compliance with the provisions of law. These schools and educational institutions have the same position as state schools and educational institutions and they are an important and equal part of the education system of the country. The Slovak

35. Currently the compulsory education in Slovakia is 10 years, but at most until completion of the school year in which a student turns 16.

36. Published in the Collection of Acts under no. 326/2001 Z.z.

37. Published in the Collection of Acts under no. 250/2002 Z.z.

38. Section 19 Act no. 596/2003 Z.z. on state administration in education and self-government of schools, and on change and amendments of certain acts

39. http://www.minedu.sk/index.php?lang=sk&rootId=37

Republic gives full recognition to diplomas issued by these schools and institutions and considers them equal to diplomas issued by state schools of the same kind, field or level. Hence, they are acknowledged as equivalent to state diplomas; moreover, the same is true about academic degrees and titles.

Denominational schools started to rise in Slovakia right after the fall of Communism in 1989, and their number at present is rather stable.

Government funding is also provided to private and denominational schools equivalent to funding of state schools. Government funding of educational institutions is established on normative principles.[40] Financing per student/year (norms) is the same for both denominational and state schools. However, state educational institutions (kindergartens, canteens, after-school nurseries, etc.) and state artistic schools still have more financial advantages in comparison to the same kind of schools founded by churches (or other private founders).[41] Financial means for schools and educational institutions from budget chapters of the Ministry of Education are provided to their founders through the Regional Education Offices according to the residence of the founder.[42]

Most state universities include theological faculties. There are also theological institutes and seminaries for future priests in Slovakia. These seminaries are specialized workplaces of public universities or theological faculties where university students are taught the values promoted by the respective church in accordance with the internal policies of the church.[43] Seminaries could also be autonomous legal entities that have an agreement with a university. In that case, the seminary students are taught the values promoted by the respective church in accordance with the internal policies of the church, and the university education is provided by the university or theological faculty.

Missio canonica or authorization of the church is an inevitable condition for any educational activity at these institutions. Internal policies of theological faculties and denominational universities are approved by the academic senate only following the church's or religious community's pronouncement. Act no. 131/2002 Z.z. on higher education and on the change and supplements to some acts stipulates which paragraphs of this Act refer to denominational public universities and theological faculties "adequately." It concerns 22 paragraphs of the Act on universities, which refer mainly to the academic rights and freedoms, establishments of schools, academic self-government and its field of activity, rectors, deans, acceptance and disciplinary proceedings, rights and responsibilities of students, university teachers, or agencies of the scientific council and executive board of the public university.

The Treaty between the Slovak Republic and the Holy See on Catholic Education and The Agreement between the Slovak Republic and the Registered Churches and Religious Societies on Religious Education were mentioned above. Also these documents introduce religious education into the Slovak educational system as an elective mandatory subject, with students having the option to attend ethics classes as an alternative. The lowest possible number of students in a religious education class is twelve.[44] Registered churches and religious societies may include also students from different classes and of different beliefs in religious education classes with their permission. If the number of students is lower than the required twelve, the principal gives consent to teaching of religious classes during religious lessons of other denominations, ethics lessons, or after school.

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40. § 10 (5) c), h), j) to m) of Act no. 596/2003 Z.z.

41. The Statutory Order of the Government of the Slovak Republic that amends the Statutory Order no. 668/2004 Z.z. on the distribution of income tax revenues to regional self-governments, as amended by Statutory Order no. 519/2006 Z.z.

42. § 3 (6) of Act no. 597/2003 Z.z. on funding of primary and secondary schools and school institutions

43. § 39 (1) Act no. 131/2002 Z.z. on universities

44. Maximum number of students is 24 – this is a principle that applies to all "educational" subjects (e.g. ethics education, fine art education, and physical education).

One lesson a week is the standard quota for religious or ethics education at state or private primary schools. At primary denominational schools, students have two lessons of religious education per week. At state or private (non-denominational) high schools, there is one lesson of religious or ethics education per week in the first and second classes. In the third and fourth classes students may, if the school offers such a possibility, choose one of these subjects as non-mandatory supplementary subject. At denominational high schools students have two lessons of religious education per week in all four classes.

Teachers of religion have the same status in labour-law relations as teachers of other subjects; however, they have to be appointed by their church or religious society. For Catholics it is the authorisation of missio canonica.[45] Parents or guardians decide on the religious education of the child until the age of 15. In both the Treaty and the Agreement, the Slovak Republic guarantees, in accordance with the will of parents or guardians, to enable religious education in pre-school facilities, too. The curriculums of religion and religious education have to be approved by the respective church after the statement of the Ministry of Education of the Slovak Republic. Besides expert qualification, the religious education also requires canonical mission or authorization by the church or religious society according to the legal regulations of the Slovak Republic. This condition applies for university teachers of theological disciplines, too.

The above-mentioned documents also recognize the right of churches and religious societies to establish and to operate their own schools and school institutions of any kind and type. At the same time, the state guarantees not to demand that the denominational schools carry out educational programs inconsistent with the upbringing and education principles of the respective church. Churches pledge to offer both general and special education at denominational schools consistent with the general and special education at state schools of respective degree and type. Both sides also oblige to cooperate in the process of preparation and creation of educational programs and in the sphere of education and upbringing in denominational schools. The schools of churches and religious societies will get the same funding as all the other schools in compliance with the legal order of the Slovak Republic.

The Agreement also enables churches to establish pedagogical and catechetical centers with a nation-wide field of activity, to provide professional and methodical guidance of denominational schools, as well as expert education of pedagogical and non-pedagogical employees of denominational schools. The state pledges to financially support theological faculties as well as not to create obstacles to the founding and activities of university pastoral centers. Article 6 of the Agreement between the Slovak Republic and the Registered Churches and Religious Societies on religious upbringing and education declares that the Agreement is open for accession by other churches and religious societies registered in compliance with the legal order of the Slovak Republic. This accession shall be decided upon by registered churches and religious societies participating in the Agreement, on the basis of a written request. All contracting parties must agree with the accession. In compliance with the legal order of the Slovak Republic, any registered church or religious society, which is not a signatory of the Agreement, can demonstrate a will to sign a similar bilateral agreement with the Slovak Republic.

X. RELIGIOUS SYMBOLS IN PUBLIC PLACES AND FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

At present, there is no law in Slovakia that would regulate the possibility to use religious symbols in public places. The Ministry of Education passed a methodical

45. Canon 805 CIC and Canon 636 CCEO.

directive regarding crosses on classroom walls in the state schools. In the case, that the majority of the parents of the pupils in the given class wish to place a cross in the classroom, it is within the school director´s authority to allow them to do so. Such cases are, however, scarce.

Offenses/Criminal acts directly or indirectly concerning religious denomination and its manifestations are covered in the Criminal Act no. 140/1961 Zb. The Act defines the facts of criminal acts in accordance with the principle that criminal doings are considered such doings which signs are defined within the act. The criminal Act stipulates that he who by violence, threat of violence or threat of other detriment shall force other person to take part in a religious act, hinder other person without permission in such a participation, or hinder other person in use of freedom of confession in other way, shall be sentenced to deprivation of liberty for up to two years or financial penalty. A religious act is considered any act or ceremony that relates to church or religious community belief confession, e.g., divine service, confession, sacrament reception/Eucharist. Other obstruction in use of freedom of confession can lie for example in violence heading towards means destruction, serving for religious ceremony performance. The Criminal Act stipulates the facts of violence against a group of citizens and against an individual because of their denomination, or because they are undenominational. Denomination implies active or passive relation to a particular religion as a general theory and explanation of the world given by particular church or religious community. The facts fulfilment can arise if threatened to the given effect, or forming alliances or masses for committing the criminal act. The criminal act of religious opinion defamation is based on public defamation – vituperation, belittlement of citizen groups because of their denomination or because they are undenominational.

The act on serving of a deprivation-of-liberty sentence forbids a sentenced person to get and own the press or objects promoting religious intolerance, and stipulates possibilities and conditions of church organisation participation in the sentenced person remedy. The act on imprisonment execution confirms the right of an accused person to provision of spiritual service, while it orders to consider the purpose of the imprisonment, it means that if the accused person is in collusion custody, provision of the accused person with spiritual service must be approved by the relevant body acting in criminal proceedings, if cases of life and health endangerment are not concerned.[46]

46. Cf. Moravčíková, M. „ State and Church in the Slovak Republic," in Robbers, Gerhard (ed.) *State and Church in the European Union.* (Second edition). Baden-Baden: Nomos, 2005, 491-518.

ZOILA COMBALÍA
MARÍA ROCA

Religion and the Secular State of Spain

I. SOCIAL CONTEXT

It is clear from a recent CIS (Sociological Research Center) barometer that a significant number of Spaniards declare they are Catholic (76 percent), although the percentage of churchgoers among the believers is much lower.[1] In other words, a considerable secularisation has occurred among the population of Spanish nationals over the last few years, as in other European countries. Spaniards were asked this question: "How would you define yourself regarding religion: Catholic, believer in another religion, non-believer or Atheist?*"* Responses included Catholic 76 percent, believer in another religion 2.1 percent, non-believer 13 percent, atheist 7.3 percent, no answer 1.6 percent. For those who, regarding religion, define themselves as Catholics or believers in another religion, the next question was, "How often do you go to mass or other religious services, not counting social occasions such as weddings, communions or funerals?" Almost never 58.2 percent; several times a year 17 percent; at least once a month 9.1 percent; almost every Sunday or national holiday 13.3 percent; several times a week 2 percent; no answer 0.5 percent. [2]

Over the last few years and due to immigration, the number of believers belonging to non-Catholic religions has increased. The majority of non-Catholic churchgoers are not Spanish. Although there are not official statistics on religious denominations, the reference by nationality is illustrative. Thus, according to the 2008 INE (National Statistics Institute) census, in Spain there are approximately: 1,000,000 foreign national citizens from countries with an Orthodox tradition (mainly from Romania, Bulgaria, the Ukraine and Russia); 900,000 citizens from countries with Islamic tradition (mainly from Morocco, Algeria and Senegal); 600,000 citizens from countries with Protestant tradition (mainly from the United Kingdom). Also, among the traditionally Catholic gypsy population, there have been a considerable number of conversions to Evangelism (above all Pentecostalism) over the last few decades, so now there are more Evangelist gypsies than Catholic gypsies.

II. THEORETICAL AND SCHOLARLY CONTEXT

The Spanish State is neutral in religious-related matters. No religious denomination has a state character. The State neutrality with respect to religion means, according to constitutional jurisprudence, that the State cannot assume religious functions. This does not mean, however, that it has to remain indifferent towards the religious phenomenon[3]; on the contrary, it is forced to favor the exercise of the fundamental rights of people and of groups and to remove the obstacles that prevent such exercise.

ZOILA COMBALÍA, University of Zaragoza, was responsible for sections 1, 3, 4, 9, 10 and 12 of this report and MARÍA ROCA, Complutense University of Madrid, for sections 2, 5, 6, 7, 8 and 11.

1. CIS Barometer, July 2009. Study number 281, available at http://www.cis.es/cis/opencm/ES/2_barometros/depositados.jsp.

2. Id.

3. STC 154/2002, 18 July, f.j. 6 "In its objective dimensions, religious freedom entails a dual requirement, referred to by art. 16.3 of the Spanish Constitution; on the one hand, the neutrality of the public powers urges the aconfessionality of the State; on the other hand, the maintenance of cooperation relations of the public powers with the different churches. In this sense, we already said in STC 46/2001, 14 February, f.j. 4, that art. 16.3 of the Constitution, after formulating a statement of neutrality (SSTC 340/1993, 16 November and 177/1996, 11 November), considers that the religious component is perceivable in Spanish society and orders the public powers to maintain "the subsequent cooperation relations with the Catholic Church and with other denominations' thus introducing an idea of a confessionality or positive secularism that "prohibits any type of confusion between religious and state functions (STC 177/ 1996)."

The Constitutional Court has declared that the secularism of the Spanish State is a positive secularism[4]; in other words, it admits cooperation with religious denominations. As an expression of that cooperative secularism, the religious denominations that have signed agreements with the Spanish State can give religion classes – with a denominational nature – in Spanish public schools, providing that such classes are requested by at least ten students. The positive note of the neutrality of the Spanish State finds support in the constitutional text, which forces public authorities to bear in mind the religious beliefs of the Spanish society, and to maintain the subsequent cooperative relations with the Catholic Church and with all other religious denominations. However, there are authors within the Spanish doctrine that consider that cooperation via agreements with the denominations as an expression of state paternalism[5] towards the denominations, which would be incompatible with secularism. Within these doctrinal currents, there is a tendency for the Spanish state to adopt the French model of a secular State. This secularist conception has been included at a political level in a manifesto by the *Partido Socialista Obrero Español* party, which currently holds a parliamentary majority and therefore occupies the State Government. The mainstream Spanish society is not secular, as shown by the sociological data provided in Section I; however, even though they are a minority, secular movements are present in the media and active in public life. Both impassioned controversies and balanced thoughts often appear on these topics in the press, especially in this last decade.[6]

III. CONSTITUTIONAL CONTEXT

In Spain since the expulsion of Muslims and Jews in the 15th Century, Catholicism has been the only religion in society until the changes caused by the increase of immigration in the last years. From a legal point of view, Spain has had an important tradition of Catholicism as the official religion of the State, with the sole exception of two brief periods: the 1869 Constitution and the Constitution of the Second Spanish Republic (1931-1936). The Republic adopted a legislation of hostility towards religion and towards the church. It produced a strong rejection in one sector of the population and a deep division in Spanish society between Catholics and anti-Catholics. It was not the only but one of the reasons that led to the Spanish Civil War between 1936 and 1939.[7]

After the war, Franco's dictatorship was established – lasting from 1939 to 1975. The State declared itself as Catholic by proclaiming: "the profession and practice of the Catholic religion, which is that of the Spanish State, will enjoy official protection." The private exercise of other religions was tolerated in their places of worship, but they were not granted true religious freedom, as it was stated that "there is no authorization for external ceremonies or manifestations other than those of the Catholic religion."[8] A study of the law of the period reveals judgments in which the Courts considered as criminal activities events such as meetings in private homes of non-Catholic groups to comment on the Bible, the possession of non-Catholic books and magazines, or home visits of those promoting non-Catholic propaganda.[9]

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4. STC 46/2001 f.j. 4: "As a special expression of such a positive attitude with respect to the collective exercise of religious freedom in its plural expressions or behaviors, art. 16.3 of the Constitution, after formulating a declaration of neutrality (SSTC 340/1993, 16 November and 177/1996, 11 November), considers that the religious component is perceivable in Spanish society and orders the public powers to maintain 'the subsequent cooperation relations with the Catholic Church and with other denominations' thus introducing an idea of aconfessionality or positive secularism that "prohibits any type of confusion between religious and state functions (STC 177/ 1996)". In the same regard, STC 38/2007, F.j. 5.

5. A. Fernández-Coronado, "Sentido de la cooperación del estado laico en una sociedad multireligiosa," *Revista General de Derecho Canónico y Eclesiástico del Estado* 19 (2009), at http://iustel.com.

6. J. M. Martín Patino, "Crisis del Estado laico," *ABC* 13, VII (2005):3; M. Fernández-Enguita, "Ni confesionalismo ni laicismo," *El Pais* 28, III (2005):34.

7. For State legislation on religion during the Second Spanish Republic see P. Lombardía, "Precedentes del Derecho eclesiástico español," *Derecho Eclesiástico del Estado Español*, (Eunsa: Pamplona, 1980), 151-58.

8. *Fuero de los Españoles* (one of the Franco's Constitutional Laws) as formulated in 1945 (art. 6).

9. A study of these judgments can be found in L. Martín Retortillo, *Libertad Religiosa y Orden Público* (Tecnos: Madrid, 1970). For information on the main lines of Franco's legal frame for religious freedom see P.

Franco's Regime was replaced by a democracy in 1978 when a new Constitution, the current Constitution, was proclaimed.[10] The new regime meant a radical change with regard to the State policies in religious matters. Thus, we went from a system of a strong confessional State to a system of State secularity with religious freedom, equality, and cooperation with the confessions. These are the four constitutional principles in force inspiring the relationships between the Spanish State and Religion.

Religious freedom and equality are at the same time principles and fundamental rights. Secularity of the State and cooperation with confessions are only principles.

A. Religious Freedom

Religious freedom as a fundamental right is recognized in Article 16.1 of the Spanish Constitution which provides: "freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law." Its consideration as a State principle comes emphasizes the rule found in Article 9.2 of the Constitution, providing that "it is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life." Thus, the law prescribes the State as not only a passive spectator, but a social State involved in the active task of promoting freedom and equality.

First of all, the religious freedom principle requires immunity of coercion in the religious field from the State and also from private persons. Nonetheless, absence of coercion is not enough to guarantee religious freedom. The Spanish State is also obligated to remove obstacles and promote conditions to make religious freedom of individuals and communities real and effective, for instance in adopting the necessary measures to facilitate religious assistance in public hospitals, penitentiary or military establishments.

B. The Principle of Religious Equality

Religious equality and non-discrimination as fundamental rights are established in Article 14 of the Constitution that states "Spaniards are equal before the law and may not in any way be discriminated against on account of…religion…."

The consideration of equality as a State principle correlates with Article 9.2 of the Constitution that, as we have previously seen, imposes on the public powers an active obligation of removing obstacles and promoting conditions for an effective guarantee of freedom and equality for both individuals and communities. The religious equality principle means, first of all, non-discrimination or the rejection of different legal treatment for individuals or groups by reason of their religious convictions or attitudes. It also means that the State is obliged to equally guarantee religious freedom for individuals and groups. All of them, regardless of their different features, historical tradition, or social roots are equally holders of the same fundamental right of religious freedom. Nonetheless, equality does not mean uniformity; it does not prevent the recognition of peculiarities. In other words, equality means equal religious freedom for everybody.

C. The Principle of Secularity of the State

Whereas religious freedom and nondiscrimination are at the same time principles and rights, secularity and cooperation are only State principles.[11]

Article 16.3 of the Constitution establishes "no religion shall have a state character." The linguistic expression is inspired by the German Constitution, but it is foreign to the

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Lombardía, *Precedentes*, 158-73; A. de la Hera, "Actitud del Franquismo ante la Iglesia", *Iglesia Católica y regímenes autoritarios y democráticos*, ed. Ivan Iban Pérez (EDERSA: Madrid, 1987), 43-70.

10. BOE (Boletín Oficial del Estado) nº 311, 29 December 1978.

11. STC 94/1983, November 8, f.j. nº 5.

Spanish tradition because it declares literally not the secularity of the State but the not-state character of religion that is typical of the protestant tradition of national churches organized and protected by the State. In any case, apart from the good or bad choice of the words, it is clear that Article 16.3 means that the Spanish State is a secular State.[12]

A secular State considers that the religious option is something that competes to individuals but not to the State. It confines its task to effectively guaranteeing (as a social State) the freedom of individuals and religious groups and to guarantee that the exercise of religious freedom is taking place within the limits of constitutional public order. Secularity of the State means the incompetence of the State to make a religious pronouncement. A consequence of this incompetence in religion is the respect for the autonomy of confessions. It is convenient to consider that secularity is a feature of public powers but not of individuals. Incompetence of the State on religion does not mean state profession of atheism or agnosticism: this option would be also contrary to secularity as it expresses and states a declaration of faith (in this case a negative declaration) but not the absence of it.[13]

D. The Principle of Cooperation

The principle of cooperation is established in Article 16.3 of the Constitution providing "the public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions." In addition, confusion and lack of communication between State and confessions are contrary to the cooperation principle. Recognizing their mutual autonomy, the cooperation principle effectively guarantees religious freedom and equality, delineating the State as the State and the confessions as confessions.

Important manifestations of the cooperation principle are the Agreements between the State and the confessions in order to bilaterally regulate the issues of mutual interest. Nonetheless, Agreements with confessions in our country are not a constitutional requirement as they are in Italy. In fact, Agreements are provided only for some confessions (those with notorious roots) whereas the cooperation principle extends to all of them by a constitutional imperative.

IV. LEGAL CONTEXT

A Code of Ecclesiastical Law does not exist in our country. We have some specific regulations relative to religious factors and some regulations dispersed in different sectors of our legal system (i.e.,, provisions on civil effects of religious marriage in the Civil Code, provisions on the offenses relative to freedom of conscience and protection of the religious feelings in the Criminal Code). However, all these provisions are inspired on the same principles that give them unity and make it possible to speak of a "system" of ecclesiastical law. We have already referred to these constitutional principles.

Article 81 of the Spanish Constitution establishes that the implementation of fundamental rights and public freedoms shall take place through Organic Acts. The approval, amendment, or repeal of these Acts requires the overall majority of the Members of Congress in a final vote on the bill as a whole. According to this rule, Organic Act 7/1980 of 5 July of Religious Freedom was passed to implement the fundamental right of religious freedom[14]. The first part of the Law (Articles 1-4) discuss the essential content of the right of religious freedom, its limits, frame of application and judicial protection. It is a direct development of what is recognized in the Constitution. In

12. See M. J. Roca, "Laicidad del Estado y garantías en el ejercicio de la libertad: dos caras de la misma moneda," *El Cronista del Estado de Derecho* 3, (March 2009): 44-51.

13. In this sense the Constitutional Court has declared that "the secularity of the State does not prevent the religious feelings or beliefs of society to be protected" (Auto TC 180/1986, 21 February 1986, f.j. nº 2).

14. For a current reflection of the Law see J. Martínez Torrón, "La Ley Orgánica de Libertad Religiosa, veintiocho años después," *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 19 (2009).

the second part of the Law (Articles 5-8), the legislator determines, between the different options constitutionally legitimate, the general conditions of the relationships of the State with the confessions. It determines how the confessions obtain legal personality in Spanish law, recognizes their autonomy, provides the possibility of Agreements for those confessions with notorious roots, and creates the Advisory Committee on Religious Freedom in the Ministry of Justice. It also outlines that the membership shall be divided equally between the representatives of the government and of the confessions and with the participation of experts.

The Organic Act of Religious Freedom applies to individuals and religious groups in a strict sense, providing in Article 3. 2 that "activities, purposes and entities relating to or engaging in the study of and experimentation with psychic or para-psychological phenomena or the dissemination of humanistic or spiritualistic values or other similar non-religious aims do not qualify for the protection provided in this Act."

The Organic Act provides the general legal regime for all confessions and stipulates the possibility of a specific legal frame by signing an Agreement with the State. Bilateral instruments have been utilized in Spain from the eighteenth century to regulate matters of common interest for Church and State, used exclusively to define the legal status of the Catholic Church. These were the Concordats, an ancient institution with a juridical nature analogous to that of international treaties. The concordatarian Agreements that are currently in effect with the Catholic Church in Spain date from 1976 to 1979.[15]

The Organic Law of Religious Freedom created a sort of replica of the Concordats and made them available to any religious denomination with notorious roots in Spanish society; these formal agreements have to be approved by an act of Parliament.[16]

Which religious beliefs are considered to have notorious roots in Spain? In addition to the Catholic Church, some groups include Protestants, Jews and Muslims. In 1992, these three religions signed their respective cooperation agreements with the State that were approved on the same day (on November the 10th) in three different laws.[17]

To obtain the notorious roots qualification and to be able to sign Agreements, the various Evangelical churches had to join together in a single Federation (even taking in non-Evangelical churches, such as Greek Orthodox Church in Spain or the Seventh Day Adventists); all the Jewish communities also had to join together in a Federation; and the same was the case for the various Islamic communities.[18] This led to some problems as the various Jewish or Muslim communities and the different Evangelical churches are not uniform, and there are significant differences between them.

To elaborate the agreements with minority religions, the guidelines for the existing agreement with the Catholic Church were followed. Thus, they recognized civil validity of marriage administered in accordance with Islamic, Jewish or Evangelical ceremony.[19]

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15. In 1979, the 1953 Concordat was replaced by a set of Agreements with the Holy See which, in fact, collectively constitute a Concordat and are similar to international treaties in Spanish law. These bilateral Agreements regulate legal affairs, economic affairs, education and cultural affairs, and religious assistance to the Armed Forces. For more information on these Agreements with the Holy See, cf. P. Lombardía & J. Fornés, "Las fuentes del derecho eclesiástico español," *Tratado de derecho eclesiástico*, (Eunsa: Pamplona, 1994) 321–76.

16. On these Agreements cf. VV.AA., Acuerdos del Estado Español con los judíos, musulmanes y protestantes, *Publicaciones de la Universidad Pontificia de Salamanca* (Salamanca, 1994); D. García-Pardo, "El sistema de acuerdos con las confesiones minoritarias en España e Italia," *BOE y Centro de Estudios Políticos y Constitucionales* (Madrid, 1999).

17. Law 24/1992, of 10 November, approving the Agreement of Cooperation between the State and the Federation of Evangelical Religious Entities of Spain; Law 25/1992, of 10 November, approving the Agreement of Cooperation between the State and the Israelite Communities of Spain; Law 26/1992, of 10 November, approving the Agreement of Cooperation between the State and the Islamic Commission of Spain (BOE nº 272, 12 November 1992).

18. The Federation of Evangelical Religious Entities of Spain (Feredación de Entidades Religiosas Evangélicas de España, FEREDE); the Jewish Communities of Spain (Federación de Comunidades Judías, FCJ); the Islamic Commission of Spain (Comisión Islámica de España, CIE).

19. "The civil effects of marriages celebrated before the ministers of Churches belonging to the FEREDE are recognized. For full recognition of these effects, the marriage must be registered in the Civil Registry Office." "Civil effects of marriages held in accordance with formal Jewish rules and officiated by dignities pertaining to

They also recognized, among other rights, the possibility of teaching classes in their religion in state schools upon student request,[20] when there was at least ten students in each class, and the teacher is paid by the State[21]; a system of tax benefits; and the right to religious assistance for persons in military, prisons, hospital or other similar public centers. This right is guaranteed for members of all beliefs, however, the system to achieve it will not be the same in all cases. Taking into account that most Spanish citizens are Catholics, the public hospitals have assigned one or more Catholic ministers to attend patients who wish to be visited by them. These ministers offer their services in a regular way, with a timetable and payment from the relevant health authority. For citizens of other religions, no such regular service has been created because there is not a sufficient social demand for it. The arbitrated system is to provide free access for the minister to the center when a patient requests it, but not of a regular nature, and therefore, without payment.

We saw how the agreements with minorities arbitrate the freedom that the Catholics had for the Jewish, Muslims and Evangelicals, but in addition they recognize in these minorities some peculiarities that Catholics do not need. For example, in the agreements with the Jews and with the Muslims, the public powers commit themselves to protecting, in terms of food products, the denomination *halal* (for the Muslims) and *kosher* (for the Jews). If the religions register these denominations in the Patent and Trademark Office, it is guaranteed that the products that carry the denomination will have been produced in accordance with the respective religious laws.[22]

This order is not stipulated for Catholics, who have no religious dietary laws. In the same way, for Jews and Muslims, as they have their own funeral rites, the possibility of assigning them plots in municipal cemeteries has been provided.[23] Also in the Agreements with minorities there is the possibility to change some religious holidays or days off. Prior agreement must be reached between the parties concerned (the worker and the company).[24]

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the FCI member Communities shall be acknowledged. Full recognition of such validity shall call for registration of such marriages in the Civil Registry Office". "Civil validity of marriage administered in accordance with the religious ceremony established under Islamic Law is acknowledged from the time of the wedding is held if the parties thereto meet the legal capacity requirements established by the Civil Code. The bride and groom shall lend their consent in the presence of one of the persons mentioned in art. 3.1 above (Islamic religious leaders and imams of the CIE) and at least two witnesses, who must be of age. For full recognition of these effects, the marriage must be registered in the Civil Registry Office (art. 7.1 of the Agreements with the FEREDE, FCI and CIE).

20. "Students, their parents and those school organisms so requesting, shall be guaranteed the right to receive (Evangelical/ Jewish/ Islamic) religious classes in public and private subsidized schools, at the primary, elementary and secondary levels, as long as the exercise of this right is not in conflict with the nature of the centre" (art. 10.1 of the Agreements with the FEREDE, the FCI, and the CIE).

See in this regard A. González-Varas, "Moral and religious teaching in Spanish schools," *Education Law Journal* 10, 4 (2009): 271-79; J. Mantecón, "L'enseignement de la religion dans l'ecole publique espagnole," *Revue Générale de Droit* 30 (1999-2000): 277.

21. Resolution of 23 April 1996 and Accord, concerning the designation and economic regulation of persons responsible for Evangelical religious teaching at public primary and secondary educational teaching centers (BOE nº 18, 4 May 1996); and Resolution of 23 April 1996 and Accord concerning the designation and economic regulation of persons responsible for Islamic religious teaching at public primary and secondary educational teaching centers (BOE nº 107, 3 May 1996). See M. Rodríguez-Blanco, "El régimen jurídico de los profesores de religión en centros docentes públicos," *Il Diritto Ecclesiastico* CXII, 2 (2001):482-573.

22. "In order to protect the proper use of such denominations (Halal / Kasher, Kosher, Hashrut –and all of these associated with the terms U, K or Parve–), the (CIE / FCI), must apply for and obtain registration of the corresponding trademarks from the Patent and Trademark Office, pursuant the legal standards in force. Once the above requirements are met, products bearing the (CIE / FCI) mark on the package shall be guaranteed for the intents and purposes of marketing, import and export, to have been prepared in accordance with (Islamic Law / Jewish law and tradition).The slaughtering of animals in accordance with (Islamic Laws / Jewish Law) must abide by health standards in force" (art. 14. 2 and 3 of the Agreements with the CIE and with the FCI).

23. See art. 2. 6 and art. 2. 5 of the Agreements with the FCI and with the CIE, respectively. See A. González-Varas, "Libertad religiosa y cementerios: incidencia del factor religioso sobre las necrópolis," *Ius Canonicum* 82 (2001):645-95.

24. See art. 12 of the Agreements with the FCI and with the CIE.

V. THE STATE AND RELIGIOUS AUTONOMY

The religious denominations registered in the Religious Entities Register, organized under the Ministry of Justice, enjoy full autonomy in the Spanish State (Article 6 of the LOLR[25]). This autonomy is recognized both for the Churches, denominations, and for the legal persons depending upon them (religious orders, foundations, teaching institutions, hospitals or other care institutions, etc.). The fact that the denominations have their own internal law is a clear expression of religious autonomy. This internal law of the denominations is recognized to some extent within the State Law through the typical institutions of private international law: referral and budget. By virtue of referral, certain denominational rules are effective in State Law, as is the case of the institution of canonical marriage, and in the marriage form, according to the Protestant, Jewish and Islamic rites. Applying the budget theory, the denominational origin terms that appear in the State Law are interpreted in agreement with the denominational law where this term has its origin (e.g. ministers of cults, temples).

The recent pronouncement of the TC, which includes the right of access to the register as an essential part of the content of the right, as it indirectly states that the essential content is not reduced to the numbering contained in Article 2 of the LOLR, as intended by the individual vote of four magistrates, seems to permit an interpretation that also includes the right to autonomy of the churches. The idea that the right to autonomy forms part of the essential content of religious freedom of the denominations is reinforced in legal basis number seven of the actual Decision:

The registration of a religious entity in the Register entails, above all, the recognition of its legal personality as a religious group; in other words, the identification and admission into the legal system of a group of people whose aim is to exercise, with immunity of coercion, their basic right to the collective exercise of religious freedom, as established in Article 5.1 of the LOLR. But at the same time, the recognition of this specific or singular legal personification confers a certain "status" on the entity, which above all is expressed in the full autonomy attributed to it by Article 6.1 of this law, by virtue of which the religious entities or denominations registered "may establish their own rules of organization, internal regime and regimes of their personnel." It adds the precept that the power of self-regulation may include the configuration of institutions created to exercise their purposes, as well as clauses to safeguard their religious identity and own nature, and due respect for their beliefs.[26]

On the other hand, the specific "status" of religious entity conferred by the registration in the Register is not limited to the aforementioned internal scope, through the recognition of the capacity of self-organization of the collective subject. Rather, it extends as well to an external aspect, in the sense that the specific expressions that, in the exercise of the basic right, are carried out by the members of the registered group or community are facilitated in such a way as to permit the collective exercise of religious freedom with immunity from coercion, with no obstacles or disturbances of any kind.[27]

The decision of the Constitutional Court on February 15, 2001 guides the interpretation of the limits that are included in Article 6.1 of the LOLR (the basic rights recognised in the Constitution, especially freedom, equality and non-discrimination), in the sense that they must coincide with the limits of Article 3 of the LOLR. It must also be taken into account that "the limits of the freedom of beliefs are submitted to a strict and restrictive interpretation."[28]

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25. Art. 6.1: "The Churches, Denominations and religious Communities registered, shall have full autonomy and shall be able to establish their own rules of organization, internal regime and regime of their personnel. These rules, like the rules that regulate the institutions created by them to carry out their purposes, shall be able to include clauses that safeguard their religious identity and own nature, as well as due respect for their beliefs, without detriment to the rights and freedoms recognized by the Constitution and especially those relating to freedom, equality and non-discrimination."

26. STC 46/2001, 15 February, FJ 7.

27. STC 46/2001, 15 February, FJ 7.

28. STC 141/2000, 28 May FJ 3. Earlier, STC, 20/1990, 15 February, FJ 3 and 5; STC 120/1990, 27 June, FJ 10 and STC 137/1990, 19 July, FJ 8.

The right to autonomy of the churches will have a different intensity depending on whether such right extends towards their members or towards third parties outside the denomination and depending on whether a contractual link, of which a denominational entity is a party, exists or not. [29] The autonomy of these denominations may not alter the private legal traffic, or affect the legal mandates, to the extent that it may endanger the Rule of Law or alter the legal certainty.[30]

With respect to the right of the denominations to establish the content of religion classes, the TC reinforced the autonomy of the denominations by declaring that "if religion classes do not form part of the general programming as religion is a subject that students can voluntarily choose, it is obvious that the teaching staff and the student parent associations lack the capacity to develop the study plan of the different educational levels, of the different religious denominations that, under the protection of Article 3.3., can establish alternative and supplementary teaching, competences that are beyond the control of the school boards that have a secular or non-denominational nature and must not intervene...."[31]

It can be said, therefore, that this power is an expression of the right to autonomy of the churches. In other words, denominations are protected by their right to autonomy, in the transmission of the dogmatic contents and values of the religion class, which may not coincide with the state conception.

With respect to the possible harm to the neutrality of the State on resorting to an external body (the denominational authorities) to hire religion teachers in public schools, who carry out a job that is considered public employment, the constitutional jurisprudence establishes that the autonomy of the religious denominations prevails[32]. The neutrality of the State forces it to not replace religious denominations in judgements on appropriateness, or to interfere in them.[33] As a general rule, in education centers and elsewhere, the option of demanding the workers of an entity or enterprise with its own set of ideas to be loyal to another set of ideas is an expression of the right to autonomy of the denominations (pursuant to community directive 2000/78, Article 4.2).

Furthermore, the fact that it is impossible to demand the cancellation of the baptism entry in parish records is considered a sign of respect for the conception that Christian churches have of each other. Appealing to the rights acknowledged in the Organic Law on Personal Data Protection on the power of owners to have access to their personal data, some people, who had made a declaration of apostasy, aimed to cancel the baptism entry. In this conflict, the Spanish Supreme Court[34] has acknowledged that Churches are entitled

29. STC 141/2000, 29 May, FJ 4, art. 16 protects an "*agüere ligere* consistent (…) in professing the beliefs desired and behaving in agreement with them, as well as in maintaining them with respect to third parties and being able to proselytize them. This power (...) possesses a different intensity depending on whether it extends to one's own behavior and how each party disposes of this, or on the repercussion that such behavior, in agreement with one's own beliefs, has on third parties, be these the actual State or individuals, aiming for them to become the target and receivers of these same beliefs."

30. STC 141/2000, 29 May, FJ 4, "From the moment when their convictions and the adaptation of their behavior to these convictions is done externally, and is not restricted to their private and individual sphere, and the extent to which they are affected becomes clear to third parties, the believer cannot hope, protected by the freedom of beliefs of art. 16.1 CE, that any limit to that behavior will only be a restriction of the infringing freedom of the constitutional precept mentioned; or alter, just by upholding the freedom of beliefs, the private legal traffic or the mandatory nature of the legal mandates on the occasion of the exercise of this freedom, under the pretext of relativizing them to an intolerable point for the survival of the actual democratic Rule of Law of which legal certainty is also a fundamental principle."

31. STC 1 April 1988, FJ 3.

32. STC de 15-II-2007, FJ 2.

33. This is mentioned in the jurisprudence that came about in a conflict between the Union of Seventh-day Adventist Christian Churches and some of its members; see the study of G. Moreno Botella, "Ministro de culto adventista y autonomía confesional," *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 1 (2003) at http://iustel.com.

34. STS of 19 September 2008, contentious-administrative court (section six), further appeal no. 6031/2007. On this decision (and subsequent ones that follow its doctrine), see B. González Moreno, "El derecho fundamental a la protección de datos personales: su contenido y límites respecto al bautismo y la apostasía," *Revista General de Derecho Canónico y Eclesiástico del Estado* 19 (2009).

for the baptism records to reflect the conception that they have on this: it cannot be deleted, therefore it cannot be cancelled.

VI. RELIGION AND THE AUTONOMY OF THE STATE

No religious denomination has a state character. Consequently, the State enjoys full autonomy with respect to the religious creed of any denomination. This State autonomy does not mean that the State cannot include values in its laws that originate from a certain religious conception of life. It will include them or not depending on whether these values are shared by mainstream society and whether they are legally recognized through the established democratic channels. Religious denominations have no representation in the legislative bodies of the Spanish State, or in the Assemblies of the Autonomous Communities. Religious denominations also do not have representation in the advisory commissions of the public bodies for the protection of childhood or youth.

By virtue of the autonomy of the religious denominations, no denomination can exert control over other denominations. Those denominations that are acknowledged as having well-known deeply-rooted beliefs (notorio arraigo) in Spain are entitled to appoint a representative who will form part of the Advisory Commission for Religious Freedom. This Commission acts as a consultant for the executive power and its opinion must be heard by the Government before an Agreement is signed between the State and a Denomination with well-known deeply-rooted beliefs (notorio arraigo) in Spain.

In Spanish law there is no limitation for access to the civil service or to any representative post, with respect to religious belonging. Indeed, a rule of this type would go against Article 14 of the Constitution, which forbids any discrimination for religious reasons, against Article 16.2, which establishes that "nobody can be forced to declare about their ideology, religion or beliefs,"[35] and against Article 103.3, which establishes the principles of merit and capacity with respect to access to the civil service.

The organization of State funerals on the occasion of terrorist attacks or the decease of Spanish soldiers on missions abroad do not harm the neutrality or represent a lack of autonomy of the State with respect to the churches. These funerals, which are not prescribed in any legal rule, are a solemn expression of condolence.

A. Legal Regulation of Religion as a Social Phenomenon

The religious phenomenon is regulated in Spain as a specific social phenomenon, which differs from humanitarian, philanthropic movements or solidarity movements in general. This, however, does not mean that positive religious freedom has prevalence over negative religious freedom on a personal or individual level. Under Spanish law, atheists and agnostics have the same scope of religious freedom as believers of any denomination. This does not prevent religion from being considered as a factor of positive social influence, as the State is forced to cooperate with religious denominations. If religion were to be considered as something that society is indifferent to, forcing the State to collaborate would seem contradictory. There is, however, a doctrinal current that is contrary to this consideration, which tries, as a logical consequence, to reduce the cooperation of the State with the denominations as much as possible. In addition, there is a tendency today to not differentiate the protection of religious freedom with respect to ideological freedom or freedom of thought in the legal field.

B. State Financial Support for Religion

The right to extract voluntary economic benefits from the faithful is acknowledged in Spain for all religious denominations. In addition, all religious denominations benefit at least from the tax exemptions that non-profit entities enjoy. In 1979, the Catholic Church signed an agreement on economic affairs with the Spanish State. By virtue of that

35. M. J. Roca, *La declaración de la propia religión o creencias en el Derecho español,* (Santiago de Compostela, 1992).

agreement, and through successive modifications, today, citizens wishing to do so can assign 0.7 percent of the amount they have to pay to the Treasury to the Catholic Church, through the personal income tax. This is not a religious tax similar to the tax that exists in the Federal Republic of Germany, as it is not linked to religious belonging, nor is it compulsory. Members of the Catholic Church may choose not to assign any amount in favour of the denomination they belong to and people who have not been baptized in the Catholic Church may assign 0.7 percent of their taxes to the Catholic Church through the personal income tax. This assignment covers approximately 25 percent of the necessary budget. Pursuant to the European regulation, following order EHA/3958/2006, 28 December, the cases of non-subjection and the exemptions foreseen in arts. III and IV of the Agreement between the Spanish State and the Holy See, 3 January 1979, with respect to value added tax and the Canary indirect general tax, were eliminated.

The "Pluralism and Co-existence" Foundation is a public foundation, created in 2005, whose assets come entirely from the tax item that is assigned to it each year in the general State budgets. This foundation has been created to finance the religious denominations that have well-known and deep-rooted beliefs (notorio arraigo) in Spain.[36]

Apart from these two direct channels whereby the State cooperates with the denominations for their financing, there are also some indirect cooperation channels, which include the following exemptions; increases in assets as a result of gifts, acquired by the Holy See, the Episcopal Conference, the dioceses, the parishes, the religious congregations and orders, as well as religious associations and entities engaged in charity-teaching, medical, hospital or social assistance activities, are exempt from the Company tax, when the conditions and requirements demanded in the aforementioned agreement concur to enjoy exemption with respect to death duties and gift taxes. The same benefit will be applicable to recognize non-Catholic confessional associations, when they are registered and have signed an Agreement with the Spanish state.[37]

Religious foundations[38] benefit from the tax regime of non-profit entities and from the tax incentives to patronage.[39] By virtue of Article 63 of the law on the reform of local tax offices (law 51/2002, 27 December), those of the Catholic church, under the terms foreseen in Agreement between the Spanish State and the Holy See on Economic affairs, and those of legally recognized non-Catholic confessional associations, under the terms established in the respective cooperation agreements, are exempt from the tax on the ownership of real property.

Apart from the direct financing (by tax allocation, for the Catholic Church, and the Foundation on Pluralism and Co-existence for Denominations with well-known and deep-rooted beliefs (notorio arraigo) and apart from indirect financing (through tax exemptions and cases of non-subjection to taxes), the State directly finances some religious or educational services provided by the denominations. Thus, for example, the Covenant of Collaboration was signed on 24 October 2007 between the State and the Islamic Commission of Spain to finance the expenses caused by providing religious assistance in state penitentiaries; by virtue of the agreement, the State assumes the payment[40] of the Islamic ministers who provide Islamic religious assistance. Likewise, it assumes the

36. Art. 7.1. of the Articles of the Foundation: "the aim of the Foundation is to contribute to the execution of cultural, educational and social integration type programs and projects of non-Catholic religious denominations that have a Cooperation Agreement with the Spanish State or denominations with well-known and deep-rooted beliefs (notorio arraigo) in Spain. Art. 8.1. of the Articles of the Foundation: "the Foundation is created in benefit of non-Catholic religious denominations that have been declared to have well-known and deep-rooted beliefs (notorio arraigo) pursuant to Organic Law 7/1980, 5 July, on religious freedom."

37. Law 29/1987, 18 December, on death duties and gift taxes. Final provision 4.

38. Law 50/2002, 26 December, additional provision 2.

39. Law 49/2002, 23 December, additional provisions 8 and 9 and Royal Decree 1270/2003, 10 October, whereby the application regulation for this law is approved.

40. The amount that must be paid to each religious assistant will depend on the demand for religious assistance effectively proved, in agreement with the following scale: Up to 50 inmates: Half day (1) / Full day (0). From 51 to 150 inmates: Half day (0) / Full day (1). More than 150 inmates: Half Fay (1) / Full day (1). The full day will be considered as six hours and the half day three hours.

payment of the Evangelic Christian religion classes, as stipulated in Judgment of 23 April 1996.[41]

C. Religious Marriage in Spanish law

The Civil Code was adapted to the new constitutional principles on marriage via Law of 7 July 1981, which established an optional marriage system that acknowledges two forms of marriage with civil effects: civil marriage and religious marriage; and it attributes the contracting parties the freedom to choose one model or the other. Article 59 establishes that "consent to marriage may be given in the way foreseen by a registered religious denomination, under the terms agreed with the State, and lacking this, authorised by the State legislation."

To date, only those denominations with an Agreement (Catholic church, FEREDE (Federation of Evangelic Religious Bodies of Spain), FCI (Federation of Israelite Communities of Spain), and CIE (Islamic Commission of Spain) have regulated this possibility in their respective Agreements. Differences between the civil effectiveness of canonical marriage and that of other religious marriages are explained by the deep-rooted nature and historical tradition of canonical marriage in Spain.

D. Civil Effectiveness of Marriage and of Canonical Resolution

In accordance with the regulations provided for in the Civil Code and in the Agreement with the Holy See on Legal Affairs, a marriage held according to the rules of canonical Law produces civil effects from the time it is held. To fully recognize these effects, registration in the Registry Office is necessary. Thus, a canonical marriage is effective in Spain without requiring preliminary civil proceedings, although it will not be fully effective until it is registered at the Registry Office, namely, without prejudice to rights acquired in good faith by third parties. The registration at the Registry Office is carried out simply by presenting the Church certificate, but the entry will be denied when, from the documents presented or from the entries of the Registry office, it is verified that the marriage does not meet the requirements demanded for it to be valid in the Civil Code.

On the request of either party, judgments pronounced by the Church courts on canonical marriage, the judgements on nullity of canonical marriage and the pontifical decisions on unconsummated marriage will have civil effectiveness in Spain, if they adapt to the State Law in judgement pronounced by the competent civil Judge in agreement with the conditions that are established for the exequatur of foreign decisions. Recognition of these canonical judgements does not prevent those who have held a canonical marriage in Spain from being able, if they so wish, to resort to civil jurisdiction to obtain the nullity, annulment or civil separation of their marriage.

E. Civil Effectiveness of Other Religious Marriages (FEREDE, FCI, CIE)

Apart from canonical marriage, in Spain it is possible to hold Islamic, Jewish or Protestant marriages with civil effects. This possibility, foreseen in the Civil Code, is developed in the three Agreements of 1992. For this purpose, and unlike what occurs with canonical marriage, the law demands that the contracting parties initiate the proceedings before the officer of the relative Registry Office prior to the marriage. After verifying the civil marriage capacity of the contracting parties, the officer at the Registry Offices grants the certificate of capacity that authorizes the parties to hold a marriage with civil effects within six months as from the issue of the certificate, before the minister of the relative religion and before at least two witnesses of full legal age. The marriage will take effect as from the moment the marriage is held, but without prejudice to the rights

41. Judgment of the sub-secretariat (of the Ministry of the Presidency), whereby the publication of the agreement of the Council of Ministers, 1 March 1996, is made available, as well as the agreement on the appointment and economic regime of the people responsible for Evangelic religion teaching, in primary and secondary education public teaching centers (B.O.E. 4 May).

acquired in good faith by third parties, until it is registered at the Registry Office. Recognition of these religious marriages does not even entail full recognition of the way they are held as this is regulated in civil law (Agreements of 1992) imposing requirements that, at times, the religious law does not demand (for example, the presence of the Imam in Islamic marriages). However, the result of this is that anyone wishing to hold an Islamic, Jewish or Evangelic marriage with civil effectiveness does not have to submit to two ceremonies, the religious and the civil ones.

As an exception, the preliminary civil proceedings can be eliminated in the case of Islamic marriage, but in this case, it will only be effective at the time such marriage is held if the contracting parties satisfy the civil capacity requirements and, at the time of the registration, the officer verifies the civil capacity requirements.

Unlike canonical marriages, in the case of these religious marriages no civil effectiveness is recognized for the possible judgements of nullity or annulment derived from denominational courts.

VII. Religious Education of The Youth

Article 27.1 of the Constitution establishes that "everyone has the right to education. Freedom of teaching is recognized." Thus, it recognizes two different rights.

On the one hand, the right to education basically leads to the obligation of the public powers to guarantee a place in school for everyone, via the creation of ideologically neutral and free public centres. It also means that the state power must manage and guide the educational system so as to guarantee its quality.

On the other hand, freedom of teaching is the right of citizens and social groups to create teaching centers so that parents have the right to choose the type of education that they wish their children to receive. These centers may, as we will see, have a certain ideology and they may be fostered by religious denominations. In Spain, in fact, the Catholic denominational school continues playing a very important role in the entire education system. The ideology of the center will be developed based on respect for constitutional principles. Thus, Article 27.6 of the Constitution states that "physical and legal persons are acknowledged the freedom to create teaching centres, based on respect for the constitutional principles."

The issue of religion classes in public schools connects to the recognized right in Article 27.3 of the Constitution, which establishes that "the public powers guarantee the parents' right for their children to receive religious and moral education that is in agreement with their own convictions."

Let us see, in more detail, the connection of these rights to the religious factor.

A. Teaching Centers with Ideology

There are three types of teaching centers in Spain, depending on their ownership and financing. Public centres, with public financing and ownership; private centers, with private financing and ownership; and private aided schools, with private ownership and public financing. As the latter receive public financing, they have to satisfy certain requisites with respect to how they are organized and to their student admission criteria.

The ideology is the actual nature and orientation of the center. Public centers must be ideologically neutral so that all students fit into the public school, regardless of their ideas and beliefs. The neutrality aims to guarantee the students' freedom of conscience. Hence, public centers cannot become instruments used by the public powers to disseminate an official ideology or doctrine. In public centers, teachers may "resist any mandate consisting in offering a certain ideological orientation to their teaching" (STC [Decision of the Constitutional Court] of 13 February 1981). In turn, they will have to relinquish any type of indoctrination over their students. In the words of the Constitutional Court: "the ideological neutrality of teaching in public teaching centres … imposes on teachers, who work therein, an obligation to relinquish any form of ideological indoctrination, which is the only attitude compatible with the respect for the freedom of the families that, based on their free decision or forced by circumstances, have

not chosen teaching centres with a certain and explicit ideological orientation for their children."

Article 115 of the Education Act 2/2006 permits owners of private aided and private education centers to endow them with an ideology; namely, a document that shows the actual nature of the centers from the point of view of their religious and ideological orientation, although it is not limited to these aspects. The ideology conditions the behavior of the members of the educational community. The rights and academic freedom of the teacher fall within two extremes. On the one hand, as indicated by the Constitutional Court in the aforementioned decision, the existence of ideology "does not force them to become apologists for such ideas, or to transform their teaching into propaganda or indoctrination, or to subordinate the demands imposed by scientific rigour on their work to that ideology." In turn, the freedom of teachers is "freedom in the teaching posts they occupy, in other words, in a certain centre, and it must, therefore, be compatible with the freedom of the centre, of which the ideology forms part. The freedom of teachers does not empower them, therefore, to aim open or overlapping attacks against that ideology, but only to develop their activity in the terms they consider to be the most adequate and which, in agreement with a serious and objective criterion, are not contrary to the former."

The most problematic question in this regard is the relevance of the activities undertaken by teachers hired by centers with ideology that are contrary to such ideology but are carried out outside their teaching function. The Constitutional Court has defended the evaluation of each specific case. It indicates that the service relationship between teachers and centers does not extend to their non-academic behavior, but it states, at the same time, that "the possible notoriety and nature of these activities and even their intentionality may make them an important and even decisive part of the educational task that is entrusted to them."

B. Religion Classes in Public Centers

In the Spanish system it has been understood that whenever religion classes are voluntary in public centers, this does not violate the secular nature of the State or the neutrality of the public school. On the contrary, such classes are aimed at making religious freedom possible, as indicated in Article 2 LOLR (Act on religious freedom), "The freedom of worship and religion guaranteed by the Constitution secures the right, which may therefore be exercised by all without duress, to: (…) receive and give religious teaching and information of any kind, orally, in writing or any other means; choose religious and moral education in keeping with their own convictions for themselves and for any non-emancipated minors or legally incompetent persons, in and outside the academic domain (…). 3. To ensure true and effective application of these rights, public authorities shall adopt the necessary measures to facilitate (…) religious training in public schools." Thus, our Constitutional Court has indicated that the neutrality of the State and of its school centers "does not prevent the organization in public centers of classes of free choice to provide the parents with the right to choose for their children the religious and moral education that is in agreement with their own convictions (Article 27.3 of the Constitution)" (STC 5/1981, repeating this principle in STC 38/2007).

With respect to the religion classes given in public schools, for the moment, these contemplate Catholic, Muslim, Jewish and Protestant teachings, under the terms established by the Holy See on teaching and cultural affairs and in Article 10 of the three Agreements of 1992 with the FEREDE, the FCI and the CIE. These are subjects that must be offered by the centers but, given their denominational nature, these students are free to follow them.

One of the most debated aspects has been the alternative that students should study who do not choose to take religion. For primary students, the regulation in force does not establish a specific activity, rather it points out that "they will receive proper educational attention, so that the choice of one option or the other (that is, study religion or not) does not represent any discrimination." For secondary education students, apart from giving

them the same options that primary students have, it establishes the possibility, for those who do not want to study religion, of choosing the non-denominational teaching of the history and culture of religions.

As the teaching of religion is denominational teaching, the teachers who have to deliver it are proposed by religious denominations so long as they have the proper academic qualifications as a guarantee of their competence. Out of those proposed, the center chooses the people it deems most appropriate. They will be hired for an indefinite time and will be paid in line with supply teachers of the same educational level. If the religious authority deems that one of the people proposed no longer satisfies the necessary requirements to occupy the post, it may withdraw the appropriateness certification, which will represent the dismissal of the teacher on the basis of lacking one of the necessary requisites to carry out his/her functions. This recruitment system, with the intervention of both the religious authorities and public centers, has been the subject of different conflicts and appeals but it was confirmed by the Constitutional Court in STC 38/2007 of 15 February.

It is clear that religion classes cannot be compulsory, as if this were the case it would violate the neutrality of the public school and the student's freedom of beliefs. A debate has arisen recently due to the compulsory implementation in the Spanish education system of the so-called subject "Education for citizenship." The social debate was transferred to the judicial field on the occasion of the conscientious objections brought forward by several parents who refused to let their children receive this subject as they considered that, based on the objectives and minimum content defined by the public powers, it was not a neutral discipline but rather based on a specific ideology, which could represent an imposed indoctrination outside the parents' election, and contrary to their religious and ideological freedom. The decision of the Higher Courts of Justice varied in the different Autonomous Communities. On 28 January 2009, the Supreme Court unified the doctrine by ruling against the right to object to the subject.

VIII. RELIGIOUS SYMBOLS IN PUBLIC PLACES

As yet, no similar law to the French one has been passed in the Spanish State with respect to the presence of religious symbols in public spaces. There is no regulation in force, either, that foresees the presence of crucifixes or other religious symbols in school classrooms, as there is in Italy or in Bavaria. In fact, new school centers are not usually equipped with crucifixes. The controversial cases arise in the older public centers. Private schools have the right (as part of the right to autonomy of denominations) to conduct their teaching within the framework of their own ideas. Hence the presence of religious symbols in schools with their own ideology is fully guaranteed.

Conflicting cases have arisen above all in the school sector due to the presence of crucifixes or nativities (in some cases, due to religious services, too.[42] To date, the majority of the decisions passed by the Higher Courts of Justice have considered that any decisions adopted by the school councils of the respective education centres –regardless of whether the decision was to keep or remove the religious symbol – were according to law[43]. In the Autonomous Community of Andalusia, when parents of a school center asked for crucifixes to be removed from the classrooms, the solution adopted was to order

42. On this topic, see: A. González-Varas, "Los actos religiosos en las escuelas públicas en el Derecho español y comparado," at Revista *General de Derecho Canónico y Derecho Eclesiástico* 19 (2009).

43. Thus the Decision of the Higher Court of Justice of Madrid, 5 October 2002, on the crucifix in school classrooms. Among the doctrinal authors who have studied the topic, see: M. Alenda, "La presencia de símbolos religiosos en las aulas públicas, con especial referencia a la cuestión del velo islámico," *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 9 (2005) at http://iustel.com; A. González-Varas, *Confesione religiose, diritto e scuola pubblica in Italia. Insegnamento, culto e simbologia religiosa nelle scuole pubbliche* (Bologna, 2005):207; Ditto, "La simbología religiosa en los espacios públicos: problemas generales y soluciones concretas en los estados europeo, *Inmigración y Derecho*, ed. I. C. Iglesias Canle Valencia (2006): 249; S. Cañamares, *Libertad religiosa, simbología y laicidad del Estado,* (Pamplona, 2005): 123; G. Moreno Botella, "Libertad religiosa y neutralidad escolar a propósito del crucifijo y otros símbolos de carácter confessional," *Revista Española de Derecho Canónico* 58 (2001).

the removal and suggest that religious symbols be displayed only in the classroom where Christian religion classes were delivered.[44] On the contrary, in the Autonomous Community of Castile-Leon, the Higher Court of Justice twice ordered the removal of crucifixes from a school center,[45] on the request of some parents, regardless of the decision adopted by the school council.

Conflictive cases are not reduced to the school sector, as they also include the presence of crucifixes and the Bible in swearing-in acts of public posts. By virtue of Royal Decree 707/1979, 5 April, Article 1, during acts involving taking possession of public posts or functions in the Administration, they are asked: Do you swear or promise on your conscience and honor to fulfil the obligations of the post… etc.)? This question will be answered by the person who has taken possession with one single affirmative answer. In other words, the situation of the person having to publicly express the option chosen does not arise. However, if the person chooses to take the oath, the Christian religious symbols (crucifix and Bible) are present; if the person chooses to make the promise, the text of the Constitution is present.

The total suppression of any religious reference or symbol in the public space in Spain seems impossible, without squandering a good part of its cultural legacy. For example, the building where the Spanish Supreme Court has its headquarters is a historical building that is full of frescoes with many biblical references. On the contrary, the building where the Constitutional Court has its headquarters is a newly constructed modern building, without any reference to any religious symbol. As yet, nobody has considered it reasonable to demand the elimination of the fresco painting from the Supreme Court, or ask for religious symbols to be introduced in the Constitutional Court.

Logically, religious symbols in the field of relations between individuals receive a different treatment. The desire expressed by some workers to wear (or not wear) certain garments in their work environment due to religious reasons, when the employer had not been warned during the interview prior to signing the work contract, has not been accepted by the courts.[46]

IX. Freedom of Expression and Offenses against Religion

Recently, a series of conflicts has been arising with reference to the tutelage that freedom of expression merits when its exercise collides with respect for religious feelings: film premieres, shows, photographic exhibitions, publication of books, etc. that ridicule sacred figures or certain beliefs, presenting them in an obscene or offensive manner.[47] The problem does not arise with respect to respectful criticism which, obviously, is protected by freedom of expression, but rather with respect to offences. Both freedom of expression and respect for religious feelings are legally protected assets so each specific case must be pondered to reach a proper solution to the conflict.

The Spanish law protects religious feelings, both in its unilateral rules, even criminally in its more serious injuries, qualifying profanation and mocking as an offence

44. There is also a report by the Ombudsman of a village in Andalusia, who, in his conclusions deems that the only places where the presence of the crucifix does not harm the State secularism in the school sector are places of cult or in the religion classroom. Perhaps, consistent with that report, the Junta of Andalusia has ordered that the crucifixes should be removed from the Virgen de la Cabeza School in Jaen, where some parents requested their removal. That is, in this case, the decision has been assumed by the Autonomous Public Administration and not by the School Board, as in the case of the Madrid school. M. J. Roca, "La jurisprudencia y doctrina alemana e italiana sobre simbología religiosa en la escuela y los principios de tolerancia y laicidad. crítica y propuestas para el Derecho español," *Anuario de Derecho Eclesiástico del Estado* 23 (2007): 257.

45. Decisions of the Court of Justice of Castile-Leon (Contentious-Administrative court), 20 September 2007 (number 1617/2007; this can be consulted in the Aranzadi Repertory of Jurisprudence, with reference RJCA/ 2008/109) and of 14 December 2009 (which can be consulted online at http://www.tirantonline.com, with reference TOL 1.724.360).

46. J. Rosell, "Improcedencia de sanción laboral por uso de vestimenta religiosa," *Aranzadi social* 1 (2003).

47. For an analysis of de conflict in the International field see Z. Combalía, "Libertad de expresión y difamación de las religiones: el debate en Naciones Unidas a propósito del conflicto de las caricaturas de Mahoma," *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado* 20 (May 2009); R. Palomino, "Libertad religiosa y libertad de expresión," *Ius Canonicum* 98, 2009: 509-48.

(Articles 524 and 525 of the Criminal Code), and also in its agreement-based regulation. Thus, the Agreement with the Holy See on Cultural Affairs expressly establishes that "safeguarding the principles of religious freedom and expression, the State will ensure that the feelings of the Catholics are respected in its social media and will establish the relative agreement on these matters with the Spanish Episcopal Conference" (Article 14).

GIUSEPPE D'ANGELO

Religion and the Secular State: Sudan National Report

I. SOCIAL CONTEXT

It has been generally recognized that the independence of political power from religious power, within Western experience, marks the definitive transition to the modern State[1] but does not interrupt the relationship between law and religion.[2]

The widespread presence of religion within the social context, its importance for the achievement and maintenance of political integration and legitimization,[3] and the recent transition from religious freedom to cultural freedom[4] make the political and legal approach to religious questions quite problematic,[5] though decisive for better satisfaction of the needs of the multicultural and multireligious society.[6] At the same time, one of the most important themes in the of debate is just represented by limitation of the "public" role of religions[7] and definition of their exact collocation in the "public arena"[8] or, in other words, by the antagonism between secularism and religion[9] and, especially, by the goal of a (re)secularization of the State and politics[10] and the consequent (re)affirmation of the basic principles of legal system, firstly laity.[11] Recently, the acknowledgment of the

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1. This is a very much discussed question, from different perspectives: for example, H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (italian translation by E. Vianello), *Diritto e rivoluzione. Le origini della tradizione giuridica* occidentale, Bologna, Il Mulino, 1988; E.W. Böckenförde, *Diritto e secolarizzazione. Dallo Stato moderno all'Europa unita*, edited by G. Preterossi, translated by M. Carpitella, Roma-Bari, editori Laterza, 2007; C. Cardia, *Manuale di diritto ecclesiastico*, Bologna, Il Mulino, 1996; M. Fioravanti, *Lo Stato moderno in Europa: istituzioni e diritto*, Laterza, Roma-Bari, 2002; P. P. Portinaro, *Stato*, Il Mulino, Bologna, 1999; I. Vecchio Cairone, *Forme di Stato e forme del sacro. Percorsi storici*, Roma, Aracne editrice, 2009.

2. J. Casanova, *Public Religions in the Modern World* (Italian translation di Maurizio Pisati) *Oltre la secolarizzazione. Le religioni alla riconquista della sfera pubblica*, Bologna, Il Mulino, 2000; R. Remond, *La secolarizzazione. Religione e società nell'Europa contemporanea*, traduzione italiana di M. Sanpaolo, Laterza, Roma-Bari, 2003; M. C. Folliero, *Diritto ecclesiastico. Elementi. Principi non scritti. Principi scritti. Regole. Quaderno 1 I principi non scritti*, Torino, G. Giappichelli editore, 2007, 132 ss.

3. A. vitale, *Ordinamento giuridico e interessi religiosi. Corso di Diritto ecclesiastico*, Milano, Giuffrè editore, 1998; I. Vecchio Cairone, *Introduzione alla storia e sistemi dei rapporti tra Stato e Chiesa*, Roma, Aracne editrice, 2009.

4. N. Colaianni, *Eguaglianza e diversità culturali e religiose. Un percorso costituzionale*, Bologna, Il Mulino, 2006; K. Ketscher, *Cultural rights and religious rights*, in M.P.L. Loenen – J. E. Goldsmith (ed.), *Religious pluralism and human rights in Europe: where to draw the line?*, Antwerpen – Oxford, Intersentia, 2007.

5. Just considering the necessary relationship between law and religion, with specific regard to relevance of canon law and religious law: see, from different perspectives, S. Berlingo, *Diritto interculturale: istruzioni per l'uso di un ecclesiasticista/canonista*, in *Daimon. Annuario di diritto comparato delle religioni*, Bologna, Il Mulino, 2008 (8); S. Ferrari, *Lo spirito dei diritti religiosi. Ebraismo, cristianesimo e islam a confronto*, Bologna, Il Mulino, 2002; M. Ricca, *Soggettività giuridica e comunità culturali (Metafore e metamorfosi per un diritto interculturale)*, in M. Tedeschi (ed.), *Comunità e soggettività*, Cosenza, Luigi Pellegrini editore, 2006; M. Tedeschi, *Diritto ecclesiastico e diritti confessionali*, in *Diritto e religioni*, 1/2008 (5).

6. M. C. Folliero, *La libertà religiosa nelle società multiculturali: la risposta italiana*, in *Diritto e religioni*, n. 1/2009 (7).

7. S. Ferrari, *Islam in Europe: An introduction to Legal Problems and Perspectives*, in R. Aluffi Beck-Peccoz – G. Zincone (ed.), *The Legal Treatment of Islamic Minorities in Europe*, Peeters, 2004.

8. Jocelyne Cesari, *Islamic Minorities' Rights in Europe and in the USA*, in Roberta Aluffi Beck-Peccoz – Giovanna Zincone (ed.), *The Legal Treatment of Islamic Minorities in Europe*, Peeters, 2004.

9. See, with regard to a specific question, D. McGoldrick, *Human Rights and Religion: The Islamic Headcraft Debate in Europe*, Oxford and Portland, Oregon, Hart Publishing, 2006.

10. M.P.L. Loenen – J. E. Goldsmith (ed.), *Religious pluralism and human rights in Europe: where to draw the line?*, Antwerpen – Oxford, Intersentia, 2007.

11. S. Rodota', *Perché laico*, Roma-Bari, editori Laterza, 2009; G. Casuscelli, *Dal pluralismo confessionale alla multireligiosità: il diritto ecclesiastico e le sue fonti nel guado del post-confessionismo*, in A. Fuccillo, *Multireligiosità e reazione giuridica*, Torino, 2008.

social relevance of religious interests as well as the need for a promotional protection of religious freedom meets with new dimensions of state sovereignty[12] and adheres to the goal of a more decisive protection, transcending traditional (i.e., national or, in a wider sense, regional) borders[13] and consequently aspiring to be asserted on a global level.[14]

Within an international legal context and according to a prescriptive description of comparative law, secularization represents a desired approach which should therefore be promoted and sustained with the perspective of a universal vision of the protection of human rights and, especially, freedom of conscience, belief and religion.

The call for secularization therefore acts, from the outside, as one of the most significant elements consenting to satisfy the conditions of (global[15]) constitutionalism, even though a more detailed investigation leads to the assumption that, firstly, the qualification of States as secular or non-secular can not be decisive at all and, secondly, that the same qualification is unable to limit the socio-cultural and legal relevance of religion.[16] However, the forms, limits and legal consequences of the various systems of relationships between the State and religious groups are to be considered as dependant variables of the respective socio-cultural and political contexts.[17] Also according to a correct comparative method,[18] they should therefore be studied within this context.[19]

In a different dimension, viewing the situation from within individual countries, the pressure towards the secular State can act as the element of potential failure of the unity of the legal system. This is the case of Sudan where, on the one hand, the demands of the international community decidedly push in the direction of the alignment to the standards relating to the upholding of constitutional rights, while on the other hand the ideal of the separation between State and religion[20] – commonly perceived as an immediate

12. G. D'Angelo, *Crisi dello Stato, riforme costituzionali, principio di sussidiarietà*, Aracne ed., Roma, 2005.

13. G. Cimbalo, *L'incidenza del diritto dell'Unione Europea sul diritto ecclesiastico – verso un "diritto ecclesiastico della Comunità Europea"*, in L.S. Rossi – G. Di Federico (ed.), *L'incidenza del diritto dell'Unione Europea sullo studio delle discipline giuridiche nel cinquantesimo della firma del Trattato di Roma*, Napoli, Edizioni scientifiche, 2008, 213 ss.; M. Ventura, *Religious Pluralism and Human Rights in Europe. Equality in the regulation of religion*, in M.P.L. Loenen – J. E. Goldsmith (ed.), *Religious pluralism and human rights in Europe: where to draw the line?*, Antwerpen – Oxford, Intersentia, 2007.

14. F. Margiotta Broglio, *Il fenomeno religioso nel sistema giuridico dell'Unione Europea*, in F. Margiotta Broglio – C. Mirabelli – F. Onida, *Religioni e sistemi giuridici. Introduzione al diritto ecclesiastico comparato*, Bologna, Il Mulino, 2000, 87 ss.

15. See Symposium: *Global Constitutionalism-Process and Substance*, in *Indiana Journal of Global legal Studies*, 16#2 (Summer 2009), particularly A. Peters – K. Armingeon, *Introduction - Global Constitutionalism from an Interdisciplinary Perspective*; A. Peters, *The Merits of Global Constitutionalism*; K. Milewicz, *Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework*; B. Simmons, *Civil Rights in International Law: Compliance with Aspects of the "International Bill of rights"*.

16. G. D'angelo, *Regolamentazione giuridica del fenomeno religioso e crisi di sovranità: spunti problematici dalle più recenti decisioni della Corte Suprema statunitense in tema di clausola di separazione*, in *Diritto e religioni*, n. 1-2/2006 (1).

17. M. C. Folliero, *Diritto ecclesiastico. Elementi. Principi non scritti. Principi scritti. Regole. Quaderno 1 I principi non scritti*, G. Giappichelli editore, Torino, 2007, 132 ss.

18. L. Pegoraro – A. Rinella, *Diritto pubblico comparato. Profili metodologici*, Padova, 2007, 7 ss.; R. Sacco, *Introduzione al diritto comparato*, in R. Sacco, *Trattato di diritto comparato*, Torino, Utet, 1992, 128 ss.

19. On application of comparative method to the study of the ecclesiastical law of the State and relationships between religion and comparative law, F. Onida, *L'interesse della comparazione negli studi di diritto ecclesiastico*, in P.A. D'Avack (ed.), *La legislazione ecclesiastica. Atti del Convegno celebrativo del centenario delle leggi amministrative di unificazione*, Vicenza, Neri Pozzi, 1967, 603 ss.; H. J. Berman, *Comparative law and Religion*, in M. Reimann – R. Zimmermann (ed.), *The Oxford Handbook of Comparative Law* (Chapter 22), Oxford University Press, 739 ss.; C. Mirabelli, *Diritto ecclesiastico e comparazione giuridica*, in F. Margiotta Broglio – C. Mirabelli – F. Onida, *Religioni e sistemi giuridici. Introduzione al diritto ecclesiastico comparato*, Bologna, Il Mulino, 2000.

20. On separation and separation theory, *ex multis*, M. A. Baderin, *Religion and International Law: Friends or Foes?*, in *European Human Rights Law Review*, 5/2009; S. Van Bijsterveld, *Equal Treatment of Religions? An international and comparative perspective*; J. E. Goldsmidt – t. Loenen, *Religious Pluralism and Human Rights in Europe: reflections for future research*, both of them in M.P.L. Loenen – J. E. Goldsmith (ed.), *Religious pluralism and human rights in Europe: where to draw the line?*, Antwerpen – Oxford, Intersentia, 2007.

consequence of secularization[21] – constitutes one of the most significant elements through which the aim of territorial independence and legal differentiation as well as the secession and division of national unity could be reached.

Practically, the tension towards the secular State revives and strengthens the democratic appeals of a part of the country, operating as a decisive factor of political division with significant results on the legal and constitutional system, but it also paradoxically ends up strengthening the religious fundamentalism of the remaining article

The case of Sudan is indeed particularly interesting and significant. Its ethnic-cultural and religious composition, lead Sudan to claim to be a valid representation of the particular heterogeneity of the African continent and in particular of Africa south of the Sahara. It is the largest country in Africa, with a population of about 30 million inhabitants spread over an area of 2.5 million km^2, which can be approximately divided into 56 ethnic groups, which are sub-divided into 597 subgroups, speaking 115 languages and dialects.[22] It is also characterized by various religious faiths (about 60 percent Muslim, 15 percent Catholics, and 25 percent animists or belonging to traditional autochthonous religions[23]). Such a reality[24] certainly produces a significant web of inter-cultural and inter-religious relationships[25] which could be useful in improving the conditions of a peaceful co-existence, so that it clearly could contribute to attaining a deeper meaning of the ideal of modern multiculturalism.[26]

Nevertheless, the same reality often clashes with the political aim of the unity of the legal system, which is imposed by the improper transposition of the Western idea of State and rule of law within a completely different context such as that of Sub-Saharan Africa[27].

The basic tension between the ambition to integrate such a rich variety of ethnic-cultural and religious identities and its potential suppression, has long been the cause of the dramatisation of the contrast between the African, and the Arab and Muslim identities and has turned towards the dichotomy between the north of the country, approximately declinable with the majority being Arab-Islamic, and the South, otherwise linked to traditional religions or those converted to Christianity. The intensification, in certain periods of the country's history, of the contrast has determined the outbreak of bloody and long lasting armed conflicts which are still far from being resolved, in which the context of religious claims have played a large role, at least under a symbolic profile.[28]

As international literature frequently recognizes, the intolerance towards the attempts of Islamization produced over time and in particular to those consequences of the generalized introduction of Islamic law often act as fuel to the claims of autonomy of Southern Sudan as well as the result of an endemic situation of conflict.[29]

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21. M.P.L. Loenen – J. E. Goldsmith (ed.), *Religious pluralism and human rights in Europe: where to draw the line?*, Antwerpen – Oxford, Intersentia, 2007

22. M. Salih, *Etno-nazionalismo nel Sudan post-indipendenza: dalle guerre civili al genocidio*, in *Sudan 1956-2006: cinquant'anni di indipendenza*, *Afriche e Orienti*, Dogana, Repubblica di San Marino, AIEP editore, 1-2/2006 (anno VIII).

23. M. A. Ayuso Guixot, *Christian-Muslim relations in the Sudan. A Survey Through The Sudanese Politics*, *Islamochristiana*, Roma, Pontificio Istituto di Studi Arabi e d'Islamistica, 30 (2004),132; Referring to 2008, ACS (Aiuto Alla Chiesa Che Soffre) *La libertà religiosa nel mondo. Rapporto 2008*, Roma 2008, indicates about 70.3% Muslim, 16.7% Christians, 11.9% animists and 1% belonging to other religions.

24. For an interesting history of Sudan, M.P. Holt- W.M. Daly, *A History of the Sudan: From the Coming of Islam to the Present Day*, Longman, 1988.

25. M. A. Ayuso Guixot, *Christian-Muslim relations in the Sudan. A Survey through The Sudanese Politics*, *Islamochristiana*, Roma, Pontificio Istituto di Studi Arabi e d'Islamistica, 30 (2004).

26. G. D'Angelo, *La libertà religiosa nelle società multiculturali: il caso sudanese*, in *Diritto e religioni*, n. 2/2008 (6).

27. The limits of occidental approach to reality of subsaharan Africa are confirmed by historical studies as well as political studies: see, for example, A.M. Gentili, *Il leone e il cacciatore*, Roma, Carocci, 2004; G. Carbone, *L'Africa. Gli stati, la politica, i conflitti*, Bologna, Il Mulino, 2005.

28. J. Haynes, *Religion, Ethnicity and Civil War in Africa: The cases of Uganda and Sudan*, in *Democratization*, 1/2008 (15).

29. A. Layish – G. R.Warburg , *The reinstatement of Islamic Law in Sudan under Numayrī: an evalutation of a legal experiment in the light of its historical context, methodology, and repercussions* , Leiden, Brill, 2002.

II. THEORETICAL AND SCHOLARLY CONTEXT

The dynamics and the – potential or emerging – results of this double tension – regarding, from the outside as well as the inside, the authoritarian approach of the relationship between the national community and the holders of political power, leading to the political use of religion, and the re-alignment to the international standards protecting the rights of individual conscience as requested by the international legal system – constitute further reasons for the interest in studying the Sudanese experience.[30]

The recognition of the role of the Sharia in the Sudanese socio-political and legal system, or the Islamic nature of the State, is a recurring problem that determines – or, if preferred, proceeds along with – the evolution of the political relationships in an authoritarian direction. It deals with issues that clearly reflect the diversity of the different Islamic theoretical-cultural approaches and interpretations, and it also influences the answer to the theme of the nature of the State, specifically relating to the relationship between law and religion, so that these questions are at least conditioned by the relationships of strength, established, time after time, within Islamism.

Generally, a specific emphasis is given[31] to the theoretical approach attributed to the era of Mahdiyya, (from "Muhammad Ahmad ibn'Abdallah, the Mahdi of Sudan in the 19th century, who was the founder of a Messianic movement that tried to realise "a pure and incorrupt Islamic state") and to the affirmation of the idea that there could not be a separation between State and religion.[32]

At the same time, current literature highlights the complexity of the relationships between this theoretical approach and the autochthonous religious traditions of Sufism, also considering that Sufism was the means through which Islam entered the area. It has probably greatly influenced the way to interpret Islamism in Sudan[33], allowing the maintenance of a certain moderation, even with the arrival of Hasan al Turabi's radical Islamic view. Notwithstanding the conditions imposed by the Ottoman dominion and the results of the activity of the Mahdi, it is worth considering that before the independence of the Sudan (1956), and more precisely in the phase of the Anglo-Egyptian condominium (established in 1899 following the conclusion of the Mahdist revolution), Islam maintained its role, even if slightly less important than in the past.

The Sharia was considered the personal law of the Muslims. In other words, it was the law applied to the relationships between themselves, while customary law was recognized as the guidelines of both the local, and the English law, which were to be considered as the territorial law, of general application.

On this basis, the Sharia highlights a progressive tendency to implement its own efficacy by lelgitimizing itself through the legal tools introduced by the colonizers, indirectly, as an effect of the claim carried out by the English legislator to the parameter of "Justice, Equity and Good Conscience"[34] or also, directly and especially after independence, following the attempts to extend the nature of personal law and amplify its possible value as territorial law.

Non-Muslim parts are thus allowed to opt for the application of Islamic law, while this one is necessarily applied when, dealing with marital issues, one of the parties is Muslim or belongs to one of the religions of the Book. Secondly, there is the adoption of a civil code based on the principles of Islamic law, according to the Muslim model, or the

30. G. D'Angelo, *La libertà religiosa nelle società multiculturali: il caso sudanese*, in *Diritto e religioni*, n. 2/2008 (6).

31. P. Woodward, *Cinquant'anni di politica islamica*, in *Sudan 1956-2006: cinquant'anni di indipendenza*, italian translation by Stefano Bellucci, *Afriche e Orienti*, Dogana, Repubblica di San Marino, AIEP editore, 1-2/2006 (anno VIII).

32. C. Ballin, *The Dimmis in the Sudanese Mahdiyyah (1881-1898)*, in *Islamochristiana*, Roma, Pontificio Istituto di Studi Arabi e d'Islamistica, 27 (2001).

33. C. Carbone, *Religiosità e religioni in Africa subsahariana. Il contatto con il Nord e la nascita del problema religioso*, in Mario Tedeschi (ed.), *La libertà religiosa*, Soveria Mannelli, 2002, tomo III; J. M. Lewis, *L'Islam nell'africa subsahariana*, in A. Triulzi – g. Valabrega – A. Bozzo (ed.), *Storia dell'Africa e del Vicino Oriente*, Firenze, 1979.

34. A. Layish – G. R. Warburg, *The reinstatement*.

acknowledgment of the Sharia as a general source of inspiration of the law, so that only non-Muslim, in personal matters, could be allowed to deviate from it.[35]

A significant turning-point in the direction of the Islamization of Sudan really occurs during the second phase of the political-military dictatorship of Jafaar Numeiri, which succeeded (1969) the brief democratic experience that set up the defenestration of Ibrahim Abboud (1964).

Abandoning the initial socialist option (which had culminated in the approval of the constitution of 1973) and starting a political phase of national reconciliation – particularly drawing together of the more convinced supporters of Islamic fundamentalism – Numeiri announced in 1977 the setting up of a committee for the revision of Sudanese legislation, headed by the influential figure of Hassan al-Turabi.

The declared task of the committee was more specifically the adaptation of the current legislation to the dictates of Islamic law. They are the premonitory symptoms of the issuing (1983) of the "laws of September," through which the Sharia is explicitly recognized as the source of law for all the Sudanese.

The evaluation of the laws of September and the real meaning thereof that emerges in the context of the international reading, is highly contrasting. On the one hand, it highlights that the extended recognition of the Sharia as the source of the law has lead to a decisive recognition of Sudan as an Islamic state, or the affirmation of a conception of national unity based on the once Arab and Islamic nature of national community (with evident disrespect to the religious and ethnic varieties of the country, as well as its being, above all, African). At the same time, it also places emphasis on the superficial nature of Islamization set up by Numeiri or, alternatively, the negative consequences, in terms of progressive isolation of the dictator, coming from the indiscriminate enforcement of Islamic law, which is even more declined according to a particular interpretation which was not unanimously shared by all Islamists.

Firstly, it has been pointed out that the introduction of the Sharia was not accompanied by a profound activity of Islamization of the civil society as well as the same government contexts that should have supported it, so that the subsequent analysis, should discuss as being a substantial failure, in reference to Numeiri's attempt.

Secondly, it is worth noting that the proclamation of Islamic law and the correlating postulates have lead to the reopening of the civil war between North and South.

It has also been pointed out that the politics of Numeiri did not have a large following in Islamic circles, as highlighted by the execution of Mahmud Mohammed Taha.[36] International literature points out that this event had a really negative effect, strengthening the belief that the activity of the dictator was significantly deviating from Islamic traditions, in such a way that it was no longer tolerated.

It is therefore not surprising that the progressively authoritarian deviation imposed by Numeiri to his government is considered to be at the basis of his removal from office (carried out without violence and accepted by a significant following within the population) by Suwar al-Dhahab (in 1985). Even with such limits (recognized in terms of a propagandistic use of the religious ideals), the aim of the Islamization of Sudan, or the construction of an Islamic State, can not claim to have been completely abandoned by the holders of political power. Indeed, it became stronger and conditioned the history of Sudan as well as the actual legal and political evolution.[37]The democratic governor of Sadiq al-Mahdi, upon taking office, as a natural consequence of the transitional government of al-Dhahab, never seriously questioned the enforcement of the laws of September and, even[38] for this reason, was not able to end the conflict with the South.

However, the arrival on the political scene of Omar Hasan Ahmad al-Bashir (1989)

35. M. Guadagni, *Sudan*, in R. Sacco, *Il diritto africano*, Torino, UTET, 1996.

36. S. Tellenbach, *L'apostasia nel diritto islamico*, in *Daimon. Annuario di diritto comparato delle religioni*, n. 1/2001, 63 ss.

37. I. Panozzo, *Il dramma del Sudan, specchio dell'Africa*, Bologna, EMI, 2000.

38. But not only: A. A. Mazrui, *Constitutional Change and Cultural Engineering: Africa's Search for New Directions*, in J. Oloka-Onyango (ed.), *Constitutionalism in Africa. Creating opportunities, Facing challenges*, Fountain Publishers, 2001, 23, 27.

determined another significant reform, on a fundamentalist basis, of the State to the point that Sudan was considered as the first and only example of an Islamic state in the whole Sunnite Islam world. The introduction of a new penal code, largely based on the dictates of the Sharia (1991), constituted a more knowledgeable and radical interpretation of political Islam and, under the unfailing direction of al-Turabi[39], accompanied, internally, a more decisive socio-cultural transformation (involving schools, the Army and the media) and, externally, a decisive policy of international propaganda based on the values of Islamic fundamentalism.

As in the case of Nimeiri – but according to a chronology that I would define "inverted" – the claim of the role of Islam marks the progressive succession of a different phase of the Bashir era, in which the radical enforcement clashed with the need to overcome the deadlock deriving from the progressive international isolation of Sudan. The approval of a new constitution in 1999 gave hope to a "reconciliation" of Islamic law with the postulates of Western constitutionalism and the ideology of human rights.[40]

More recently, the relaxation of the alliance with al-Turabi as well as the signing of the peace treaty between the North and South announced the start, for Sudan, of a new legal and institutional phase culminating with the approval (in 2005) of the interim national constitution and the interim constitution of Southern Sudan.

In both cases, the relationship between State and religion is of significant, even symbolic, primary importance. It confirms, with reference to the African context, the relevance of religions[41] in today's constitutional processes and transitions.[42]

III. CONSTITUTIONAL CONTEXT

A. The Constitution of 1999

For a better reconstruction of the constitutional web upon which the relationship between State and religion in Sudan is based today, it is worth focusing on, and comparing, the 1999 constitution and the transitional constitutions, both national and of Southern Sudan approved in 2005.

Regarding the first, it is important to point out that this is a text to be considered as a result of a highly authoritarian power, destined to operate within a highly authoritarian context.

This is a very noteworthy observation, drawing attention to the various difficulties it could meet with, with regard to the real alignment to the Western vision of constitutionalism and especially of individual and collective rights (with it being highlighted that the 1999 constitution should be considered nothing more than a facade).

However, we can clearly realize its very distance from the Western sensitivity, especially with regard to the concept inspiring the relationship between the State and religion. In fact, the latter not only assumes a clear political role absolving to an effective task of legitmization of the constituting power and conditions, in a negative sense, the constitutional set-up of rights even if formally sanctioned in the constitution.

With regard to the first aspect, it is worth considering the preliminary dispositions dealing with the State and the main directives, contained in the first part of the constitution (Article 1-19), even if we must consider that these dispositions are explicitly deprived of a legal relevance. They are indeed considered as objectives of an essentially

39. M. Burr – R. O. Collins, *Hasan al-Turabi and the Islamist state, 1989-2000*, Leiden, Brill, 2003.

40. I. Bantekas – H. Abu-Sabeib, *Reconciliation of Islamic Law with Constitutionalism: the Protection of Human Rights in Sudan's new constitution*, in *African Journal of International and Comparative Law/Revue Africaine de Droit International et Comparé*, October 2000, vol.12, pt. 3. Some Authors prefer to point out that the 1991 Criminal Act and the 1998 Constitution of the Republic of Sudan "epitomize what may be described as the regime's "discursive dissimulation"": M. Mahmoud, *When Sharia Governs: The Impasse of Religious Relations in Sudan*, in *Islam and Christian-Muslim Relations*, 2/2007, (18).

41. G. D'Angelo, *Factor religioso, procesos constituyentes, transiciones constitucionales: la esperiencia de Sudàn*, in *Revista general de derecho publico comparado*, n. 1/2009, in www.iustel.com.

42. On the concept and the dynamics of constitutional transitions, G. De Vergottini, *Le transizioni costituzionali*, Bologna, Il Mulino, 1998.

programmatic nature and therefore void of any prescriptive value (Article 19), finally destined to the legislator and, more generally, to public officials, intending to guide them in the managing of public things.

For this reason, it is clear that we could consider these dispositions as very significant ones, regarding that their meaning lets us know, so to speak, the "identity card" of the statuary order. It is very significant, in its singularity, the disposition defining the nature of the State. It declares openness toward the various races, cultures and religions (due to the fact that Sudan is described as "embracing homeland"), but immediately adds the recognition that Islam is the religion of most of the population, while Christianity and other traditional faiths have a considerable following (Article 1).

Another singular – and symptomatic of the intention to establish a clear subordination of the State to religion – is the set up that is given to the issue of sovereignty, or in other words, the concrete allocation of sovereign power to the rulers. The preliminary recognition of Sudan as a federal republic (Article 2) necessarily requires the constituent to recognize in the Sudanese people the holder of sovereign power as well as the source of legitimacy of the power of the State, but the Sudanese people themselves are expressly considered to be God's representative on Earth.

This translates into an explicit division between the attribute of sovereignty, recognized to the people (and through them, to the State, substantially according to the basic set up of Western democratic constitutions) and the more meaningful supremacy, undeniably recognized in the Divine (Article 4). In other words, the State is nothing more than a vehicle for divine action, which is guided through the people.

The further unravelling of these preliminary dispositions is absolutely consequent with the assumed views, so that the formal concessions to a secular vision of the relationship between political power, institutions and citizens are quite marginal and irrelevant.

The dispositions dealing with the zakat (defined as financial duty, requested by the State) are particularly interesting as well as those dispositions showing a consideration of the State as a ethical State. For example, Article 16 defines the preservation of society from corruption, delinquency, hostility towards Muslims, and promotion of morally virtuous behaviour as aims of the State's action.

These dispositions include the very interesting Article 18, which expressly and in detail orders public officials to behave in line with the religious dictates when carrying out their public duties.

The same constitution also sets out to condition (Article 71) those undertaking any public office by taking an oath according to a formula, painstakingly described, full of clear and decisive religious elements.

In fact, it is nothing more than a further confirmation of a type of identification between religion and politics, or, in other words, of the instrumental nature of resorting to the religious factor as an element of political legitimization, in the sense we have just outlined, even if, at the same time, it does not specifically seem necessary to be a Muslim in order to undertake a public office, be it of a political type or not, and the complete set of rights and duties to which the Constitution is bound, requires mere citizenship. That is the reason why, according to some[43], the Sudan could not yet be considered a strictly Islamic state.

However, the most significant consideration deals with the setting up of the theme of sources of the law.

According to Article 65 of 1999 constitution, "Islamic law and the consensus of the nation, by referendum, Constitution and custom shall be the sources of legislation; and no legislation in contravention with these fundamentals shall be made; however, the legislation shall be guided by the nation's public opinion, the learned opinion of scholars and thinkers, and then by the decision of those in charge of public affairs."

43. I. Bantekas – H. Abu-Sabeib, *Reconciliation of Islamic Law with Constitutionalism: the Protection of Human Rights in Sudan's new constitution*, in *African Journal of International and Comparative Law/Revue Africaine de Droit International et Comparé*, October 2000, vol.12, pt. 3,540.

Islamic law is therefore clearly indicated as the source and parameter of constitutional legitimacy of the state legislation while its fundamental characterization as a religious law with the substantial indeterminateness of the distinction between the political and religious levels which lead to considering the Sharia as prevailing in absolute over the other forms of rule making as set out within the context of the same disposition.

This notation is indirectly confirmed by the second part of the same disposition, that, establishing the principle which "the legislation shall be guided by the nation's public opinion, the learned opinion of the scholars and thinkers, and then by the decision of those in charge of public affairs," evidently refers to an internal and typical dynamic of the interpretation of Islamic law.

It leads us directly to the second of the aspects that we have previously highlighted, as particularly significant of the non-secular nature of the State, as defined in the 1999 constitution.

In fact, it is difficult not to realise how the explicit claim to a religious source and particularly to the Sharia can herald relevant consequences with regard to the real meaning and efficacy of rights formally recognized in the dispositions of title II, first part, of the same constitution.

These dispositions seem highly severe and detailed in explaining the contents of "rights and duties," proposing a reconstructive model of the first, fundamentally, in accordance with the Western characterization of "negative freedom," or, in other words, taking care to protect those subjective situations of illicit inclusions and pressures of political power.

Many of these dispositions expressly request that rights and freedom are recognized according to the law. It is the case even with regard to the right to life: Article 20 excludes from this limit only freedom from slavery, forced labour, torture and humiliating practices, thus allowing the violation of the right to life "in accordance with the law". The following Article 33, coherently, expresses the principle in which the death sentence will not be ruled unless in the case of "extremely serious offences by law," leaving the possible eventuality of incriminating laws being placed after the crime has been committed. It is naturally the case for personal freedom and movement freedom or freedom of belief and religion, thought and expression, association and organisation, the right to property and so on.

It is true that it is also possible to identify dispositions in which such limitation is not specifically mentioned. This is the case in the aforesaid freedom from slavery and torture, the right to citizenship, the right to preservation of cultural identity and religion, the right to legal action, the presumption of innocence and the right to defense, and, even more, the right to equality. More specifically, the 1999's Constitution contains specific dispositions on the theme of equality without distinction of religion (it is worth highlighting Article 21: "All people are equal before the courts of law. Sudanese have duties as regard to functions of public life; and there shall be non discrimination only by reason of race, sex or religious creed. They are equal in eligibility for public posts and offices not being discriminated on the basis of wealth") and religious liberty (Article 24, Freedom of creed and workship: "Every human being shall have the right of freedom of conscience and religious creed and shall have the right to declare his religion or creed, and manifest the same by way of worship, education, practice or performance of rites or ceremonies; and no one shall be coerced to adopt such faith, as he does not believe in, nor to practice rites or services he does not voluntarily consent to; and that is without prejudice to the right to choice of religion, injury to the feelings of others, or to public order, all as may be regulated by law").

Therefore, in one case as in another, dealing with the inviolable recognized rights that include the possible restrictions (only) in the cases and manner established by the law, it is likely that the effective contents of the contemplated laws are substantially determined by Islamic law, directly relevant through the effects of the explicit claim contained in Article 65 of the Constitution.

Taking into account Article 24 of the Sudanese Constitution and the solemn

affirmation of the right to religious freedom it contains.

Notwithstanding the letter of the rule, such a declination can hardly be considered capable of covering the eventual hypotheses of abandoning the Islamic faith.

Freedom of religion should not consider apostasy as a faculty for Muslims, in coherence with the interpretation which inspires what is commonly defined "Islamic reserve" in ratification of the International Charter of the rights by several Islamic states,[44] and, generally, with the Islamic view of human rights[45] as well as the consequent Islamic declarations, like the Declaration of Cairo (Article10).[46]

On the contrary, it is also worth highlighting a further aspect that emerges from Article 65 Cost. and can be positively evaluated.

This disposition, indeed, does not only consider the Sharia but explicitly calls upon the role of the customs as a source of legislation, indirectly recognizing the relevance of the variety of the social-cultural and legal context.

Thus being, the nature of Sharia makes it very decisive and tends to tip the balance with customary law in favor of Islamic law or at least to determine a decisive counter-position between them. Also considering the variety of sudanese views on human rights,[47] the same disposition could favor, or legitimize, a relationship of mutual conditioning between the Sharia and customary law that could also contribute to neutralize the reciprocal difficulty, along the evolutionary dimension resulting at least coherent and respectful of the African characteristic.[48]

B. Interim National Constitution (2005)

The interim national constitution as well as that of Southern Sudan, issued and enforced during 2005 to regulate the political-institutional dynamics as well as the juridical sphere of the country during the transitory period, is based on different prospects which, however, presume the common recognition of the importance of the religious factor. In a distinct line of continuity to the 1999 constitution, the interim national Constitution deals with the recognition of the "political" role of religion, even if there are significant adjustments in the direction of a more knowledgeable precise definition as well as a more decisive guarantee of rights and freedoms, even in religious matters.

The opening to the religious legitmization of political power seems, in the comparison with the 1999 constitution, to be less intense and more implicit. This is probably due to the political need to draw up a widely shared constitutional text, therefore acting upon a greater care in the use of religious references that had been perceived as evident and impassable reasons of division.

At the same time, it is not to exclude that the writers of the constitution had intended not to preclude (and even favor) the obtaining of results that are substantially not so different from the 1999 constitution, specifically with regard to the situation in North Sudan, so that we had to raise the problem of the meaning to be attributed to the recognition which "the Interim National Constitution shall be the supreme law of the land. The Interim Constitution of Southern Sudan, state constitutions and all laws shall comply with it."

In fact, a certain inclination to the strengthening of the bond between the State and religion – as well as the (re)affirmation of the nature of the State as substantially non-

44. A.Vitale, *Corso di diritto ecclesiastico. Ordinamento giuridico e interessi religiosi*, Milano, Giuffrè, 2003.

45. A. Pacini (a cura di), *L'islam e il dibattito sui diritti dell'uomo*, Torino, Edizioni Fondazione Giovanni Agnelli, 1998.

46. O. A. Zeid, *Equality, Discrimination and Constitutionalism in Muslim Africa*, in J. Oloka-Onyango (ed.), *Constitutionalism in Africa. Creating opportunities, Facing challenges*, Fountain Publishers, 2001, 173 ss.; H. E. Kussala, *Islam and Human Rights in Sudan*, in Encounter, Pontificio Istituto di Studi Arabi e d'Islamistica, Roma, n.331 (January 2008).

47. H. E. Kussala, *Islam and Human Rights in Sudan,* in *Encounter*, Pontificio Istituto di Studi Arabi e d'Islamistica, Roma, n.331 (January 2008).

48. On African legal system as a "pluralistic system," M. Guadagni, *Diritto dei paesi africani*, in *Digesto delle discipline pubblicistiche*, Torino, Utet, 1991.

secular – clearly results at the basis of the single dispositions and spirit of the constitution.

The national constitution does not reproduce the divide between the concepts of supremacy (in the relationship between divine and earth) and sovereignty (in the temporal context). It prefers to deal with the first directly, ascribing it to the population, with regard to ownership as well as the State regarding the exercise thereof, "in accordance with the provisions of this Constitution and the law, without prejudice to the autonomy of Southern Sudan and the states" (Article 2, national Const. 2005).

The explicit basis of state sovereignty to a source of divine legitimization – originally founded in the formulation of Article 4 of the 1999 Constitution, in other words in the specific recognition of the State subordinate to God – is now only apparently dissolved by the reconduction of the relative reference within the context of the preamble to the Charter of 2005: here indeed we can find the explicit formalization of the gratitude of the Sudanese population to the merciful God "who has bestowed upon us the wisdom and will to reach a Comprehensive Peace Agreement that has definitively put an end to the longest running conflict in Africa."

In fact, it is a far from irrelevant homage as highlighted by the further dispositions relating to the nature of the State and the set up concerning the fundamental basis of the Constitution and the directive principles and objectives of the action of the State.

The formulation of Articles 1 and 4, dedicated to the nature of the State and the fundamental basis of the Constitution, respectively, underlines indeed the very significant openness to religions and cultures (Article 1) or traditions and customs (Article 4) as sources of the moral cohesion and inspiration of the Sudanese population, so enforcing a decisive mixture between politics and religion.

Stated differently, it is clear that such a wide and general formulation can favor an instrumental use of religious reference, depending on (because of) the particular socio-cultural and regional circumstances and consequently the supremacy, in such contexts, of the Islamic issues of the North.

With these assumptions, we can now (re)consider the configuration assumed by the disposition of the 1999 constitution (Article 18), regarding the relevance of religious values as a profile of the relationship between the State and religion and the nature of the first, and compare it with the correlative setting of interim national constitution.

It is worth remembering that Article 18 of the 1999 constitution served to impose on public power and those in public office the respect of the fundamental religious inspiration (in) one's own actions and those of the State. Therefore, the homologous (regarding its collocation) disposition of Article 6 of the interim national constitution inverts the perspective, preferring to access a type of self-limiting of the State towards specific and detailed religious rights, which explicitly oblige the respect of the State itself and, therefore, could induce belief that the religious reference to avoid any worth of political legitimization.

Considering what we have just highlighted, we could affirm that the Sudanese constituent preferred not to face the issue and therefore for the same reasons adopted for other profiles voluntarily vague and ambiguous dispositions. Article 6 of the interim national constitution seems to rather limit itself to anticipate the contents of the subsequent Article 28, allocated to the part dedicated to the Bill of Rights.

In fact, it is sufficient to move slightly away from Article 6 to observe the persistence of a certain tendency to color with ethnic-religious contents the political objectives of the State as well as the contents of the legislation. According to Article 16, first comma, collocated in the dispositions relating to the principles and guiding criteria of the action of the State, – but we can also point out that Article 22, explicitly but in a less evident way that the homologous Article 19 of the 1999 constitution, deprives them of any formal-juridical relevance – the State is legitimated in drawing up laws aimed at the protection of society from corruption, delinquency and social perils as well as guide the national community in following social values coherently with the religions and cultures of Sudan. This is presumably, even in this case, the way to intend the disposition, which can vary considerably depending on the regional context in which it is applied, placing itself in a

substantial line of continuity in relation to the 1999 constitution.

On the other hand, with Articles 56, 71 and 89 of the same constitution, the oath imposed with the aim of the valid admission in the functions of the President of the Republic, Minister and member of the National Legislation, respectively, remains unaltered. Clearly, it is not completely coherent with the eventual needs to obtain a religious neutralization of political power or, in other words, to secularize the state.

Similar considerations can be made for the rights and freedoms disciplined by the second part of the Constitution.

Surely, it is evident that there is an attempt to define the contents precisely and, above all, to reaffirm the legal value of the affirmations constituting the basis of reference of the Sudanese Bill of Rights. It is also worth highlighting the potential inclination towards a positive and promotional reconstruction of the rights and constitutional freedoms that could derive from the dispositions allocated in the previous sections of the aforementioned Constitution (e.g., Article 1, comma 2 collocated in the context of the first part, title I as well as Article 12 and the whole title II of the first part).

It is also worth focusing on the subtraction of the dispositions of the Bill of Rights from the relevant context of the emergency presidential powers (Article 211).

However, many of the problems present in the 1999 Constitution still remain intact. The diffused reference to the formula of "according to law" and to public order in limiting the effective content of rights and freedom and the relevance, on such a level, of the determinations of Islamic law (see Article 38 dealing with religious freedom), the explicit prevision of crimes punished with hudud and so on.

In particular, Article 5 introduces a decisive differentiation of the system of the sources by declaring that "Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic Sharia and the consensus of the people. Nationally enacted legislation applicable to Southern Sudan or states of Southern Sudan shall have as its sources of legislation popular consensus, the values and the customs of the people of the Sudan, including their traditions and religious believe, having regard to Sudan's diversity. Where national legislation is currently in operation or is to be enacted and its source is religion or custom, then a state, and subject to Article 26 (1) (a) hereir in the case of Southern Sudan, the majority of whose residents do not practise such religion or customs may: (a) either introduce legislation so as to allow practises or establish institutions, in that state consistent with their religion or customs, or (b) refer the law to the Council of States to be approved by a two-third majority of all the representatives o initiate national legislation which will provide for such necessary alternative institutions as may be appropriate."

As we can see, in relation to the new Sudanese constitutional phase, the set up based on Article 65 of the 1999 Constitution is developed in two directions: in a quite negative direction, strengthening the claim of the prevalence of Islamic law in the North, in a quite positive direction, freeing the dynamic of the sources of legislation as in the case of the South.

In fact, as coherently specified in Article 5 of the Interim Constitution of Southern Sudan: "The sources of legislation in Southern Sudan shall be: (a) the Interim National Constitution; (b) the Interim Constitution of Southern Sudan; (c) customs and traditions of the people of Southern Sudan; (d) popular consensus of the people of Southern Sudan; and (e) any other sources."

C. The Interim Constitution of Southern Sudan (2005)

As Article 13 affirms, the dispositions of the national interim constitution are integrated and completed by the corresponding dispositions of the interim Constitution of Southern Sudan. Leaving out of consideration several specific profiles (the limitations "according to law" of many of the dispositions regarding rights and freedoms, the permanence of the death sentence, etc) as well as a natural structural homogeneity of the same dispositions, the latter indicate a more decisive improvement of those provisions of the national constitution that are evidently conditioned by non (completely) secular nature

of the State. The explicit extension of the prohibition of torture with reference to the hypotheses of punishment following prosecution (Article 22) and even more the exclusion of the punishment hudud (Article 25) is significant.

In relation to religious freedom, it is worth highlighting how the relative disposition completely reproduces the content of Article 6 of the national constitution, collocated among the determinations relating to the nature of the State and its guiding principles.

The collocation of the disposition within the context of the Bill of Rights seems to be more in keeping with its finality and its contents but above all, it allows it to operate in a completely opposite way in relation to the choices imposed in the national Constitution, making space, among its founding principles, for a different construction of the relationship between the State and religion.

In fact, according to Article 8 of the interim Constitution of Southern Sudan, "in Southern Sudan, religion and state shall be separate. All religions shall be treated equally and no religion shall be declared the official religion of Southern Sudan; religion or religious beliefs shall not be used for divisive purposes (…)".

The solemn affirmation of the principle of separation between state and religion naturally assumes a fundamental importance as well as a symbolic nature, constituting a characterizing and distinctive trait between North and South.

It is nevertheless evident that it does not lead to – it can not lead to – a confining of religion within the context of only individual conscience and to exclude every form of cooperation between the state and religions.

The same constitutional context in which that solemn affirmation is inserted inspires this conclusion. In fact, it is worth considering that the preamble of the interim constitution of Southern Sudan seems to be interested in taking note of the role of religion in relation to the creation of the new constituting phases, by integrally using the model of gratitude towards a merciful God, who in this case is thanked "for giving the people of the Sudan the wisdom and courage to reach a peace agreement which ended a long and tragic conflict."

This is a very significant recognition, due to it strengthening the idea that religion can still play a relevant public role, in consolidating the peace process as well as in relation to the future political determinations.

It is also worth considering that a different type of reasoning would lead to a paradoxical interpretation of the constituting process. In fact, it would be a constitution that rather than aid social dynamics, would with every probability neutralize them.

The point is essential and is confirmed by a more complete interpretation of the same article, which highlights the ultimate finality of the principle of separation. It should emphasize not the refusal to recognize the social role of religion but it should guarantee the equal treatment of all religions in order to stop that one prevails over the others and above all, the neutralization of every possible form of religious conflict. This has a corresponding meaning in the subsequent Article 37: "Ethnic and cultural communities shall have the right to freely enjoy and develop their particular cultures; members of such communities shall have the right to practise their beliefs, use their languages, observe their religions and raise their children within the context of their respective cultures and customs in accordance with this Constitution and the law."

IV. Legal Context

In substance, the transitory constitutions of 2005 highlight, when dealing with religious freedom and the relationship between State and religions, a double disciplinary regime.

The transitory national constitution continues to recognize the value of the Sharia in the North, as (potentially unique, however prevailing) source of law. The transitory constitution of Southern Sudan affirms, for the South itself, an innovative principle of separation between the State and religion that clearly serves to stop that Islamic law can be recognized as having the role of general source of the law.

In both cases, the constitutional declarations relating to the system of the sources of

law and the general relationship between State and religion are followed by the recognition of the right of religious freedom as well as the prohibition of discrimination due to religious reasons, even if the real meaning of this recognition changes considerably with the changing of the affirmations that precede it, being less permeable to the influence of Islamic law in the case of the South.

Nevertheless, even when living with the explicit recognition of a principle of separation, religion in Sudan maintains a role of primary importance on a political level as well as in the concrete development of legal and administrative relationships.

It is firstly worth noting that the most important political parties are characterized by an explicit religious matrix, conditioning their political action and social appeal, so that it could be said that the political antagonism often leads to religious antagonism, even though it is not always easy to understand how sincere the religious reasons founding the politics of the government are.

It is so, in particular, for the parties that are currently in power. On the one hand, the National Congress Party (NCP), a government party that is associated to the conservative Muslims of the North and is to be considered as a direct descendant of the National Islamic Front (NIF) active during the Nineties. While on the other, the Sudanese People's Liberation Movement (SPLM), main member of the coalition, linked to the Christians of the South and the historical Umma Party (UP) that is considered as a direct link to the Mahdist revolution. It results indeed founded in the second half of the 1940s, by the son of Mahdi, Said Abd al Rahman al Mahdi, and was associated to the Ansar order, which was lead by through its most well known leader, Sadiq al-Mahdi. It is also worth considering the other historical Democratic Unionist Party (DUP), that is inspired by the Sufi orders, as well as the Islamic movement known as Khatmiyya and the Popular Congress Party (PcP), founded from the secession of the NcP as a consequence of the dispute between Al-Turabi and Bashir.[49]

It is worth highlighting that the political dynamics influence the very significance to be ascribed to the constant reference to Islamic law. In particular, it is the interpretation of the governing party that determines what the meaning of the Sharia actually is, as it is evident just considering the potential importance of the codification of Islamic rules.

As soon noted, following the signing of the Comprehensive Peace Treaty and the subsequent start of the new constitutional phase, both the Muslims and Christians were then called upon to cooperate with the authorities in the managing of the transitory period.

From a second perspective, which will be discussed in detail later, the reference to the religious factor greatly conditions the daily life of the common citizen.

The fact that the constitutional previsions widely guarantee the right to religious freedom and sanctions the equality of all the citizens in the eyes of the law has already been mentioned.

Nevertheless, discrimination on religious grounds, to lead again to the recognition of a fundamental condition of privilege guaranteed to Islam or however to be considered as the result of the previous Islamization of society, are frequent in the North[50]. While in the South, the real conditions of life, on the whole more uncomfortable, make it more difficult, or put in second place, the satisfaction of the issues associated to freedom of conscience, belief and religion.[51]

With regard to the institutional level, it is worth considering that both in the North and the South, there is no space, even if, naturally, for different cultural reasons –

49. I. Panozzo, *Sudan. Le parole per conoscere*, Roma, Editori riuniti, 2005; Campagna Sudan (ed.), *Scommessa Sudan. La sfida della pace dopo mezzo secolo di guerra*, Milano, Altra Economia edizioni e Cart'armata edizioni, 2006, 113 ss.

50. ACS (Aiuto Alla Chiesa Che Soffre), *La libertà religiosa nel mondo. Rapporto 2008*, Roma, 2008; U.S. Department of State, *2009 Report on International Religious Freedom*, available at http://www.state.gov/g/drl/rls/irf/2009/127257.htm

51. *Sfollati, il punto debole*, intervista a J. Saverio; G. Sartor, *L'impatto del Cpa sulle popolazioni del Sud Sudan.Il "possibile" ritorno degli sfollati e rifugiati e la loro integrazione*, in Campagna Sudan (a cura di), *Scommessa Sudan. La sfida della pace dopo mezzo secolo di guerra*, Milano, Altra Economia edizioni e Cart'armata edizioni, 2006.

identification between the State and religion in the first case, separation in the second – due to the explicit affirmation of a principle or practice of cooperation, in a formal sense according to the model of concordat or, more generally, to the principle of necessary negotiation, that in effect would see the State and Churches face each other on an equal basis as well as in an antagonistic direction, because of the consideration of the latter as autonomous legal systems (be they original or not).

It is also worth considering that several religions and in particular the Catholic Church have often accused their own legislative reformation – above all following the issuing of the Miscellaneous Amendment Act (1994) – in terms of private associations, on the model of voluntary organisations.[52] Nevertheless the government agencies do not disdain to use the support of religious representations in order to make their own politics more efficient – or at least in order to justify and support them – especially following the conclusion of the conflict and the subsequent start of the transitory phase.

In particular, the presence of Islamic exponents as well as the Christian Churches in the country has lead to the integration of the lay components (state rulers and magistrates) within the context of the commission as set out by the peace treaties of 2005 with the task of finding a solution to the condition of the non-Muslim residents of the city of Karthoum, with particular regard to the problems of the application of Islamic law.[53]

This commission seemed moreover to want to carry out a role of intermediation with the Government, urging for presidential pardons or in some cases the release of those who had been arrested for violating determined rules of a religious nature such as the selling of alcohol.

It is also worth considering that the churches with the greatest and longest presence in the country continue to request to be included in the consolidation processes of the peace treaties.

Even if often and with official stands, the religious representations complain about the marginalization of their support in relation to the conclusion of the conflict as well as the drawing up of the peace treaties, the possible result of inter-religious dialogue, which even the external observers do not fail to indicate the potentiality, do not seem to be irrelevant for the desired stabilisation of the peace processes.

In this direction, several specific agencies have been created, under government protection, the inter-religious Council of Sudan and, in a more strictly religious view, the Council of the Sudanese Churches.

Regarding the first, it is to be considered as the result of a first attempt to institutionalise inter-religious dialogue, as the international context requests, in the perspective of constructing a more solid national identity that does not ignore the consideration of the public role of religion.

It consists of Islamic representatives as well as representatives of the Council of the Sudanese Churches and exponents of other churches that do not belong to the council; its specific and main task consists of acting as a governmental consultancy agency for the promotion of government policies regarding "religiously important" areas such as human rights, development and occupation and education.

The agency therefore subtends an explicit recognition of the role of inter-religious dialogue in the development of the relationships between government agencies and the community, as well as in the growth of a conscience of the importance of basing religious relationships on the reciprocal respect.

Regarding the second organization (the Council of the Sudanese Churches), it could be said an agency created and acting within Christianity. It could clearly attract the attention of Islam, within the perspective of inter-religious dialogue, or as a political reference for the Sudanese government a well as the international community.

The direction of its "political" action towards the Sudanese government as well as the international community has a significant confirmation in its most official stands.

Its declaration, dated 13 March 2009, that followed the announcement of the decision

52. ACS (Aiuto Alla Chiesa Che Soffre), *La libertà religiosa nel mondo. Rapporto 2004*, Roma 2004.
53. ACS (Aiuto Alla Chiesa Che Soffre), *La libertà religiosa nel mondo. Rapporto 2008*, Roma 2008.

of the International Penal Court to issue a international warrant for the arrest of President Bashir, is very significant in this direction.[54]

It is indeed to be considered as proof of the fear of the Sudanese people regarding the effects of that news, in considering its potential and negative consequences especially on the goal of a definitive peace for the whole Country.

That is substantially the reason why it appeals to the Government of Sudan as well as the armed forces, asking for the real removal – through a stronger diplomatic and politic action – of every impediment to the goal of national reconciliation.

The tone of the declaration – that does not hide a critical vein towards the decision of the Court – is indeed particularly significant. The Court's decision becomes a problem, pointing out that, on the one hand, it can surely appear justified in a strictly juridical perspective, while on the other, it risks appearing disrespectful of the real conditions of the Sudanese society, also dissuading the attention of the International community – which the same Council expressly appealed to, in requesting to continue keeping the peace and maintain the difficult reconstruction throughout post-conflict Sudan – from the real objective of the peace process. As the declaration itself clearly implies, the real aim of the peaceful requests are the recuperation of the truth within the perspective of institutional reconciliation, of reforms and re-integrations. In this way, it should be clear that the main worries, or in other words, the responsibilities and objectives of the international action, are something completely different, as clearly highlighted by the further declaration of the Council of Sudanese Churches issued after the XVII general assembly held in Khartoum between 10-14 August 2009.[55]

On the whole, these positions, can even seem to be pro-government, but they undoubtedly help us understand the real impact of international decisions on Sudanese society, inducing the international agencies to adopt a more pragmatic behaviour[56]. That is a position also confirming the importance of an inter-religious dialogue, as highlighted by the explicit exhortation, aimed at all the religious communities, to observe the prophetic message of God in preserving the peace, harmony and stability of the country, as well as to pray for the Nation, President and people of Sudan.

V. The State and Religious Autonomy

It is difficult to quantify how important these stands are in orientating the action of the international agencies as well as the politics of the government. Nevertheless, it does not seem that they should be considered completely useless or inefficient.

It is also worth noting that indirect recognition of the "public role" of religions produces very negative consequences with regard to religious autonomy from the State. Governmental authorities heavily intervene on the internal organisation of religious groups (impressing on the power of nomination and removal of the imam[57]) and even on the religious-doctrine content, determining its real meaning as correspondent to true interpretation.

The State institutions also show very evident difficulties in adapting their action to the constitutional indications, with more specific reference to protection of collective and individual freedoms. They tend, particularly in the North, to heavily interfere in the religious choices of individuals, favoring the conversion to Islam and forbidding, or rather discouraging, the abandoning of the Islamic faith. Public order and security frequently constitute the excuse for sudden and violent blitzes in places of worship, in particular non-Muslim, by the armed forces or the imprisoning of religious leaders and missionaries, often accused of forcing religious conversions from Islam. Public authorities also carry out rigorous checks of the religious affiliations of citizens.[58]

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54. Available at http://www.conflittidimenticati.it/cd/a/28961.html.

55.Available at www.allafrica.com/stories/200908171180.html.

56. V. Peskin, *Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan*, in *Human Rights Quarterly*, 31 (2009).

57. U.S. Department of State, *2008 Report on International Religious Freedom*.

58. ACS (Aiuto Alla Chiesa Che Soffre) *La libertà religiosa nel mondo. Rapporto 2008,* Roma 2008.

The preference for top-level relationships between the government and religious authorities highlights that, on the whole, the government authorities are interested in maintaining a penetrating form of control on religious-associative phenomena.

Within this context, public institutions confirm, in the North, a privileged consideration towards Islam.[59] Laws regarding religious freedom are interpreted in a more coherent way when they are to be applied to non Islamic groups while in the South, the same appear to be ineffective and inapplicable.

The Christian churches more frequently highlights about the ease with which government permits are given for the building of mosques rather than those of other faiths, in particular Christian ones.

The theme is important because it is connected to the issue of the properties of religious groups. Theoretically, religious groups are able to be real estate proprietors and, particularly, landowners.

Nevertheless, the concrete impossibility to construct buildings for worship on their lands can indirectly act as a reason to abandon the possession or at least undersell them.[60]

The dynamics of the concluded (hopefully definitively) armed conflict between the North and South have also had a negative influence. During the war, these lands and buildings were often occupied. However, with the end of the war, the returning of these to real proprietors has been far from immediate and easy.

Similarly, it is worth considering that foreign organisations and religious groups wanting to carry out proselytism and evangelisation have to apply for government authorisation. However, this disposition is not applied when relating to Muslims[61].

The provisions of the penal code on specific religiously characterizing behaviours, such as apostasy, are clearly acting in this direction. They also justifies government authorities' incident surveillance towards all activities that are carried out inside churches and places of worship and often creates episodes – frequently reported by non-Muslim groups – of abuse of power on the part of the armed forces.

It is worth noting the unfavorable stand of the Sudanese government towards the non governmental organisations as well as the other humanitarian organisations acting on the Sudanese territory, whose range of activity is somewhat limited due to the specific legislative dispositions that place it under strict forms of control[62].

On the other hand, as previously mentioned, non-Muslim religious groups and organisations are substantially considered to be just like voluntary organisations as well as non governmental organisations, so that they are subjected to the same obligations of registration and the same controls of the public authorities.

VI. Religion and the Autonomy of the State

As previously discussed, the most important and deep-rooted religious communities are called upon to develop a significant dialogue with governmental authorities, even through the inclusion of specific representation within specific state agencies.

Nevertheless, this recognition, appears, at the least, highly ambiguous.

Firstly, it does not seem to be completely efficient (but different notations could be naturally made for Islam). Secondly, it leads to a significant strengthening of a vertical set up of relationships being on within religious communities, indirectly limiting the freedom of minor groups as well as individuals.

In order to distinguish with precision what attains to the public sphere and what to the religious one still remains difficult. The most recent stands assumed by the agencies we have previously mentioned, such as the Council of the Sudanese Churches, could lead us to think, at first sight, that the State is not completely autonomous from religion. Nevertheless, the tendency to the political use of religion could rightly lead us to point out

59. U.S. Department of State, *2009 Report on International Religious Freedom*.

60. ACS (Aiuto Alla Chiesa Che Soffre) *La libertà religiosa nel mondo. Rapporto 2008*, Roma 2008.

61. ACS (Aiuto Alla Chiesa Che Soffre) *La libertà religiosa nel mondo. Rapporto 2004*, Roma 2004.

62. Campagna Sudan (a cura di), *Scommessa Sudan. La sfida della pace dopo mezzo secolo di guerra*, Milano, Altra Economia edizioni e Cart'armata edizioni, 2006.

a kind of subordination of religion to the State. Religious rules of Islam continue to constitute, in the North, a really important parameter for the evaluation of the lawfulness of the behaviour of individuals and groups even when they are not Muslims, also determining the real extension of freedom and rights as they are formally sanctioned by constitution.

VII. Legal Regulation of Religion as a Social Phenomenon

Discussing the importance of religion, as a social phenomenon, primarily means recalling the real respect of religious freedom by public authorities.

With regard to this theme, as previously discussed, the constitutional determinations appear formally in line with the need to guarantee the civil and political rights of the citizens. Naturally the real adaptation of the legislation as well as the administrative and governmental procedures to the constitutional assumptions – that, as we have seen above, in the cases of both North and South, should lead to a decisive implementation of the degree of protection of the freedom of conscience, belief and religion – can not be immediate. It should be necessarily gradual and therefore, in our case, results being highly problematic.

This is valid not only for the North – even though we could rightly think that the interim national constitution is not so different from the previous one – but also for the South. Here, social and economic difficulties of everyday life make it increasingly difficult to bring into effect the constitutional provisions regarding rights and freedom, even in religious matters[63].

At the moment, neither the common constitutional recognition of the right to religious freedom, nor the constitutional diversification, between North and South, of the relative regimes of the relationship between the State and the Church still seem to act, on the whole, as a factor of improvement of qualitative standards regarding religious rights and freedom. They have not still lead to any relevant legislative reforms but rather operate, on an interpretative level, as a further factor of territorial re-adaptation of the already existing, single ruling regulations.

This leads to results that are somewhat ambiguous, above all in the North, leading to new limitations of individual freedoms as well as making old discriminations even more severe.[64]

On several more specific profiles, as in the particular case of religious crimes, the south of the country is far more liberal, resulting in almost none of the specific punishments of the North being applied. Nevertheless, several of the limitations of religious freedom or rather discriminations of religious belief present in the North tend to be reproduced or rather crystallised – inverted in part – in the South.

It is worth taking consideration the case of religious holidays within both (a) working and educational context. In both the North and South, the identification of a specific day dedicated to a festivity (Friday in the first case and Sunday in the latter) is accompanied by the recognition of the right to a two hour justified break, for the Christians of the North on Sunday and Friday for the Muslims in the South.[65]

However, in both cases, neither one nor the other can effectively make use of this right or either apply the relative laws associated to the needs of their own religions (with two hours not being enough, especially when considering the time required to reach the Christian places of worship).

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63. International worries about real conditions of life in Sudan are recently confirmed by United Nation' Security Council. See Resolution 1891 (2009), in http://www.un.org/docs/sc/unsc_resolutions09.htm, where it is noted "with deep concern the ongoing violence, impunity and consequent deterioration of the humanitarian situation and humanitarian access to populations in need", and reiterated "its deep concern about the security of civilians and humanitarian aid workers (…)".

64. It is often pointed out that "non-Muslims suffer persecution in the form of denial of work, food aid and education": so the African Commission, as outlined in M. Evans – R. Murray (ed.), *The African Charter on Human and People's Rights. The System in Practice*, 1986-2006

65. U.S. Department of State, *2007 Report on International Religious Freedom.*

In a medium-long term perspective, it is possible that the explicit recognition of the principle of separation between the State and religion in the interim constitution of Southern Sudan can aid the process of real improvement of the protection of religious rights and freedom.

We can mention, as a significant example in this direction, the recognition of personal statutes or, in other words, the possibility that, in determined sectors, statutory law leaves space to religious rules or, even, to traditional law and customs.

This is a former practice, having also found an explicit recognition in the 1999 constitution, but it is to be considered that the Sharia has progressively ended up occupying every possible normative space, above all, in the capital city as well as the urban centers.

Nevertheless, particularly outside of such contexts, Islamic law has more decisively interacted with customary law, creating a quite positive mutual conditioning process. It could indeed lead Islamic and customary law to reduce their respective strictness. In this context, it is even not to exclude that Islamic law can result in fact even more respectful of human rights than certain interpretations of customary law.

Reporting this evolutionary trend in the context of the current transitory phase and considering that both of the interim constitutions expressly confirm the role of personal statutes and, in particular, of customary law as an integrative/alternative source of legislation in relation to personal issues, several further possible developments can be defined. It is therefore possible that the application of the principle of separation between State and religion, in Southern Sudan, could lead to interesting consequences:

(1) act as a training factor for the North, therefore supporting a tendency to the evolutionary interpretation of the Islamic law, making use of results of a positive relationship with local uses and customs and so allowing a type of controlled progression of itself in the direction of the protection of human rights;

(2) differently act as a factor of closure of Islamic law in the North, according to a tendency to which the different (in relation to Article 65 of the 1999 Constitution) formulation of the art 5of the interim national constitution could prelude.

In fact, the claim to customary law as well as uses and traditions as a possible general source of legislation seems to be greatly reduced in national interim constitution, so that we could rightly think of a substantial closure of the sources of law around the central value of the Sharia, which would favor a strict interpretation, as impermeable as possible to the support of local identities.

VIII. STATE FINANCIAL SUPPORT FOR RELIGION

The theme of financial support that the State recognizes for religion is naturally affected by the discriminating conditions under which non-Muslim religious groups and communities exist.

Public institutions could seem not to be obliged to support religious communities and their activity. However, in the North, it is not uncommon for the State to financially support the construction of mosques.[66]

It is also worth highlighting that the 1999 constitution considers the paying of the zakat by Sudanese citizens to be a financial duty, so that its collection being, at least, a State task. In coherence with the diversification introduced in the interim phase, the interim national Constitution (Article 20) clarifies, firstly, that no fiscal duty can be imposed if only by law, then reduces the zakat to a Muslim duty. The matter is naturally ignored by the interim Constitution of Southern Sudan.

IX. CIVIL EFFECTS OF RELIGIOUS ACTS

The cultural and ethnic-religious heterogeneity of Sudan and the absolute permeability to the religious values of the Sudanese socio-juridical context – according to

66. U.S. Department of State, *2008 Report on International Religious Freedom*.

the characterization that, with the due diversification, can be considered as a characteristic of the whole of sub-Saharan Africa, as we have seen above – leads us to consider any effort to confine religious rules within the context of mere juridical irrelevance substantially vain. It is so even when the state law seems to lack any specific, formal reference in such (a) sense.

Family law is naturally the area within we can appreciate the very long distance from a secular approach to the theme of the sources of legislation, characterizing the Sudanese legal system. The most important family legal relationships are indeed regulated by personal statutes, Islamic laws for Muslim, customary and traditional law for the others.

Nevertheless, it is not surprising that, even in this area, the process of Islamization leads to Islamic law expanding and sacrificing the need of the minor ethnic and religious groups. The consideration of Islamic law as the general source of inspiration of the law has progressively lead it to be applied to the case of mixed marriages as well as those of uncertain definition as customary law[67]. At the same time, it is still worth pointing out that the differentiation between civil law, Muslim law and customary law can not always be considered in a very rigorous way; it is also to be considered that the specific context – for example, urban or rural – could be really significant.

According to these indications, we must consider the fact that Sudanese family law (fundamentally, the Muslim Personal Law Act, 1991) is explicitly based on the Sharia, so that state law ends up considering explicit religious prohibition – such as Muslim women not being allowed to marry non Muslim men unless they convert to Islam, while a Muslim man can easily marry a non-Muslim woman – just like civil prohibition.[68]

The Sudanese therefore seem to be free to have a religious ritual when getting married without the obligation of having a civil ritual, but rather having to register the marriage.

Nevertheless, there are significant limitations regarding civil effects (especially about women's rights or marital status), in the cases of traditional or unregistered weddings. It is also worth considering that the system regarding registration of marriages principally serves the needs of the Muslims. It does not include any form of contamination between religious rituals (not required in the case of Muslim marriages, expected that it does not assume a sacramental nature) and civil procedure of recognition. In addition to the preliminary aspects as well as the drawing up of the matrimonial contract, it is only requested that the marriage is made public, even if only through the wedding celebrations.[69]

The importance – more or less direct according to the case – of religious rules as well as traditional and customary law has a natural correspondent on the level of judicial function, with regard to controversies and discipline of family relationships, confirming – even if in the lack of specific formal rules – a consistent space for customary and religious law as well as the relative courts. For most of its recent history, the Sudanese judicial system has in fact been characterized by the existence of three different jurisdictions: civil, sciaraitic and customary, with separate hierarchies but united under the control of the Supreme Court, having the very important and specific task, among others, of establishing, in cases of doubt, which jurisdiction should settle a determined controversy.[70]

Openness towards traditional courts and tribunals could be considered as still operating in the current state, but now in a quite different context.[71] Current interim constitutions as well as the 1999 constitution move from the (re)affirmation of statutory nature of judicial power and organisation, consequently operating under state guidance.

Article 130 of the Interim Constitution of Southern Sudan more specifically claims

67. M. Guadagni, *Sudan*, in R. Sacco, *Il diritto africano*, Torino, UTET, 1996.

68. ACS (Aiuto Alla Chiesa Che Soffre) *La libertà religiosa nel mondo. Rapporto 2008*, Roma 2008.

69. See *Embassy of the United States, Khartoum, Sudan*, www.sudan.usembassy.gov/marriage.html

70. M. Guadagni, *Sudan*, in R. Sacco, *Il diritto africano*, Torino, UTET, 1996.

71. On the process of unification of judiciary realized under Numeyri, A. Layish – G. R.Warburg, *The reinstatement of Islamic Law in Sudan under Numayrī: an evalutation of a legal experiment in the light of its historical context, methodology, and repercussions* , Leiden, Brill, 2002

that "The Supreme Court of Southern Sudan shall: (a) be the court of final judicial instance in respect of any litigation or prosecution under Southern Sudan or state law, including statutory and customary law (…)". This is a very interesting provision, confirming that the Supreme Court itself constitutes the possible tool through which state authority can hinder the decisions of the traditional or religious tribunals, which it considers to be improper.

As previously stated, the extension of Islamic law to non-Muslims is a phenomenon of wider range. It is destined to follow several different applicative paths as highlighted in the case of several dispositions of the 1991 penal code which allows rules to be applied to non-Muslims that would be only applicable to them.[72] For example, the obligation to wear a kind of clothing should regard only Muslim women but the same obligation can often regard non-Muslim women due to it considering a different behaviour as offending public morality or assuming a provocative connotation.

Motives of religious intolerance also seem to be at the basis of the ban to produce and sell alcohol, according to Islamic law but clearly extending to non-Muslims. Nevertheless, it is to be considered that the concrete application of the disposition is at the same time moderated by the widespread appeal to a presidential pardon.[73]

It is therefore possible that the confirmed recognition of personal status (see Article 15 of the interim national Constitution, with the corresponding Article18 in the interim Constitution of Southern Sudan, where the right of men and women to get married and have a family is recognized "according to their respective family law") have different consequences, according to whether it refers to North or South. In the second case, it could prove less permeable to the dominant influence of Islamic law and therefore more open to customary law.

Clearly, the problem of respecting human rights, in particular for women, remains from being resolved.[74] However, the reform of the judicial system will probably play an important role, above all in the South, as well as, more specifically in the North, the cultural and scientific construction of those called upon to administer justice and who are in fact, at the moment, not very inclined to an interpretation of the law free from the basic assumption constituting the recognized centrality of the Sharia.

X. RELIGIOUS EDUCATION OF THE YOUTH

Being closely associated to a problem of proselytism, the theme of education, and more widely that of the youth, is highly conditioned by the religious element.

Geographical location therefore conditions the content of scholastic education. In the North, in particular, Islamic education classes are necessarily taught in all public schools[75]; they are held by state approved teachers. At the same time, Christian private schools too must employ teachers to hold Islamic religion classes[76].

The possibility of following Christian religious education classes is sometimes granted to the Christian students in the North. In practice this if often difficult to realize, however, due to the lack of teachers of this subject. As in the case of the working context, within the school context, the Christian students of the North have to go to school on Sunday, just like all the other students. Similarly, Muslim students have to go to school on Friday in the South.

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72. In fact, the application of religious law to non-adherents of the religion is, naturally, often considered "fundamentally unjust": M. Evans – Rachel Murray (ed.), *The African Charter on Human and People's Rights. The System in Practice*, 1986-2006.

73. See, for example, the episodes pointed out in ACS (Aiuto Alla Chiesa Che Soffre) *La libertà religiosa nel mondo. Rapporto 2008*, Roma 2008, 480, 482.

74. M. Evans – R. Murray (ed.), *The African Charter on Human and People's Rights. The System in Practice*, 1986-2006.

75. U.S. Department of State, *2009 Report on International Religious Freedom* points out that some public schools excuse non-Muslims from Islamic education classes.

76. As U.S. Department of State, *2009 Report on International Religious Freedom*, also points out, "Christian leaders cited these requirements as exacerbating problems in the relationship between the Muslim majority and the Christian minority and as further marginalizing the place of Christianity in northern society".

XI. Religious Symbols In Public Spaces

The civil recognition of the rules of Islamic law, particularly in the north of the country, conditions the freedom to wear religious symbols in public, above all, upon gender, specifically upon being female. The dictates of Islamic law therefore influence the real meaning of several rules contained in the Sudanese national penal code, for example, Article152, which references "Obscene and Indecent Acts" inserted into charter XV dealing with "offences against honour, reputation and public morals": "(1) Whoever does in public place an indecent act or an act contrary to public morals or wears an obscene outfit or contrary to public morals or causing an annoyance to public feelings shall be punished with flogging which may not exceed forty lashes or with fine or with both." (2) The act shall be contrary to public morals if it is regarded as such according to the standard of the person's religion or the custom of the country where the act takes place."

Arrests are frequent, as well as subsequent convictions leading to the flogging of women (even those originally from Southern Sudan as well as non-Muslims and therefore not held to respect the Sciaraitic dictates) caught wearing trousers. In a recent case, reported in the international press, rather than declare herself guilty and receive a reduced penalty, the accused preferred to give up her immunity (due to being a UN representative), and faced a public trial, inviting international journalists and national figures to assist the trial.

The Sudanese judges sentenced the accused to a pecuniary punishment as set out by the law, avoiding any form of corporal punishment. However, the accused refused to pay the fine, preferring imprisonment. After only one day in jail, the accused was freed due to the fine being paid – against her will – by a local trade union association.

XII. Freedom of Expression and Crimes Against Religion

In general, the discrete spaces assigned to religious freedom are naturally determined, geographically. The situation in the North should be clearly more problematic than in the South. However, we have also to consider that the conditions of poverty and economic and cultural underdevelopment in the South, where, due to the conflict, large portions of the population live.

There is consistent suffering, not always immediately evident if considering only the legal-formal ground, on the level of recognition as well as the practice of individual civil freedom: the latter indeed are not always guaranteed in a completely convincing manner, which could be due to the constitutional determinations that solemnly place the rights to freedom at the center of the legal system.

In fact, such rights are created under highly ambiguous terms and often accompanied by limits that could be defined as being subjected to a very "liberal interpretation."

It is clear that, on these assumptions, the most-favorable status accorded to the Islamic faith leads to significant consequences, determining the existence of particular specific penal sanctions aimed at protecting religion (or better a particular religion, therefore acting with no respect of the principle of equality) by actions held by many to be offensive.

Even on this level, it therefore is worth noting the particular bond that is created between the necessary protection of the sphere belonging to political power, in terms of a reconstruction of the latter in a strictly authoritarian version, and the coloring in an ethical and religious sense of most of the obligations and/or prohibitions of the citizens.

This is also for freedom of expression and press, that are subjected to the typical powers of the authoritarian States (the pre-approval of contents of the publication by the Government as well as the suspension of journalistic and informative activity considered to not conform to the governmental political direction) and however suffer from the set up, directly or indirectly, of penetrating constraints of a religious nature, according to the 1991 penal code. We could consider the well-known episode of the publication of an article considered to be blasphemous due to it offending Mohammed, with the subsequent

closure of the paper which published the article as well as the arrest of its editor.[77]

Recent provisions relating to the freedom of the press seem to want to accord a greater respect to this right, while at the same time maintaining the power of the government to censor. Similar consideration can also be made in the case in which the freedom of expression and demonstration of thought are carried out in different contexts than that of the press, being on the verge of the limits of the freedom to teach and therefore include the educational function of the teachers.

An elementary school teacher in the capital was accused of blasphemy, subsequently being arrested and then pardoned by the President, for having allowed her young students to name a teddy bear Mohammed.[78] This kind of case without a doubt reports on a tangible level the (apparent abstract) juridical analysis, highlighting the idea of how evident the difficulties of the Sudanese population actually are in carrying out their freedoms. It also highlights how decisive and predominant the influence of the claim to ethnical-religious values in limiting the civil right and freedoms is.

Nevertheless, the conclusion of several of the events mentioned – and in particular those discussed in this paragraph and paragraph XI that can in effect appear singular in the eyes of the Western observer – and in particular the inclination to use presidential pardons, could also give the possibility of considerations of a wider perspective with which to define the possible results of the Sudanese constitutional transition, under the specific profile of the relationship between the qualification of the State through the relationship with the religious phenomena and possible implementation of the levels of protection of the freedom of belief, conscience and religion.

Excluding extreme solutions – indeed far from being remote – such as the renewal of the civil conflict, the clear and decisive declaration, in the transitory constitution of Southern Sudan (Article 8), of the principle of separation between State and religion seems to constitute a very significant element through which we can point out the alternative between the secession of the country and the progressive getting over of extremist positions. Clearly, in the latter case, the appeal to the needs of the secularization of the State can strengthen the bond with the democratic ideal and assume the meaning of a complete modernisation of the whole Sudan. It is difficult to foresee with a degree of certainty what will happen in the immediate future, as well as identify any symptomatic elements of an evolution that will go in one direction or another.[79]

It also seems that the diversification of the constitutional regime in relation to the relationships between the State and religion represents, at a first reading as well as on a juridical-formal ground, a strengthening element of the tension towards the decisive interruption of the previous order.[80]

The prospect of an autonomous institutional destiny of the South of the country could therefore act, for the North, as an element of definitive abandoning of the legitimate ambition of the non-religiousness of the public institutions as well as lead to a definitive withdrawal in relation to the results of the 1999 constitution. In fact, as previously discussed, the reaffirmation, in the transitory national constitution, of the role of Islamic law, seems to be less permeable to the "other" influences, than the 1999 constitution.

Starting with the different assumption of the reaffirmation of the political ideal of a united Sudan, in the medium-long term the urge for secularization coming from the South of the country could influence, if not accompanied by the attempt to marginalize Islam, the constitutional set up of the North, favoring the progressive secularization or at least support a positive relationship of mutual conditioning between the dictates of the Sharia and customary law. The frequent use of presidential pardons with subsequent merely symbolic affirmations of the sentence associated to the civil laws with a religious content, can be considered, at the moment, as a positive signal in this direction.

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77. ACS (Aiuto Alla Chiesa Che Soffre) *La libertà religiosa nel mondo. Rapporto 2008*, Roma 2008.

78. ACS (Aiuto Alla Chiesa Che Soffre) *La libertà religiosa nel mondo. Rapporto 2008*, Roma 2008.

79. J. Oloka-Onyango *Constitutionalism in Africa: Yesterday, Today and Tomorrow*, in J. Oloka-Onyango (ed.), *Constitutionalism in Africa. Creating opportunities, Facing challenges*, Fountain Publishers, 2001.

80. R. O. Collins, *"Un Sudan democratico, secolare e unito": illusione o realtà?*, 17 ss.

Nevertheless, it is worth clarifying the true meaning to be ascribed to the separatist ideal of the constitution of Southern Sudan. Separation between State and religion in no way can be considered as an index of a complete and definitive neutralization of every juridical relevance of religion or its public role.

The current experience of Sudan so leads to restate that the objective of the secularization is far from representing uniform results, so that it can not always be interpreted in the same way. It constitutes an aim as well as a result to be contextualised, in both a diachronic and synchronic sense, but it can not absolutely lead to a complete neutralization of every reference to religious values.

On these basis, the separation between State and religion as well as secularization should be intended as a means for an equal opening towards religions or, in general, different ethno-cultural and religious identities, imposing an impartial recognition of their relevance in the order of the State.

MAARIT JÄNTERÄ-JAREBORG

Religion and the Secular State in Sweden

I. THE RELIGIOUS AND SOCIAL COMPOSITION OF SWEDEN

In 2009, the population of Sweden amounted to approximately 9.3 million inhabitants. With regard to area, Sweden is the third largest country in Western Europe.[1] Sweden is a constitutional monarchy with a parliamentary democracy. The country scores high on a wide range of international indicators, such as standard of living, longevity, gender equality, well-being, and well-functioning democratic institutions. A large majority of the population (73 percent in 2008) are members[2] of the Church of Sweden, which is the Evangelical Lutheran former State Church of the country.[3] More than 40 percent of all marriages celebrated in Sweden in 2008 were officiated within the Church of Sweden. Approximately 60 percent of all new-born children were baptized, and 83 percent of all dead were buried according to the rites of the Church of Sweden.[4]

In spite of these figures, Sweden is regarded as a very secular country, religion being basically "private matter" not to be publicly demonstrated. In fact, Sweden is often described as one of the most secular countries in the world.[5] Reference is made to a "Swedish paradox" reflecting a situation where the majority population has only a weak Church-associated belief in God (and resurrection), but still continues to make use of the rites of the Church in important life situations.[6] According to statistics from the Church of Sweden, only 2 percent of its members regularly attend worship services.[7] According to a recent European Barometer Study, only 23 percent of the Swedish population admit believing in God.[8] Other available figures indicate that as many as 85 percent of the population identify themselves as non-believers.[9] Studies classify 90.1 percent of the population as being of "Christian Protestant origin," 1.8 percent as Catholics, and 8.2 percent as of "other" religious belief.[10] The category "other" consists mainly of Muslims (Islamic religions).[11] Yet other studies claim that approximately 80 percent of the

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1. See http://www.sweden.se/facts.

2. It should be noted, however, that until 1996 all citizens of Sweden were automatically born into the Church of Sweden on condition that at least one of the parents belonged to the Church. Since then, but not retroactively, one must, as a rule, be baptized to become a member of the Church. Only Swedish citizens or foreign citizens residing in Sweden may become members of the Church. SOU 1997:41, 86.

3. Available at http://www.svenskakyrkan.se/default.aspx?di=37017. Membership rates are, however, going down. In 2004, e.g., 80 of the population were members of the Church of Sweden. See A. Bäckström, N. Edgardh Beckman, P. Pettersson, *Religious Change in Northern Europe, The Case of Sweden* (2004), 18.

4. See http://www.svenskakyrkan.se/SVK/ENGLANG.HTM (visited 29 December 2009). The number of baptized children can be compared with the number from 2003, when 70 percent of all new born children were baptized within the Church. In comparison, burials within the Church had dropped less, from 87 percent to 83 percent. See Bäckström et al, *Religious Change in Northern Europe, the Case of Sweden*, 18.

5. See, e.g., SOU 2009:52, 86; T. Pettersson, *in* I. Svanberg and D. Westerlund, *Religion i Sverige* (2008), 34–38.

6. Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 87–88. "What in normal everyday life is *religiously abnormal* in Sweden, is considered *religiously normal* in *abnormal* situations." Id., 139.

7. Available at http://www.svenskakyrkan.se/SVK/eng/liturgy.htm.

8. *Special Eurobarometer 225 / Wave 63.1*, European Commission January – February 2005, 9. These results are rather similar with those of a World Value Survey, carried on in the 1990s and 2006 and described byPettersson *in* Svanberg and Westerlund, *Religion i Sverige*, 34–38.

9. Available at http://en.wikipedia.org/wiki/Sweden.

10. Available at http://en.wikipedia.org/wiki/Sweden.

11. The number of "Muslims" in Sweden is estimated to lie between 250,000 and 300,000. Of these, approximately 100,000 are believed to be religiously active. See Bäckström et al., *Religious Change in Northern*

population of the Nordic countries, Sweden included, have some sense of belonging and identification with their national "Folk Church."[12] Of the political parties represented in Parliament, only one – The Christian Democrats – have issues of religion and faith on their agenda. This party is the smallest of the bourgeois parties at present in charge of the Government, with approximately 5-6 percent of the vote. But even for leaders of this Party, it would be most odd and unusual to refer to God in their public speeches or in the public arena in general.

Until recently the population of Sweden was unusually homogeneous as regards to ethnicity, language, and religion. During the last sixty years Sweden has transferred rapidly from a country of emigration into a country of immigration with ethnic, cultural and religious diversity. Today, more than 2 million inhabitants are of foreign origin, meaning that their own or their parents' place of birth was in a foreign country. This number can be compared to the situation in the early 1900s when 0.7 percent of the population was foreign-born. Today, more than 200 languages are spoken in the country, as compared with the previous total dominance of the Swedish language.

Sweden has also been transformed into a multi-confessional society. As a sequel to immigration into Sweden, religion has gained a new kind of visibility in the Swedish society. This is demonstrated through newly built mosques (with minarets), religiously articulated dressing codes, celebration of Ramadan, and increasingly, the founding of schools with a religious curriculum. Much of the new visibility of religion in Sweden, then, is due to Islam's new presence in the country, which in turn challenges the majority society's understanding of the role of religion and neutrality in respect of confession.[13]

Is it "neutral" (or "neutral enough") to celebrate the finishing of school terms in a church building (Evangelic Lutheran), as public schools in Sweden have done for generations, or does it have a "hidden" religious meaning? If so, should this tradition be discontinued, because it is a form of coercion against pupils of another faith or belief? Religion attracts increasing attention in the Swedish public debate also due to other changes in the society.[14] In this discussion, the contents of the concept of "freedom of religion and faith" have been at stake in respect of issues such as alleged hate-speech, Islam, homosexuality, and recognition and officiating of same-sex marriages by faith communities. Important cases have been examined not only by Swedish courts but also by the European Court of Human Rights.

II. THE RELATIONS BETWEEN RELIGION AND THE STATE OF SWEDEN HISTORICAL OVERVIEW

A. From a Catholic Church Province to a Unified Evangelic Lutheran Church and State

The present relationship between the State and religion in Sweden is the result of a long and complex historic development, characterized by deep tensions between conflicting ideas, interests, and forces.[15]

Christianity was gradually established in Sweden during a period of three centuries (800-1100 CE). Sweden became an ecclesiastic province of its own within the Catholic Church, under the direction of a Swedish archbishop placed in Uppsala who in turn was under the Pope. The Church and Canon Law had a considerable influence on the societal developments and internationalization of Sweden as well as on the laws of the country. Canon law came to co-exist together with the provincial laws of the country. The Church, which came to own approximately one fifth of all land in Sweden, took active part in the

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Europe, The Case of Sweden, 83. According to M. Sayed, Islam *och arvsrätt i det mångkulturella Sverige, En internationellt privaträttslig och jämförande studie*, (2009), 81, up to 400,000 can be estimated to be Muslims, in one sense or another.

12. See Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 88–90, 139–40.

13. SOU 2009:52, 86.

14. The Internet is often mentioned as a factor of particular importance. Also new forms of spiritualism and various forms of "private religions" have emerged and become increasingly popular. Id.

15. SOU 1997:41, 53. This presentation is largely based on that report, 53–90.

care of the sick and the poor, and in education. The Church founded the country's first University in 1477 in Uppsala.

Sweden was one of the first countries in Western Europe to embrace of the ideas of the Reformation (*Västerås Parliament* 1527). Reformation gave an opportunity, i.a, to weaken the powers and influence of the Catholic Church in Sweden and to confiscate its property, to get rid of the Danish influence in the country, and to unify the country. In 1593, the *Convocation of Uppsala* took the final decision that the Evangelist-Lutheran faith was to be the national religion of Sweden under the supremacy of the King. A State Church – the Church of Sweden – was established. Unity of faith became the foundation of the State for the following 300 years.[16]

The King, the Government, members of Parliament, judges, and all government officials could only be of the Evangelic Lutheran faith. A certain proportion of the members of Parliament consisted of clergymen.[17] The Church not only functioned as a religious congregation, but also as a forum for social and general public issues, setting the standard for societal values and the culture of the land, which passed from one generation to another unchanged.[18] The relations between the Church and the State were modelled on German, Lutheran inspired examples. A distinction was made between "worldly regulations" and "spiritual regulations," both originating from God but to be kept separate.[19] The Church of Sweden was organized in a similar manner as the previous Catholic Church province of Sweden, but with different functions and less autonomy in relation to the State.

During the centuries that followed, to lead a religiously active life under supervision of the Church of Sweden was generally considered a part of being a national of Sweden.[20] During a major part of this period, dissenting religious views were criminalized and severely punished. Nationals of Sweden who tried to apostate from the pure evangelical faith were expatriated.

B. Gradual Dissolution of the Unity of Faith and the Unified Church

During the course of the 18th century, the State slowly began opening up to religious freedom by allowing immigrants to practice their religion in Sweden.[21] In the 1809 Constitution of Sweden, the requirement of religious unity was abolished. Another aim of the Constitution was to safeguard the freedom to exercise one's religion, or to abstain from exercising it.[22] This political turn was probably caused by the liberal ideas of the Enlightenment. Nevertheless, it was not until the 1860s that it became legally possible for Swedish nationals to leave the State Church – but then only for the purpose of entering into another congregation, approved by the State. An unconditional legal right to leave the Church of Sweden without having to enter another congregation was not granted until 1951 through the enactment of the Religious Freedom Act (1951:680) (*Religionsfrihetslagen*). Freedom from religious affiliation became an important civic right, expressed by the so-called negative principle of religious freedom.[23] Since the 1951 enactment, the protected freedom of religion is, basically, a right for the individual and not for the collective. Another landmark event took place in 1958, when it was decided that the Church of Sweden should allow female ministers. This decision, which divided the Church, is an example of strong State interference.[24]

16. Sweden, Norway, Denmark, Iceland and Finland form together what may be called to Protestant Nordic Region. See Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 33.

17. This was an automatic legal right of the clergy which came to an end only in 1863.

18. See Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 36.

19. SOU 1997:41, 58–59.

20. Government Bill, Prop. 1997/98:116, 17.

21. This development was dictated out of concern for the State's economy and to make it possible to recruit qualified (Christian) craftsmen into Sweden. Also in 1782, adherents of Judaism received certain rights to exercise their religion in Sweden. See SOU 1997:41, 62–63.

22. This meant, i.a., that it was no longer compulsory to attend services and to take part in the Holy Communion. SOU 1997:41, 63.

23. See Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 47.

24. As a compromise, a so-called conscience clause was adopted through Act 1958:514, enabling the

The following decades proceeded with discussions, surveys, and analyses on the State-Church relations by several national committees appointed by the Government. The point of departure has been the special legal position of the Church of Sweden in relation to societal developments. Should the Church remain a part of the State organization, or should it be separated in full or in part? Many of the previous social functions of the Church, such as medical care, education, and social care had gradually become the responsibility of the State. A strong welfare State, based on the idea of a "Folk Home,"[25] was built up in the decades following the Second World War, mainly under the influence of the Swedish Social Democratic Party.

The country experienced strong economic growth and the standard of living, health, and education rose in all levels of society. New legislation, based on the idea of gender equality paved the way for women's entry into the labour market and abolished the remains of religious values in fields such as family law.[26] In this sense, the law was "secularized," i.e., liberated from "the chains of religion." The Church became primarily an "administrator of a specifically religious social sphere," and as a result suffered a decline in its social authority.[27] Religion became increasingly regarded as belonging to the private sphere of life only. Sociology of religion studies consider these developments as the explanation to why Church engagement in present-day Sweden is among the lowest in the world.[28]

On 1 January 2000 the separation between the State and the Church of Sweden was carried out (hereafter referred to as "the State-Church separation" or "the separation"). The Act (1998:1591) of the Church of Sweden established the fundamentals of the Church of Sweden as a religious community, in line with the self-image of the Church.[29] The Church of Sweden is described as a democratically[30] governed *Folk Church of Sweden,*[31] based on evangelical Lutheran articles of faith but open to everybody and operating everywhere in Sweden. Section 1 of Act (1997:1591) of the Church of Sweden states: "The Church of Sweden is an Evangelical Lutheran Community of faith, manifested in parishes and dioceses. The Church of Sweden also has a national organisation." The Church consists of thirteen dioceses, each led by a bishop, working closely together with a democratically elected diocesan board. On a national and international level, the Church is represented by the Archbishop of Uppsala. The relevant regulations are contained in the Ordinance of the Church of Sweden (1999). The Ordinance, which is an internal church regulation, regulates issues such as the decision-making procedure of the Church, the ordination of bishops and clergy, and the Church's financial administration. The highest decision making body is the General Synod, which meets twice a year. As regards organization, the Church consists of 2,219 parishes, 1,025 pastorates, 152 deaneries and 13 dioceses.[32] The Church is in charge of approximately 3,500 church buildings.

Since the separation of the State and the Church, religious communities in Sweden were placed on a formally equal legal footing, the State being officially neutral in respect

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dissenting priests from cooperating with female ministers. This clause was applied until 1983.

25. The underlying idea was a vision of the society as a "large family," replacing the earlier welfare functions of the family. See Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 42-43.

26. See M. Jänterä-Jareborg, "Family Law in a Multicultural Sweden – The Challenges of Migration and Religion," *Uppsala-Minnesota Colloquium: Law, Culture and Values, De lege* (2009): 155–56.

27. See Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 14.

28. See Pettersson, *in* Svanberg and Westerlund, *Religion i Sverige*, 34, 37.

29. Government Bill, Prop. 1997/98:116, 38.

30. Church elections take place every four years. A right to vote belongs to all members of the Church, starting at the age of 16 years. During the last elections, slightly more than 10 percent of those qualified to vote made use of their vote.

31. The idea of a "Folk Church" is to be seen as a counterpart to the idea of the Swedish society as the "Folk Home." It is a vision of the Church meeting the challenges of the modern society, as a popular movement in a situation which no longer is unitary/homogenous. The general elections are an example of giving the people "the folk" and influence. See Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 44–47, 65. See also SOU 2009:52, 87.

32. Church of Sweden Calender 2003. See Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 75.

of confession. A special enactment, the Act (1998:1593) on Religious Communities, treating all denominations on a pluralistic basis, was adopted simultaneously with the Act (1998:1591) on the Church of Sweden. The Church of Sweden ceased to be a part of the public administration of Sweden and became a voluntary organization.[33] The separation had been prepared for well in advance, i.a., by removing specific, in nature "secular," functions of the Church to State bodies. For example, in 1991 the Swedish Tax Registration Offices (*Skatteverket*) took over the previous function of the Church of Sweden to maintain and keep the national registration records.[34] The Church kept, nevertheless, some of its historic privileges and special public commissions. Through the special enactment mentioned above, the Church of Sweden acquired a special legal status not comparable to any other association or body in Sweden.[35] This enactment "assigns the Church a semi-official role both as a state-regulated institution and as a religious organization."[36] This has been explained as a compromise between the necessity to pay regard to this Church's position in the history of Sweden and the goal of treating religious denominations equally in Sweden.[37]

III. SWEDISH DEBATES RELATING TO THE CHURCH-STATE RELATIONSHIP, SECULARISM, AND THE SECULAR

The separation between the State and the Church of Sweden was preceded by several decades of debates and discussions on how the State and the Church of Sweden should relate to one another. Several Committees appointed by the Government studied these issues. Their recommendations varied from maintaining the constitutional bond with the State and the basic structure and functions of the Church, to a complete separation between the Church and the State.[38]

The legal situation of today corresponds more to the second model, although there are also exceptions. The distinction that still needs to be made between the Church of Sweden and other denominations is motivated primarily by Sweden's history and the role played by the Church. The Church of Sweden is subject to specific legislation and is in charge of several semi-public commissions. It continues to play a unique role in particular with respect to the administration of graveyards and funerals as well as the care of the Sweden's cultural-historical heritage in form of old church buildings and other property belonging to the Church.

Secularism can mean different things,[39] for example, that the previous functions of churches are taken over by secular bodies. As described above, Sweden is largely secular in this respect. Another indicator of secularism is low participation of the public in church activities. Also in this respect, Sweden is secular. Yet another understanding of secularism is that religion is kept out of the public arena. In this respect, the situation is more complex in Sweden, as shall be developed in the next sub-sections.

There are indicators implying an increasing religious engagement in Sweden alongside with the country's transformation into a pluralistic, multicultural society. In this respect, the stance taken by the Swedish State is mixed. On the one hand an official aim is to promote multi-confessionality in the Swedish society. Religious activities are considered an advantage to society and worthy of various forms of state support. The State also

33. The Church of Sweden is the largest independent organization in Swedish society. Id. at 61.

34. In 1996, Swedish citizens ceased to become automatically, upon birth, members of the Church of Sweden if one parent was a member.

35. See Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 36.20.

36. Id. Others emphasize that the Church of Sweden, as well as the registered religious communities, are not public law subjects, but associations of private (civil) law. It follows that the "semi-official role" of the Church is contested. See, e.g., D. Hanqvist, *Religion som privatangelägenhet – stat-kyrka-reformen, Förvaltningsrättslig tidskrift* (2002), 389–93.

37. Government Bill, Prop. 1997/98:116, 18. See also SOU 2009:52, 88.

38. Before the separation was finally carried out, many preparatory legislative steps had been taken. See SOU 2009:52, 87.

39. See Pettersson, *in* Svanberg and Westerlund, *Religion i Sverige*, 32–38.

strives to promote co-operation among the various religious communities in the country.[40] On the other hand, the State strives not only at remaining neutral in respect to confession but also at protecting the individual from any form of religious coercion.[41] The constitutional protection of the equal rights and human dignity of all individuals takes priority in cases of conflict. An illustrative example of the Swedish position is that the State provides financial support to religious communities. This support is, nevertheless, conditional. The denomination must, i.a., be registered as a religious community, which involves a certain degree of State control, and contribute and confirm the fundamental values upon which the Swedish society is based, i.e., those values that keep society together.[42]

Free-standing confessional schools are much debated in Sweden. In 2008, there were 100 such schools authorized by the competent State authority and also funded by public means. Schools with a confessional orientation constitute approximately 10 percent of all authorized free-standing schools in Sweden. The right of religious groups to maintain their identity and confession in schools of their own is confronted with the risk that certain minorities will otherwise be isolated from the rest of society.[43] The State has chosen to promote a sense of belonging and identity, for example, by permitting schools with a confessional orientation, as long as they can be considered to supply education of the same quality as that of the public schools.

The constitutional limits in Sweden with regard to multi-culture and multi-confessionality have also caused debate in other respects. In 2008, the Swedish government appointed a committee to investigate and propose special education for Imams in Sweden on Swedish society, its traditions, language, institutions, and laws. The purpose of this commission was, basically, to create means to facilitate integration of new immigrant groups in Sweden. Interestingly enough, in its report to the Government in 2009, the committee abstained from delivering any such proposals by reference to the Constitutional rights of individuals and to the official confession-neutral stance of the State.[44] This report is, at present, subject to a general consultation procedure among the concerned institutions and bodies in Sweden. Among the Muslim communities in Sweden, the reaction to special education initiatives focused on the communities' religious leadership has been mixed.

Generally speaking, the churches have become more visible in society during the last two decades and their assistance has come under demand in situations of public crisis following, for example, large scale accidents, often under dramatic circumstances where many lose their lives or where people of various ethnic origins are involved. Today, the important role played by religious communities in emergency management is both recognized and financially supported by the State.[45]

Sociology of religion studies indicate that religion is in Sweden to stay but that it is taking new forms; some even see clear trends of de-secularization.[46] Also, the State advocates pluralism, which includes recognition of the value of religion and exercise of religion and the co-existence of various religions. The Act (1998:1593) on Religious Communities treats all denominations on a pluralistic basis. One major reason for this stance is the policy of the State that all citizens should be able to feel that they belong to the society, that they have equal rights, so as to provide a context where all citizens are willing to participate in society. Differences of religion and faith should not be an obstacle for achieving integration.

In Sweden, research in particular within the sociology of religion prefers to use the

40. SOU 2009:52, 93.

41. Id., 98.

42. See infra, Sections V, *C* and VIII, *B*.

43. See K. Borevi, *in* Svanberg and Westerlund, *Religion i Sverige*, 381.

44. SOU 2009:52, 12–13.

45. The State Commission for Government Support to Faith Authorities is in charge of coordinating the religious communities' contributions in cases of emergency and for granting State subsidizes. See infra, Section IV, *H*.

46. See Pettersson, in Svanberg and Westerlund, *Religion i Sverige*, 32–38.

expression "religious change" instead of secularization.[47] The semi-official position of the Church of Sweden is, however, difficult to combine with the official rhetoric/ideology which, on certain conditions, treats all religious communities alike. The image of a Folk Church is also difficult to combine with the society's transformation into a multicultural society.[48] Following the State-Church separation, the Church's membership rates have declined and continue to decline.[49] Still, the great majority of the population remain members of the Church of Sweden. All in all, the Swedish position would seem to qualify as that of an "accomodationist regime," committed to the neutrality of the State but allowing high levels of cooperation with religions.[50]

IV. CONSTITUTIONAL AND OTHER LEGAL CONTEXT

A. Relevant Provisions – Past and Present

In 1634, the first Constitution of Sweden was enacted. Its initial provisions established religious unanimity as the foundation of Swedish society and law, the purpose being to unite the country religiously in order to strengthen the State's political foundations and facilitate governance.[51] These provisions were transferred unaltered to the subsequent constitutions, until the Constitution of 1809. The 1809 Constitution was based on a more liberal outlook and no longer made any reference to religion as a foundation of the State and its legal order. The 1809 Constitution, under the influence of the Enlightenment, contained explicit provisions on freedom of religion, but only in the sense of providing the individual the freedom to exercise his or her religion.

The present 1974 Constitution of Sweden, through provisions in the Ordinance of Government (*Regeringsformen*), safeguards the freedom of each citizen to alone, or with others, exercise his or her religion without state infringement.[52] It guarantees, likewise, the individual's freedom to disassociate from religion and the freedom of not having to acknowledge one's views, including religious views.[53] This provision has also been characterized as a constitutional guarantee of religion as a "private matter" of the individual.[54] The Act (1951:680) on religious freedoms was repealed on 1 January 2000, as redundant in relation to the provisions on religious freedom in the Ordinance of Government.

The constitutionally protected freedom of religion cannot in itself be restricted; it is regarded as an absolute right of the individual. Freedom of religion requires treating all religious communities alike. However, the exercise of religion is often linked with other fundamental freedoms, such as the freedom of assembly and the freedom of expression. These freedoms can under certain conditions be restricted as long as the limitations can be justified with regard to fundamental values of a democratic society. Although the right to religion and to the exercise of religion have not been defined by law, they do not, for example, justify any acts that normally are penalized.[55] Nor can freedom of religion infringe upon other individuals' constitutionally protected rights.[56]

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47. See Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 20.

48. T. Ekstrand's doctoral dissertation "The Limits of the Folk Church – A Theological Analysis of the Transition from State Church to Free Folk Church," (2002) (in Swedish) focuses on this challenge. See also Bäckström et al., *Religious Change in Northern Europe, The Case of Sweden*, 65.

49. This development may have various reasons. Since 1996, e.g., a Swedish citizen is no longer (upon certain conditions) automatically born as a member to the Church. Another reason is that once the Church was separated from the State, those who are not interested in the activities or rites of the Church felt it to be a logical decision to leave the Church. A third reason may be the church fees that are levied by the State in connection with tax revenues. Many tax payers, seeing the size of the church fee on their tax sheet, feel motivated to leave the Church. See infra, Section VII, *C*.

50. See Questionnaire, 1.

51. See SOU 1997:41, 60–62.

52. Ordinance of Government, Ch. 2 § 1.6.

53. Ordinance of Government, Ch, 2 § 2.

54. SOU 2009:52, 92.

55. See SOU 1997:41, 94.

56. SOU 2009:52, 92.

The European Convention on the Fundamental Freedoms and Human Rights (1950) was incorporated into Swedish law through a special enactment in 1994[57] through which the Convention rights obtained a constitutional status.[58] As a result, Swedish citizens enjoy double religious protection from the State, – through the Constitution and through the Convention.[59] In 2003, a provision was added to the Ordinance of Government stating, i.a., that the prospects of religious minorities to maintain and develop their own culture and denomination should be promoted.[60] This provision states a goal for the public sector in Sweden without being legally binding.

An exception to the principle that no religious community in Sweden is to play any specific role in the confession-neutral governance of the country[61] follows of the Ordinance of Succession (*Successionsordningen*),[62] which is part of Sweden's Constitution. According to this Ordinance, the Head of State (the King or Queen of Sweden) must be of the "pure Evangelical faith." If the Head of State apostates to another religion, he or she must abdicate. Also, princes and princesses shall be brought up in accordance with the "pure Evangelical faith."[63]

These constitutional demands concerning confession have not been repealed as other constitutional provisions have on this issue. The reason is that the confession of the Head of State is considered to be a matter of state law rather than a matter of religious freedom.[64] The Head of State is granted religious freedom through his or her right to abdicate.[65] These constitutional requirements have been questioned, but they are not subject to any pending law reform. They can be claimed to constitute the major difference of treatment in Swedish law on the basis of religion or belief.

According to the Ordinance of Government, all regulations regarding religious communities require the form of law.[66] These regulations are found in the Act (1998:1593) on religious communities, as well as in the Act (1998:1591) on the Church of Sweden. Furthermore, these regulations can only be changed either with qualified majority in Parliament, or after two voting procedures with a general election in between.[67] It follows that both enactments are, thus, constitutionally protected from hasty or frequent legislative changes.

The Constitution does not contain any explicit provisions on State neutrality on religious issues or on the principle of equality when dealing with religions. Nevertheless, this is implied, and it is also confirmed by statements in *travaux préparatoires* preceding the Church-State separation reform.[68] In 2003, a provision was inserted into the Constitution obliging the State to support the prospects of religious minorities to maintain and develop their own culture and denomination.[69] This provision can be seen as an expression of the general goal of equal treatment of different religions and faiths.[70] All individuals should be able to feel included in the society. It also provides grounds for the granting of State subsidies to religious communities.[71]

The Ordinance of Government contains a general delegation clause which stipulates that administrative duties of a public law nature can be delegated to, i.a., a *registered religious denomination*.[72] This clause constitutes the constitutional ground for the State's

57. Act (1994:1500) on the Implementation of the European Convention.
58. Ordinance of Government, Ch. 2 § 23.
59. See SOU 2009:52, 94.
60. Ordinance of Government, Ch. 1 § 2 ¶ 5.
61. This question is also addressed in the Questionnaire, Question No. 6.
62. This Ordinance dates back to 1810, but was revised in 1979, i.a., to enable cognatic succession.
63. Ordinance of Succession (to the Throne), § 4. See Government Bill, Prop. 1997/98:116; Government Bill, Prop. 1997/98:49.
64. Government Bill, Prop. 1997/98:49, 17–19.
65. See SOU 1997:41, 117.
66. Ordinance of Government, Ch. 8 § 6.
67. See id.
68. Government Bill, Prop. 1997/98:116, 19.
69. Ordinance of Government, Ch. 1 § 2 ¶. 5. See also supra, Section III, *D*.
70. Government Bill, Prop. 2001/02:72, 19.
71. SOU 2009:52, 92. See further infra, Sections IV, *H* and V, *C*.
72. Ordinance of Government, Ch. 11 § 6.

delegation to religious denominations the competence to officiate marriage ceremonies with full civil law effects.

B. State Bodies Dealing with Religious Denominations

In Sweden, there are two state bodies that deal with various issues related to religious denominations, namely the Commission for Government Support to Faith Communities (*Nämnden för statligt stöd till trossamfund, SST*)[73] and the Legal, Financial and Administrative Services Agency (*Kammarkollegiet*). The Commission is in charge of distributing the State's financial support for religious denominations[74] and carries on a dialogue with the religious communities in the country about the prerequisites for the grants. In addition, it handles matters concerning the denominations' roles in the coordination of emergency management. The Agency, in turn, is in charge of the formalities relating to the registration of religious denominations.

Under Swedish law, in order to obtain legal personality, religious congregations must establish themselves as an association recognized by the State.[75] Since 1 January 2000, a special form of association is available for religious congregations for this purpose called "registered denomination of religion (or faith)" (*registrerat trossamfund*).[76] The Agency examines the formal criteria for registration, and does not regard or intervene in the denomination's confessional issues. The Agency is also in charge of the State's delegations to denominations regarding the right to officiate marriage ceremonies.[77] The assignments of the above-mentioned bodies do not extend to any issues of a confessional character.

In addition, in 2000 the Government established a special Council for contact with faith communities (*Regeringens råd för kontakt med trossamfunden*),[78] chaired by the Minister of the Government in charge of issues relating to religious denominations.[79] The Council consists of eighteen members, including representatives from the religious denominations in Sweden. The Council, which meets three to four times per year, is designed as a forum for contact, information, and debate on issues of joint interest. Formal agreements between the State and religious communities do not belong in the Swedish model.

The Swedish State has delegated the right to officiate marriage ceremonies to various faith communities in Sweden. The same conditions for delegation apply in this respect to all religious denominations. The State offers assistance with the levying of registered religious denominations' member fees. Prior to the State-Church reform, this assistance was only available to the Church of Sweden, but now all congregations have a possibility to apply for this assistance.[80] This form of assistance requires that the community in question contributes to maintaining and strengthening of the fundamental values on which society is based. It is also required that the community is stable and vital.[81]

V. THE STATE AND RELIGIOUS AUTONOMY

A. Confessional Neutrality and Autonomy of the Religious Denominations

Since the separation between the State and the Church of Sweden, the official goal of the State is confessional neutrality. Religious denominations are autonomous and free from any State interference. The State does not interfere with the contents of any confession, the procedure for selection or choice of staff, or the denomination's financial

73. See http://www.sst.a.se
74. Act (1999:291) on Fees to Registered Religious Communities.
75. See Act (1998:1593) on Religious Communities.
76. See Regulation (1999:731) on Registered Religious Communities, § 2.
77. Act (1993:305) on the Right to Officiate Marriage within a Religious Community, § 2.
78. Available at http://www.regeringen.se.
79. At present (2009), this is the Ministry of Culture.
80. See infra, Section V, *C*.
81. See 16 § Act (1998:1593) on Religious Communities.

affairs. Nevertheless, the State has access to certain instruments which in fact constitute a mechanism of control, at least to a certain extent.

Swedish law requires that a religious denomination must be founded in the form of an association, recognized by the State as a "registered community of religion (or faith)" (*registrerat trossamfund*),[82] in order to obtain legal personality.[83] A denomination of religion or faith is defined by the legislation as a community for religious activities, including the arrangement of services.[84] Registration requires that the denomination has regulations stating its purpose and objectives, a name, board, names and other contact information of the members of the board, and those with the rights to represent the denomination.[85] Registration is granted by a state body, called The Legal, Financial and Administrative Services Agency (*Kammarkollegiet*),[86] which means that a state body is in charge of assessing which kind of a community qualifies as a religious community. This control is, nevertheless, aimed to be of a purely formal nature.[87] The granting of registration, in turn, is a precondition for granting State support to the denomination in question or for State delegation of any commissions involving exercise of law. State support takes place in the form of financial subsidizes or assistance with the levying of registered religious denominations' member fees in connection with income taxation in Sweden.

The State may provide financial subsidizes to a registered religious denomination only upon condition that the denomination contributes to the maintenance and development of fundamental values of the society. According to statements in a Government Bill,[88] it is required that the denomination counteracts all forms of racism and other discrimination as well as violence and brutality. The denomination is expected to contribute to equality between men and women. Its members and staff are to be guided by ethical principles which correspond with the fundamental democratic values of the society. These requirements do not, however, mean that the confession of the denomination should in itself be "democratic" or that the denomination's staff must be elected in a democratic procedure.[89] These issues are considered to remain outside of the scope of secular law. Financial subsidizes are granted upon application by the Commission for Government Support to Faith Communities,[90] each application being assessed individually. State subsidizing of religious denominations is based on the idea that the denominations are a part of popular movements in society and that they perform functions that are to the advantage of society. Due to these requirements it has been claimed that secular law, instead of defining religion, uses an "instrumental definition of religion" relating to societal advantage as a condition for state funding.[91]

On the other hand, it is today evident that representatives of each religion are the ones to define the contents of their religion.[92] Still, secular law may impose restrictions to what religion may require according to the followers of that religion. An example is that both koscher-slaughter and halal-slaughter of animals are forbidden in Sweden. According to the Act (1988:534) on Protection of Animals (*Djurskyddslagen*) the animal must be given anaesthetics before its blood may be run off.[93] Another example relates to circumcision.

82. See Regulation (1999:731) on Registration of Religious Communities, § 2. This form of organization was considered by the legislator to best correspond to the religious denominations' self-image.

83. Act (1998:1593) on Religious Communities, §§ 7–9.

84. Act (1998:1593) on Religious Communities, § 2.

85. See Act (1998:1593) on Religious Communities, §§ 7–8. The "contact information" includes the social security numbers of each member – or in lack of such – the date of birth. The Agency in charge of registration must be informed without delay of any change in the data of relevance for the registration.

86. See supra, Section IV.

87. Government Bill, Prop. 1997/98:116, 25, 27.

88. Government Bill, Prop. 1998/99:124, 64.

89. See SOU 2009:52, 94.

90. See supra, Section IV.

91. A. Jarlert, *Individuell eller institutionell religionsfrihet?*, 4. (To be published in a forthcoming Anthology Families – Religion – Law, Uppsala 2010).

92. Id.

93. Act (1988:534) on Protection of Animals, § 14. See Y. Myhrberg & K. Ohlsson, *Djurskyddslagen, Karnov Svensk lagsamling med kommentar*.

Circumcision of women is considered to be a very serious crime in Sweden, irrespective of any consent.[94] Although heavily criticized in public debate, circumcision of boys is permitted under certain conditions, such as that the operation shall be performed by a medical doctor.[95]

It follows that there exist certain contradictions between the State´s alleged general neutrality towards issues of religion and belief and the requirements set for subsidizing the activities of a religious denomination by the State or restrictions concerning certain religious rituals and requirements, such as slaughtering of animals and circumcision.

B. Church of Sweden

The present electoral system of the Church of Sweden – and in particular the role of the political parties in it – is a subject of debate.[96] At these elections, which take place every four years, representatives are elected at both the diocesan level and national levels. The groups responsible for the nomination of candidates are made up primarily of the political parties, each drawing up a special list of candidates (party members) for the elections. Although non-political groups may also draw up special lists of candidates, the unique involvement of political parties in the Church of Sweden cannot be questioned. Approximately 10 percent of the voters make use of their vote, compared with national elections in Sweden where voters' participation exceeds 80 percent.

VI. RELIGION AND THE AUTONOMY OF THE STATE

Questions of relevance under this part of the Questionnaire are of very limited importance under the Swedish model after the separation between the State and the Church of Sweden in 2000. To the extent that the questions raised can be of relevance, they have been dealt with under Sections IV and V, above. In general, the answer is that religious communities do not play any specific role in the secular governance of the country. They are, for example, not represented in any legislative or executive bodies. The religious communities of the country are also placed on an equal legal footing. It follows that none of them has the power to control other religious communities under the State law. Such functions are in Sweden performed by special state bodies, mentioned under Section IV, *B* above, and acting under secular law.

On the other hand, when legislative reforms in secular law of any alleged religious interest are initiated by the Government, the major religious communities are always heard, in particular or among other consulted bodies, before any Governmental Bill is put forth to Parliament. For example, before Swedish legislation on marriage was extended to cover same-sex couples in 2009, special hearings were held with leaders of all the major religious communities in Sweden regarding their position on this issue. In addition, these communities formed a special "referee group" in the preparation of the legislative amendments, with the right to attend all meetings of the legislative committee in charge.

VII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

Freedom of religion and freedom *from* religion enjoy specific constitutional protection in Sweden (see Section IV B, above). Furthermore, according to the Ordinance of Government, all regulations regarding religious communities require specific legislation.[97]These regulations are found in the Act (1998:1593) on religious communities as well as in the Act (1998:1591) on the Church of Sweden. In addition, the Ordinance of Government contains a general delegation clause, which stipulates that administrative duties of a public law nature can be delegated to a *registered religious denomination*.[98]

94. Act (1982:316) on Prohibition of Circumcision of Women. See also J. Schiratzki, *Barnets bästa i ett mångkulturellt Sverige – en rättsvetenskaplig undersökning*, (2000), 119–20.

95. Act (2001:499) on Circumcision of Boys.

96. See Bäckström et al, *Religious Change in Northern Europe, the Case of Sweden*, 76.

97. Ordinance of Government, Ch. 8 § 6.

98. See infra n. 72.

A religious community in Sweden that wishes to be treated as such must be registered. *Registered religious community* is a special legal figure created for religious communities by Act (1998:1593) on Religious Communities.[99] The Church of Sweden, which is regulated by an Act of its own, i.e., Act (1998:1591) on the Church of Sweden, is a registered religious community *ex lege*. A registered religious community can acquire rights[100] and duties, and initiate proceedings in court and other authorities.[101]

In connection with the separation of the State and the Church of Sweden, church tax was replaced from 1 January2000 by a church fee. Interestingly enough, just as the church tax earlier, the fees of the Church of Sweden continue to be levied by the State in connection with the general tax return system.[102] A novelty brought by the reform is that the same right, to be assisted by the State in the levying of church fees, is now available to all officially registered religious communities.[103] This fee constitutes approximately 1 percent of an individual's income in all the religious communities which make use of this service, with the exception of the Church of Sweden where the fee is established at the parish-level.[104] Nevertheless, the community must fulfil special requirements to be provided such assistance.[105] In this regard, the State also levies a special burial fee which everyone who is recorded in Sweden's population registry to be habitually resident in Sweden has a duty to pay, irrespective of confession (or lack of confession).[106] The State does not keep any record of the religious affiliations of the population.[107] On the other hand, the State levying of membership fees, upon application of a registered religious community, makes it apparent on the tax pay slip to which community the tax payer belongs.

Even after the Church-State separation, certain parts of the activities of the Church of Sweden still bear the imprint of public law and are subject to special legislation.[108] An example is the Burial Act (1990:1144) (*Begravingslagen)*, which deals with the Church's special responsibility for graveyards and funerals in Sweden. The Church of Sweden is, as a rule, in charge of the administration of burial activities in Sweden. The local parishes are the main actors. In the capital of Stockholm, however, the municipality is in charge. Administration of burial activities means, i.a., a duty to supply a sufficient number of burial grounds and graves for those who are registered within a certain region, irrespective of their faith. It also involves an obligation to continuous consultation and information with representatives of non-Christian communities within the region.[109] The County Government Boards in Sweden are under the duty to provide alternative burial forms. Roman and Greek Orthodox Catholics, Jew, and Muslims have access to burial grounds of their own in Sweden.

When the State and the Church of Sweden were separated, the Church became the owner of all Church buildings that had been inaugurated for divine services before January 1, 2000. According to Chapter 4 of the Act (1988:950) on Cultural Heritage

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99. If a religious community abstains from registration, it can still qualify as a so-called ideal association. A religious community cannot be registered in the form of a company, financial association, or foundation. See Act (1998:1593) on Religious Communities, § 7 ¶ 3.

100. For example, a registered religious community is free to receive gifts and testamentary donations.

101. See Act (1998:1593) on Registered Communities, § 9 ¶ 1.

102. This procedure is regulated by Act (1999:291) concerning Fees to Registered Religious Communities.

103. See Act (1998:1593) on Religious Communities, § 16. Earlier, individuals who did not belong to the Church of Sweden were not covered. The only way to avoid paying this fee is to resign from the membership of the religious community.

104. Information relating to the size of the fee is available on the homepages of all the concerned religious communities. Relevant information is also available on the National Tax Authority's homepage.

105. See supra Section V, *B.* In addition to the Church of Sweden, eight religious communities in Sweden make use of this service by State. They consist of the Catholic Church of Sweden and so-called Free Churches of Protestant Christian origin.

106. See Burial Act (1990:1144), Ch. 9.

107. On the other hand, the number of members is registered with the tax authorities in those cases where the community in questions makes uses of the State's fee levying services.

108. Bäckström et al, *Religious Change in Northern Europe, The Case of Sweden*, 64.

109. Special "ombudsmen" represent those who do not belong to the Church of Sweden. See Burial Act (1990:1144), Ch. 10.

(*Kulturminneslagen*) the Church is responsible for the care and maintenance of these church buildings and sites in accordance with their cultural-historical value and with respect to their appearance and purpose. With the exception of ordinary measures to maintain the property and urgent measures, any reconstruction, demolition or other changes in the exterior or the interior require special permission by the local County Government Board (*Länsstyrelsen*) or the National Office of Antiquitie (*Riksantikvarieverket*). Detailed provisions regulate the care to be provided by the Church in respect of church buildings and sites, church movables, and burial-grounds. In connection with the State-Church separation, a special system of state subsidizing of the Church for the care and maintenance of this property was created on a diocese basis.[110]

Freedom of religion or belief does not entitle individuals or groups, on the basis of conscientious objection or otherwise, to exemptions from laws or contractual clauses of general applicability. Certain administrative exceptions have been made with regard to Swedish male citizens' general duty of military service.[111]

The Commission for Government Support to Faith Communities and the Council for Contact with Faith Communities (above, Section IV) are, i.a., aimed to facilitate peaceful coexistence and respect between religious communities. Both are organized under the Swedish Ministry of Culture. A new important field of cooperation is emergency administration.

VIII. State Financial Support for Religion

In Sweden, the State itself provides direct financial support for religious communities. Religious communities are regarded to be organizations whose activities generally speaking are for the benefit of the society and therefore qualify for financial state support. The conditions for this support are regulated in a special enactment, Act (1999:932) on State Support to Religious Communities, in combination with the Act (1998:1593) on Religious Communities.[112] The general aim of the State's funding is to create opportunities for denominations to pursue long-term religious activities such as worship services, spiritual guidance, education, and care. Tax-exemptions for support to religious communities, education, charitable purposes, etc., have been advocated in public debate in Sweden but are not yet permitted under Swedish law.

A special state body, called Commission for Government Support to Faith Communities, has had responsibility over this area since 1971.[113] In 2007, 50,232,000 Swedish crowns – corresponding to approximately 550,000 Euros at then applicable currency rates – were distributed by the Commission as State subsidizes. As mentioned earlier, only religious communities that contribute to the upholding and support of the fundamental values in society qualify for financial state subsidizes. The fundamental values of society consist of respect for democracy, human rights and fundamental freedoms, and gender equality. It is furthermore required that the community is registered as a religious community and that it pursues activities with stability and vitality.[114] Stability requires in this context that the community has been continuously active in Sweden for at least five years, has an organized structure, a solid economy, and premises for its activities.[115] The Commission is also expected to carry on dialogues with the religious communities. It has institutionalized cooperation with the Islamic Cooperation Council and the Ecumenical Council for the Orthodox and Oriental Churches.[116] In 2007, the Commission became in charge of coordinating relief work by religious communities

110. See Act (1988:950) on Cultural Heritage, Ch. 4 § 16.

111. See Act (1994:1809) and Regulation (1995:238) on Duty of Total Defense (= *Lagen/Förordningen om totalförsvarsplikt*).

112. In addition, a special regulation applies, entitled Regulation (2007:1192) with Instruction for the Board for State Grants to Religious Communities.

113. See supra Sections IV, *H* and V, *C*.

114. In 2007, forty registered faith communities received grants of various sizes.

115. Act (1998: 1593) on Religious Communities, § 16.

116. See SOU 2009:52, 72.

in connection with general crises, such as national catastrophes of various kinds where people of different ethnic origin are injured or lose their lives.

The State subsidies are divided into three different categories: a) an organizational grant enabling the parishes to provide religious services, offer pastoral care, and give education; b) a working grant to support activities within specific areas that the State wishes to subsidize; and c) project grants, which are aimed to stimulate new forms of activities and cooperation.[117]

When the State and the Church of Sweden were separated as of 1 January 2000, the Church became the owner of the church buildings and sites that had been inaugurated before that date. To compensate the Church for the costs of caring and maintaining this property, a special system was created of State support to the Church.[118] The justification for this compensation, called church-antiquarian compensation, is that the property in question constitutes an invaluable part of Sweden's cultural and historical heritage, not the faith of the Church as such.[119] The amount of compensation is decided by Parliament upon a proposal by Government, based on estimations made by the National Office of Antiquities. The compensation granted is then divided among the dioceses of the country. No other religious communities in Sweden are included in this system.

All the public subsidies to the religious communities are funded by general tax revenues and other income of the State or municipality. In this respect, it should be noticed that all registered religious communities qualify for public financial support. It is only in respect to the church-antiquarian compensation that the Church of Sweden enjoys a privileged position. The financing of salaries to the clergy and other staff, as well as the financing of church services is a purely internal matter of the religious communities.

IX. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

Secular law can recognize legal effects to acts performed according to religious law only to the extent that a religious community has performed these acts within the mandate given to it by secular legislation. Of importance in this respect is the semi-official function that the Church of Sweden continues, by force of legislation, to enjoy in certain fields. The Ordinance of Government contains, furthermore, a general delegation clause enabling the State to delegate administrative functions to a registered religious community.[120]

In Sweden, a marriage can, alternatively, take place in a civil law form or in a religious form. The religious communities' right to officiate marriage ceremonies with full legal effects can be mentioned as an example of the above-mentioned delegation according to the Ordinance of Government.[121] The same conditions for delegation apply in this respect to all religious communities, for example that the denomination must have at least 3,000 members and that its activities are organized in such a manner that it can be expected to pay regard to the rules of the Swedish Marriage Code. The delegation takes place by decision of a state body (*Kammarkollegiet*)[122] upon application by the community. In 2008, approximately forty registered religious communities in Sweden had authorization to officiate marriage ceremonies in Sweden.[123] A marriage within a religious

117. Available at http://www.sst.a.se/inenglish.4.7f968fc211eeec933de800011945.html.

118. Act (1988:950) on Cultural Heritage, Ch. 4 § 16.

119. See SOU 1997:43; Government Bill, Prop. 1998/99:38, 133–60.

120. Ordinance of Government, Ch. 11 § 6.3.

121. See Act (1993:305) on the Right to Officiate Marriages Within Religious Communities. Until the law amendment in 2009, all ministers of the Church of Sweden had an automatic right to officiate marriages in force of their ordination as ministers of the Church. Other religious communities (and their ministers) received the right to be granted such a right – upon application – through the Religious Freedom Act (1951:680). See SOU 2007:17, 255–60.

122. This is the same state body which is in charge of registration of religious communities. See supra, Section V, *B.*

123. These communities include various Christian, Muslim and Jewish denominations. See A. Jonsson, *in* I. Svanberg & D. Westerlund (eds.), *Religion i Sverige* (2008), 384–85. Altogether, more than seventy denominations are registered as religious communities in Sweden (2008).

community but without the required State permit to officiate marriages is invalid according to secular law. Upon special conditions, the Government can upon application of the parties declare an invalid marriage as legally valid; a few such cases are examined every year. As regards marriages performed according to religious law abroad, the marriage is recognized under Swedish private international law as legally valid in Sweden if the marriage is valid according to the law of the country where the marriage was celebrated.[124]

In 2009, Swedish legislation on marriage became gender-neutral, making it possible for same-sex couples to enter into marriage in Sweden. All Sweden's leading religious denominations were to a varying degree opposed to this law reform.[125] After the new legislation was adopted by Parliament, only the Church of Sweden has taken a positive decision, in its General Synod in September 2009, to officiate same-sex marriages once the marriage liturgy of the Church has been revised accordingly.[126] In the 2009 law reform, it was however, made clear by the legislator that no faith community or priest would be under an obligation to officiate same-sex marriages; to require otherwise was considered to infringe upon the religious communities' and concerned staffs' freedom of religion.[127] The religious communities, and their ministers, have continued autonomy to decide whose marriages they are willing to officiate.[128] The opposition from the religious communities towards extending the concept of marriage to same-sex couples has in the general debate in Sweden been used as an argument to fully secularize marriage and to cancel the State delegation to religious denominations to officiate marriages. Interestingly enough, also representatives for religious communities, in particular several bishops of the Church of Sweden, have publicly advocated that marriages should only be officiated in the form of secular law. The reason is that the notion of marriage in secular law, after the reform, no longer corresponds to the notion of marriage in religious law.

Only secular courts are recognized by Swedish law. It follows that these courts in Sweden have exclusive jurisdiction and that only their decisions are recognized by State authorities. Religious courts in Sweden remain an internal affair, without jurisdiction according to the secular law. Under Swedish rules on private international law, however, the jurisdiction of religious courts abroad may be recognized if the religious court is competent according to the rules prevailing in that foreign State. Under the same conditions, the decisions of a religious court abroad may also be recognized and enforceable in Sweden.[129]

X. RELIGIOUS EDUCATION OF THE YOUTH

All children are under Swedish law guaranteed the right to education.[130] The basic responsibility for organizing the various levels of school education (so-called public schools) belongs to the municipalities of the country. Since a law reform in 1990, also independent physical and legal persons may found schools, so-called free-standing schools (*fristående skolor*).[131] This includes the right of religious communities to found and run schools with a confessional orientation.[132] To create and run any free-standing

124. See M. Jänterä-Jareborg, "Family Law in a Multicultural Sweden – The Challenges of Migration and Religion," *Uppsala-Minnesota Colloquium: Law, Culture and Values, De lege* (2009): 160–62.

125. See SOU 2007:17, 223–25, 351–65 on dissenting opinions to the Committee's proposal to extend the concept of marriage to same-sex couples.

126. Although the Synod took this decision by a clear majority, many were opposed.

127. See SOU 2007:17, 274–81.

128. The religious communities apply different kinds of conditions, and also their priests may refuse to officiate in marriage ceremonies, for example, when the parties are not members of the community, when one of them is divorced, etc. In such cases, the civil ceremony is, normally, the option.

129. Of special relevance in this respect is art. 63 of Council Regulation (EC) No. 2201/2003 of Nov. 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000. The article concerns the Regulation's scope of application in relation to EU member states' concordats with the Holy See.

130. See School Act (1985:1100), Ch. 1 § 2.

131. See School Act (1985:1100), Ch. 1 § 3. These schools are regulated specifically in Chapter 9 of the Act.

132. See School Act (1985:1100), Ch. 9 § 2 ¶ 2. It was not considered possible, not least with regard to

school in Sweden requires a special permit (authorization) by the National School Agency (*Statens skolverk*). Several conditions must be fulfilled,[133] including that the education is capable of giving the pupils knowledge and capacities essentially equivalent to those provided by the public schools and that the education corresponds with the general goals and the values of the latter. The schools must be open for all pupils, irrespective of, for example, their faith,[134] and the teaching staff must have the general qualifications required by the School Act (1985:1100). A school with a certain confessional orientation may not favour teachers of its own faith at the expense of professionally qualified teachers not belonging to that congregation.[135]

An authorized, free-standing school – confessional as well as non-confessional – is publicly financed, through the general tax system. More precisely, the school is entitled, according to the School Act, to receive for each pupil from the pupils' home municipality a specific school allowance, and may not take any fees of the pupils.[136] In economic terms, authorized free-standing schools are, thus, basically on an equal footing with the public schools. Nevertheless, the National School Agency has the right to deny public funding to an authorized confessional free-standing school if it is considered that the activities of the school involve negative consequences for education in the concerned municipality.[137] Diplomas granted by authorized confessional schools are recognized by the State. According to statistics from 2005, kept by the National School Agency, there were altogether 100 authorized free-standing schools with a confessional orientation.[138] The great majority of these schools had an express Christian profile, whereas ten of them had a Muslim orientation.

The curricula of public schools in Sweden must include non-denominational education which covers all major confessions in an objective and comprehensive manner.[139] This education is to be characterized by openness and tolerance and provide the pupil the opportunity of taking personal stances to issues of faith. Included are moral and ethical issues relating to life and death, guilt and responsibility, and so on. Also the authorized free-standing schools with a confessional orientation are required to pay regard to these requirements in their curricula.[140] This means, i.a., that the education in the school's own confession may not replace such education that the public schools are expected to provide in the field of religion and faith.[141] Parents, furthermore, cannot deny their children from taking part in any form of obligatory school education.[142]

Obligatory school education on issues of religion and faith has been regarded as problematic in Sweden ever since the enactment of the Religious Freedom Act (1951:680). In the 1960s, it was considered necessary to supplement denominational religious education, based on the primacy of Christianity, with knowledge on other religions. Successively, non-denominational issues have become central within this part of the school curricula. The free-standing schools with an express religious orientation are often a point of public debate.[143] Limitations in this respect are under consideration, for

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Sweden's international obligations, to require that the free-standing schools would have a non-confessional orientation. See K. Borevi, in I. Svanberg & D. Westerlund (eds.), *Religion i Sverige* (2008), 379–80.Of relevance in this respect is the European Convention on Human Rights and Basic Freedoms (in particular art. 9. 8, 10 and 14), and its first additional protocol (art. 2).

133. See School Act (1985:1100), Ch. 9 § 2.

134. This means, e.g., that Christian schools must be open for pupils who are not Christian and Muslim schools for pupils who are not Muslim. K. Borevi, in I. Svanberg & D. Westerlund (eds.), *Religion i Sverige* (2008), 380.

135. Id.

136. See School Act (1985:1100), Ch. 9 § 6. During the last years, new free-standing schools have been founded in Sweden, on a company basis, with clear financial motives. The education seems to be of a general good level, although these schools normally also make an economic profit.

137. K. Borevi, in I. Svanberg & D. Westerlund (eds.), *Religion i Sverige* (2008), 380–81.

138. See id. at 379.

139. Instructions by the National School Agency. See www.skolverket.se,.

140. See H.Vogel, Skollagen, Karnov,*Svensk lagsamling med kommentar*, Ch. 9 § 2 ¶ 2.

141. Id.

142. See SOU 1997:41, 137.

143. See K. Borevi, in I. Svanberg & D. Westerlund (eds.), *Religion i Sverige* (2008), 381.

example, that no preaching of a religion (*förkunnande undervisning*) should take place under the lectures during school hours.

XI. Religious Symbols in Public Places

There exist no general legal restrictions related to wearing religious symbols in public places in Sweden. On the contrary, wearing religious symbols falls generally under the constitutionally protected right of freedom of religion.[144] Also the Act (2003:307) on Prohibition of Discrimination protects against discrimination on the basis of religion.[145] However, due to other problems related to, for example, school attendance or other work, clothes that in whole or in part cover the face and/or the body of the student or employee may in an individual case be prohibited by, e.g., the principal of the concerned school.
In one case, the question arose whether a bus driver, who was a Sikh, could wear a turban while driving the bus. This was answered affirmatively. Other cases have concerned female students' right to wear special head coverings. The National Ombudsman for Matters of Discrimination *(Diskrimineringsombudsmannen*) has stated that any general prohibition in schools of religious head coverings would prevent the individuals in question from exercising their freedom of religion. According to a decision by the National School Agency, a school direction may prohibit the wearing of religiously articulated clothing only for special reasons, for example, when it threatens the order and security in the school or prevents the school from carrying out its pedagogic commission.[146]

In a Communication of 2003,[147] the National School Agency, on the other hand, pointed out that schools are not to be used as places for public religious manifestations. A public school environment should be kept neutral in respect of confession. This position, as well as respect for the individual's freedom to exercise his or her religion through the wearing of religious symbols, would seem to apply for public places in general in Sweden.

XII. Freedom of Expression and Offences Against Religion

Blasphemy was decriminalized in Sweden in 1949 and replaced by an enactment which protected serenity of faith (*trosfrid*).[148] This enactment was repealed in 1970. It follows that Swedish law does not protect religion as such against defamation but protects the exercise of religion. This can include protection against offensive statements. Of special relevance is an offence called "agitation against a national or ethnic group" (*hets mot folkgrupp*), criminalized in the Penal Code, Ch. 16 § 8.[149] In this respect, religion is closely linked with other fundamental and constitutionally protected freedoms, such as the freedom of assembly and the freedom of expression, which under certain conditions can be restricted.[150] In this context, all religions are placed on an equal footing.

According to the above-mentioned provision in the Penal Code, "a person who in a disseminated statement or communication threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, color, national or ethnic origin or religious belief, shall be sentenced for agitation against a national or ethnic group to imprisonment for at most two years, or if the crime is petty, to a fine."[151] Where the limits to the freedom of expression are to be drawn through this provision is influenced by the

144. See above, Sections IV, *C* and IV, D.

145. In Swedish: Lag (2003:307) om förbud mot diskriminering, § 1. See also Act (1999:132) concerning measures against discrimination in work-life on the basis of ethnicity, religion, or other belief.

146. Decision No. 52-2006:689.

147. Communication No. 58-2003:2567.

148. In 1964, a court of appeal convicted a journalist, who had joked in a radio program about Holy Communion wine in petrol pumps, for offence against serenity of faith. See C. Hedin, in I. Svanberg & D. Westerlund, *Religion i Sverige* (2008), 391.

149. This provision dates back to Act (1988:835).

150. See supra, Section IV.

151. Penal Code, Ch. 16 § 8.

European Convention on Human Rights and Fundamental Freedoms. In a recent much debated case in Sweden, a Christian Freechurch pastor had giving a sermon in his church on the topic of homosexuality and the Bible.[152] The pastor compared homosexuals to a cancerous tumor in society. He was convicted for agitation under this provision by a first instance court. The court of appeal reversed this decision on the grounds that a conviction would be a disproportionate limitation of religious freedom of expression, and made references to the Swedish Constitution as well as the European Convention. The Supreme Court shared this conclusion. According to the Court a conviction would have been in line with the Swedish legislation's intentions, but would probably not live up to a European standard as expressed by the European Convention. The general conclusion drawn in Sweden is that the European Convention has resulted in a more tolerant approach towards "hate speech" if found on a par with religious expression.[153]

Another relevant provision is found in the Penal Code, Ch. 16 § 4. "A person who by act of violence, loud noise or other like means disturbs or tries to interfere with a public religious service, other public devotional exercise, wedding, funeral or like ceremony, a court session or other state or municipal official function, or a public gathering for deliberation, instruction or to hear a lecture, shall be sentenced for *disturbing a function or public meeting* to a fine or imprisonment for at most six months."

Of relevance, furthermore, is Penal Code, Ch. 16 § 10 criminalizing offences against the peace of the tomb. "A person who, without authorization, moves, injures or outrageously treats the corpse or ashes of the dead, opens a grave or otherwise inflicts damage on or abuses a coffin, urn, grave or other resting place of the dead or a tombstone, shall be sentenced for *crime against the peace of the tomb* to a fine or imprisonment for at most six months."[154]

According to Penal Code, Ch. 29 § 2, it is an aggravating circumstance when a crime is committed in order to violate a person or a group of persons because of, for example, the person's or the group's religious belief.

152. See, e.g., T. Bull, "Freedom of Expression and the Limits of Tolerance: A Swedish Saga," *Uppsala-Minnesota Colloquium: Law, Culture and Values, De lege* (2009): 113–14.

153. See, e.g., id. at 116, 126.

154. Penal Code, Ch. 16 § 10

RENE PAHUD DE MORTANGES

Religion and the Secular State in Switzerland

I. Introduction

Today, Switzerland is a secular state in which state and religion are in principle separated. This does not mean, however, that religion is totally banned from public law. On the cantonal level, the state acknowledges a privileged status to different important religious communities. Moreover, the state reacts to the rise of religious plurality. It tries to solve the legal and factual problems which occur due to the emergence of non-western religious communities. The focus of the state policy is to a lesser extent on the laity of the state than on the religious neutrality; in areas which are of interest for the state, it cooperates with the religious communities.

The present contribution explains the basic norms concerning the regulation of the relationship of the state and the religious communities in the Swiss Confederation. Along with the description of the current development and some exemplary court decisions these norms will illustrate the secular state's position concerning religious matters.

II. Historical and Social Context

Like elsewhere, the constitutional law on religious matters in Switzerland is the result of a long historical development. It responds to more recent denominational developments as well. Without any claim of completeness, this paper begins with a few references to the historical development. This may provide for better understanding of the current system.

At the beginning of the 16th century, the Swiss Confederation consisted of a conglomerate of autonomous counties which were connected by a network of alliances.[1] Depending on their positions, these counties were either fully autonomous or only allocated. Other parts of today's Switzerland were tributary districts of one or several of these counties. Until the end of the Middle Age, people in the counties naturally identified with the one and only Christian church. The splitting of belief of the churches in the wake of the Reformation was an important test for the system of alliances of the Confederation. Some of the counties turned to the Reformation, whereas others stayed with the old belief. To solve the conflict of belief in the common tributary districts, the first *Landfriede* (land peace) was concluded in Kappel near Zurich in 1529. This grew from the religious principle of territorial exclusivity (*cuius regio, eius religio*). The denominational variations ampng groups from from county to county was recognized on the level of the constitution. The living together of the two Christian denominations in the tributary districts nevertheless led to several armed conflicts. The complete constitutional equality of the two denominations (*parity*) in the tributary districts was not established until the fourth *Landfriede* (land peace) of 1712.

In the fully autonomous counties, however, the denominational exclusivity remained until the end of the old Confederation in 1798. Whoever did not want to be part of the

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1. On the constitutional history of Switzerland in general, see Peyer, H. C., *Verfassungeschichte der alten Schweiz*, Zurich 1978; *Handbuch der Schweizer Geschichte*, vols. I &. II, Zurich 1980; Pahud de Mortanges, R., *Schweizerische Rechtsgeschichte*, Zurich 2007; *Geschichte der Schweiz und der Schweizer*, 3d ed., Zurich 1986; Kölz, A., *Neuere schweizerische Verfassungsgeschichte*, vols. I & II, Zurich 1992 and 2004; Kley, A., *Verfassungsgeschichte der Neuzeit*, 2d ed. Bern 2008. For a concise overview of the history of the Swiss state church legislation. see Kraus, D., *Schweizerisches Staatskirchenrecht. Hauptlinien des Verhältnisses von Staat und Kirche auf eidgenössischer und kantonaler Ebene*, Tübingen 1993, 14 ff.

official religion could move away, but had to leave his possessions. Only a few protestant counties mercifully granted an *ius emigrandi*. Even until 1847, denominational disputes led to armed conflicts between the cantons. Only in the Constitution of the young Confederation which was founded 1848 after civil war (*Sonderbundkrieg*) was the freedom of conscience established as a fundamental right, though restricted to the Christian denominations. For Jews, there was neither a freedom of belief nor a freedom of establishment at first. In the old Confederacy they could only in the "Jewish villages" of Endingen and Lengnau on the German border. Their dead could only be buried on an island in the Rhine.[2] The denominational restrictions of the freedom of establishment and religion were dropped in 1866 and 1847. With the revision of the Constitution in 1874, a number of denominational exception norms aiming at the Catholic Church were introduced. These norms were not removed until 1979, 1999, and 2001.[3]

The federal census of 2000[4] reports the following religion affliations among the Swiss population: 41.8 percent (7.28 million total) Roman Catholic Church; 33 percent Swiss Protestant Church; 2.2 percent to various Protestant Free Churches; 1.8 percent Christian Orthodox churches; 0.2 percent (or 13,312 people) to the Christ-Catholic Church. About 0.2 percent (17,914 people) Jewish, 4.3 percent (or 310,807 people) Islamic communities; 11.1 percent of the population calls itself "irreligious"; remainder "other." The numbers concerning religion and denominations have been relatively unchanged for a long time. Only in the decades after World War II has the religious landscape evolved.[5] Due to migration of workers from Italy and Spain, which are traditionally Catholic countries, the number of Catholics in the population rose considerably until 1970. Since the mid-1970s, foreign workers have been increasingly recruited from the traditionally Christian Orthodox and Muslim areas of South Europe. During the Balkan wars in the nineties, Switzerland took in many refugees from the former Yugoslavia. The number of Muslims has been multiplied by fifteen since 1970; the Muslims now constitute the third biggest religious community in Switzerland.[6]

Simultaneous to the religious multiplication, the percentage of persons without a religious denomination rose from 1.5 percent in 1970 to 11 percent in 2000. Particularly in the urban centers of Switzerland, like Zurich, Basel and Geneva, the moving away from churches is pronounced. In the cantons of Basel-Stadt and Geneva, the Roman Catholic Church and the Protestant Church are confronted with a dramatic loss of members. In the more rural regions of Switzerland, the decrease is smaller, but even there the tie between the members and their churches is becoming more of a formality, with services of churches increasingly sought only for baptisms, funerals, and weddings. On the other hand, it is remarkable that most Swiss remain members of their churches despite considerable church taxes. They consider that their church nevertheless does something useful, even though they do not need it for their own purposes.

III. CONSTITUTIONAL AND POLITICAL CONTEXT

After the counties had held the church sovereignty during the Ancien Régime, the framers of the federal state of 1848 abstained from stipulating a federal competence in this

2. Cf. *Juden in der Schweiz. Glaube-Geschichte-Gegenwart* (Willy Guggenheim ed.) Zurich 1982.

3. These included the prohibition of Jesuits and convents, the prohibition of electing clerks into the highest federal authorities and the so-called bishopric article. Compare with Kraus, supra note 2, at 142 ff.; Winzeler, C., *Strukturen von einer "anderen Welt"*; Freiburg i. Ue. 1998 (Freiburger Veröffentlichungen zum Religionsrecht, vol. 2).

4. Cf. Bundesamt für Statistik (ed.), *Eidgenössische* Volkszählung 2000; *Religionslandschaft in der Schweiz*, Neuenburg 2004, 48 ff.

5. Haug, W., "Die Religionsgemeinschaften der Schweiz im Spiegel der Volkszählung," Pahud de Mortanges, R./Tanner, E. (ed.), *Kooperation zwischen Staat und Religionsgemeinschaften nach schweizerischem Recht. Coopération entre Etat et communautés religieuses selon le droit Suisse*, Zurich 2005 (=Freiburger Veröffentlichungen zum Religionsrecht, volume 15), 13 ff.

6. Heiniger, M., "Muslime und Musliminnen in der Schweiz – ein statistischer Überblick," Pahud de Mortanges, R./Tanner, E. (ed.), *Muslime und schweizerische Rechtsordung. Les musulmans et l'ordre juridique suisse*, Zurich 2002 (=Freiburger Veröffentlichungen zum Religionsrecht, volume 13), 6.

field. According to the effective Federal Constitution (hereafter "Constitution"),[7] which entered into force in 2000, the following applies: The relationship between the churches and the state is governed by the cantons.[8]

The federal state itself does not have a religion and does not favor any religion. On this level, the state and religion are in principle separated. The preamble of the Federal Constitution indeed starts with the invocation of God ("In the name of God Almighty!"). This is supposed to point out the existence of a higher power besides the people and the state. The invoked God must not only be understood in its Christian meaning; nor shall thus be founded a Christian state. The separation of the state and religion is not explicitly mentioned in the Constitution, but is derived from the freedom of religion which is protected directly on the level of the Constitution like the other fundamental rights. According to Article 15 of the Constitution, the freedom of religion and conscience is guaranteed.

In Switzerland, apart from the freedom of religion, which has been developed by the Swiss Supreme Court, the majority of the state church law is cantonal law. Therefore, with 26 cantons, we have *26 different systems of state church law*. Politicians adhere to the cantonal sovereignty in this matter; this policy finds its justification in the small-area spaces and the considerable linguistic and cultural differences between the cantons. However, the basic allocation of competences cannot prevent the Confederation from legislating on religiously relevant issues like pastoral care in the army, development aid, or asylum and refugee laws.

The Federation of Swiss Protestant Churches (FSPC) has formulated suggestions for a framework article in the Federal Constitution a few years ago.

This could have been a legal basis for the regulation of the relationship between the state, the churches and other religious communities.[9] But these suggestions were met with little interest by political parties because they were perceived as a turning away from the secularism by the Confederation. In accordance with that, there is *no administrative office* at federal level which deals with religious questions. The religious communities have to seek different contact persons in the federal administration depending on their factual question. If a member of the Federal Council receives religious communities, it generally only happens in the form of a delegation which contains members of all the important religious communities. By this means they aim to avoid that a religious community has a privileged access to the supreme federal public authorities.

The majority of the political parties keep a certain distance towards the religious communities as well. In the past years, the "Christlichdemokratische Volkspartei" (CVP), which was the party of the Catholics until the 1970s, has deliberately distanced itself from the position of the Roman Catholic Church in multiple factual questions. The other big political parties have a party platform with a neutral philosophy of life. A few other small parties have a party platform with a religious character, but these parties are of little importance in the political process. The religious communities, therefore, present today just one voice among many others in the political life of Switzerland – this besides the parties, labor unions and lobbying-organizations.

IV. Legal Context I: Religious Freedom

Article 15 of the Constitution guarantees the freedom of religion, which, for historical reasons, is called "freedom of conscience and belief" in Switzerland.[10] The constitutional text reads as follows:

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7. Bundesverfassung der Schweizerischen Eidgenossenschaft (Federal Constitution of the Swiss Confederation) of 18 April 1999 (SR 101).

8. Bundesverfassung der Schweizerischen Eidgenossenschaft, art. 72.

9. See Friederich, U./Campiche, R. J./Pahud de Mortanges, R./Winzeler, C. (ed.), *Bundesstaat und Religionsgemeinschaften. Etat fédéral et communautés religieuses*, Bern 2003 (=Schweizerisches Jahrbuch für Kirchenrecht, supplement 4), 93 ff.

10. Cf. Winzeler, C., *Einführung in das Religionsverfassungsrecht der Schweiz*, 2nd edition Zurich 2009 (= Freiburger Veröffentlichungen zum Religionsrecht, vol. 16), 15 ff.; Kraus (ann. 1), 73 ff.

> Paragraph 1: Freedom of religion and conscience is guaranteed.
> Paragraph 2: Everyone has the right to choose freely their religion or their philosophical convictions, and to profess them alone or in community with others.
> Paragraph 3: Everyone has the right to join or to belong to a religious community, and to follow religious teachings.
> Paragraph 4: No one shall be forced to join or belong to a religious community, to participate in a religious act, or to follow religious teachings.

Paragraphs 2 and 3 reinforce the principle of paragraph 1. The list does not have to be understood as conclusive; just some important examples of the protected activity are enumerated. Religious freedom covers the *inner* freedom to choose to belief or not as well as the *external* freedom to express, practice and spread the religious and philosophical convictions within certain boundaries.[11]Whereas paragraph 2 and 3 treat the *positive* part of the protected freedom of religion, paragraph 4 lists important cases of the *negative* part of the matter. The positive aspect of the freedom of religion protects in particular the religious or philosophical self-determination of each person and the (even collective) practice of his convictions in this regard. Concerning the negative content of the freedom of religion, the primary objective is to protect people from state constraint in religious matters; a religious act cannot be imposed.[12] As several court rulings show, problems center to a lesser extent on the apparent constraint than in the hidden, indirect constraint.

Freedom of religion is not limited to granting the individual subjective rights. Beyond that it also features objective and programmatic contents. The state, for example, is obliged to denominational and religious *neutrality*: any state partisanship shall be prevented to protect religious peace. This commandment is not absolute, however; the cantons may recognize individual religious communities under public law due to their church sovereignty. These recognized religious communities are thereby subjected to better conditions than the others who are not so recognized. This privilege has to be based on factual reasons; otherwise Article 8 of the Constitution ("equality before the law") would be violated.[13] Moreover, this neutrality does not obligate a ban on the topic of religion from the public sphere or, for example, from schools. Schools are indeed not allowed to identify with a particular or specific religious view – of the majority or minority – which would create a disadvantage for the members of other denominations.[14] The phenomenon of religion has to be considered at school however; an anti-religious attitude or a militant laicism would not be neutral.[15]

The fundamental right protects primarily *individual* persons. According to the jurisprudence, freedom of religion can only be invoked by *juristic* persons if they pursue a religious purpose[16]. Juristic persons of the economic life are denied the right to invoke the freedom of religion. Therewith, the Swiss Supreme Court protects at the same time the church taxes of juristic persons which are provided for in some cantons. If a corporation has to pay church taxes according to cantonal law, it cannot argue that a majority shareholder is not a member of the churches recognized under cantonal public law, for example.[17]

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11. BGE (decision of the Supreme Court of Switzerland) 118 Ia 56; 119 Ia 184; Kley, A./Cavelti, U. J., Ehrenzeller, B./Mastronardi, P./Schweizer, R. J./Vallender, K.A. (ed.), *Die schweizerische Bundesverfassung*, 2nd edition Zurich 2008, note 6 to art. 15 Cst.; Müller, J. P., *Grundrechte in der Schweiz*, Bern 1999, 86; Rhinow, R., *Grundzüge des Schweizerischen Verfassungsrechts*, Basel 2003, n.1344/1348.

12. Mahon, P., n. 5 ff. to art. 15 Cst., in Aubert, J. F./Mahon, P. (ed.), *Petite commentaire de la Constitution fédérale de la confédération suisse du 18 avril 1999*, Zurich et al. 2003; Winzeler (ann. 9), 24 ff.

13. See Famos, C. R., *Die öffentlichrechtliche Anerkennung von Religionsgemeinschaften im Lichte des Rechtsgleichheitsprinzips*, Freiburg i. Ue. 1999 (=Freiburger Veröffentlichungen zum Religionsrecht, vol. 6), 101 ff.; Hafner, F./Gremmelspacher, G., "Islam im Kontext des schweizerischen Verfassungsrechts," Pahud de Mortanges/Tanner (ann. 6), nn. 1361 f., 1373 ff.

14. BGE 116 Ia 261; cf. Müller (ann. 10), 90 ff.; Rhinow (ann. 10), n.1352 ff.; Mahon (ann. 11), n.14 ff.

15. BGE 123 I 296.

16. BGE 97 I 120; 118 Ia 46.

17. BGE 102 Ia 468; 126 I 122.

According to the current legal situation, it has to be assumed that religious communities recognized under public law, in particular the Protestant and Catholic national Churches, cannot invoke Article 15. With the recognition under public law, the respective religious community becomes a state institution. The state does not have a fundamental right against itself in principle. According to the doctrine, the churches recognized under public law should at least have the possibility of accessing the Swiss Supreme Court if they act on behalf of their members.[18] A number of authors think that the national churches need to have a comprehensive right of self-determination. In other words, the *corporate* dimension of the freedom of religion needs to be extended.[19]

Like every fundamental right, the freedom of religion can be restricted. In accordance with Article 36, such a *restriction* requires a legal basis, a public interest, and has to be proportionate. Moreover, the essence of the freedom of religion must not be restricted. Sometimes, such restrictions result from the positive law itself, like for example from Article 72, Paragraph 2 of the Constitution: the Confederation and the cantons can take (police) measures to protect the public order between the members of the different religious communities. In other cases, the authorities have to undertake a balancing of the legally protected interests.

This balancing has to withstand the control of the Swiss Supreme Court should the situation arise[20]. However, the restriction must not touch the *essence* of the fundamental right in any case. What this essence includes must be concretized by the jurisprudence and the doctrine. Part of the essence certainly is the prohibition to force someone into becoming a member of a denomination, not part of the essence is the public practice of a denomination, and thus any public demonstrations or actions in relation with worship services.[21]

According to Article 35, Paragraph 3, the authorities have to arrange for the fundamental rights to be effective between individuals if they are suitable. Thus, the Constitution accepts an indirect (respectively collateral) *horizontal effect* of fundamental rights; state norms therefore have to be interpreted in compliance with the fundamental rights. In connection with the freedom of religion, this is of importance for the labor law, for example. It has to be formed and applied in a manner to allow the employees to practice a religion within the limits of certain boundaries.[22] The termination of employment may be abusive if it results from the exercise of the constitutional rights in this area. If an employee works in a company with a religious tendency, an accordant denomination may be demanded.[23]

The freedom of conscience and belief is furthermore protected by all the cantonal Constitutions as well as by Article 9 of the ECHR and Articles 18 and 27 of the ICCPR. Occasionally, people appeal to the European Court for Human Rights after the decision by the Swiss Supreme Court, but the court has never extended the range of protection because of the convention.[24] Because Article 9 of the ECHR is more precise than the national law concerning the requirement of a predominating public interest respectively the consideration of the principle of proportionality, this conventional norm has nevertheless reached a proper importance in the area of the conditions for a state intervention in religious freedom rights.[25]

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18. Cf. Mahon (ann. 11), note 4 to art. 15 Cst. concerning this topic.

19. See Winzeler (ann. 9), 42 ff. for the state of affairs.

20. Rhinow, R., *Die neue Bundesverfassung 2000*, Basel 2000, 116.

21. BGE 123 I 301; Winzeler (ann. 9), 35; Kley/Cavelti (ann. 33), note 6 to art. 15 Cst.; Müller (ann. 10), 87 ff.; Mahon (ann. 11), note 11 to art. 15 Cst.

22. See Gloor, W., "Kopftuch an der Kasse – Religionsfreiheit im privaten Arbeitsverhältnis," *ARV/DTA* 2006/1, 1 ff.

23. Cf. Vischer, F., *Der Arbeitsvertrag, in: Schweizerisches Privatrecht*, volume 7.4, 3rd edition Geneva and Munich 2005, 239; art. 336 para 1 letter b of the Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht) vom 30. März 1911(SR 220).

24. See, e.g., BGE 118 Ia 46; see also cases involving religious laws of the Swiss Supreme Court and the European Court of Human Rights on available at http://www.religionsrecht.ch.

25. Cf. BGE 117 Ia 311.

A. Religion at School

School is an area which demonstrates how secular a state really is, because even for religious communities, this is a preferred place to exert influence on young people. According to Article 62 Cst., education is a cantonal matter. The cantons are obliged to ensure a sufficient primary education open to all children. This education is compulsory and is placed under state direction or supervision. Generally, schools in Switzerland are *public schools*. They are operated by the cantons and communities and can be attended by all students, independent from their religious view. The education has to be religiously neutral to respect the students' freedom of religion (refer to subsection III, above). The school and teachers must not identify unilaterally with one religion or proselytize for it. Nevertheless, there may and shall be room for the phenomenon of religion in the general education; it should be presented in a tolerant way.

In many cantons there is a denominational religious education, which is sometimes presented by representatives of the church. This class is optional; parents have the possibility to cancel the registration for their children. Giving religious lessons at public schools is a privilege of the religious communities recognized under public law only (see cipher 6). Alongside many schools offer a class of religious *studies* where regular teachers neutrally inform about the phenomenon religion and the big religious communities. This class aims to increase the general education and is therefore mandatory. By trend, the denominational religious education becomes less important; some schools replace it with a class of religious studies.

Beside public schools, some *private schools* exist. The state does not, therefore, have a monopoly on schools.[26] Private schools are not placed under state direction, but state supervision. The supervision is realized by formulating certain requirements for the authorization of the school as well as by conducting inspections.

Besides religious communities, the funding bodies of private schools are organizations with a special philosophical or educational concepts (e.g., Rudolf-Steiner schools, Montessori schools, etc.). Up until the 1970s, private schools were mainly funded by churches. Due to the drop of members, in particular of the Catholic order, they were no longer able to ensure regular schooling in some places. A number of religious schools therefore had to shut down or were placed under state direction.

In a few big cities, primary schools which are funded by Jewish communities exist.

There are some projects for private Muslim schools at the moment. Generally, public schools in Switzerland are of excellent repute, not only because of the high pedagogical standard but also because of the integrating function. Private schools with a religious background are met with a certain mistrust because of the last-mentioned reason.

B. Some Recent Religion Cases of the Federal Supreme Court

In the present section, the state's concrete efforts to protect the freedom of religion, secularism, and religious neutrality will be illustrated by recent Supreme Court decisions. The Supreme Court plays an important role here because it is able to react more quickly to social changes. Its decisions are always activelydiscussed in the jurisprudential doctrine; this fact shall also be illustrated below. According to the Supreme Court, the freedom of religion not only protects the traditional religions of the Christian churches and religious communities, but *all* the religions, independent of their quantitative distribution in Switzerland. Basically, any conception of the relationship between humans and divine transcendence is protected by the fundamental right. The statement of belief nevertheless has to reach a certain basic ideological meaning; it therefore has to comply with an overall world view.[27]

Freedom of religion basically includes each individual's right to orient his *entire conduct* towards the teachings of a religion and to act according to his inner beliefs. The

26. *Biaggini, G., Bundesverfassung der Schweizerischen Eidgenossenschaft*, Zurich 2007, n. 4 to art. 62.
27. BGE 119 Ia 183.

freedom of religion therefore also protects beliefs which do not imperatively demand a religiously motivated behavior for a concrete life situation, but which regard the reaction in question as the appropriate instrument to deal with the life situation according to the religious conviction.[28]

A specific difficulty arises from the Islamic principle which connects faith with the duty to arrange all the areas of human life primarily according to religious rules. The secularism of the state is thus apparently put into question. Here, the state is bound to examine *which* religious statements may claim the protection of the Constitution, because otherwise the freedom of religion loses its contours. A court or an administrative authority thereby cannot rate religious convictions nor verify the theological accuracy nor interpret relevant parts of religious texts.

C. Integration Is More Important Than the Freedom of Religion: No School Dispensations for Swimming Lessons

In 1993, the Swiss Supreme Court allowed a Muslim father to remove his daughter from co-ed swimming lessons in the second year of primary school based on the considerations mentioned above. The Supreme Court based its decision on a poll conducted by the educational board of the canton of Zurich with different members of Islamic communities. This poll showed that the Koran only requires covering of the female body from sexual maturity onward. Nevertheless, even younger girls and boys of strong faith are not permitted to take part in co-ed swimming lessons.

This decision was not met with unanimous assent in the jurisprudential doctrine. By correctly trying to not judge religious convictions, the Supreme Court protected a particularly strict line of the Islam. In order to come to this decision, the Supreme Court subordinated opposing public interests, including Article 8 (equality of men and women). The dress code finally only concerns girls; it therefore provokes an inequality due to gender-specific attributes.[29] The public interest of *equalization* should have been ranked more important.

The decision also implicates other areas of significant public interest. According to Article 62, Paragraph 2 Cst. and the cantonal school law, attendance at school is compulsory in order to assure a *well-regulated and efficient schooling*. The coherence of the different classes and the education shall not be strained excessively.[30] The cantonal school laws furthermore point up that the goal of primary school is to facilitate the education and the free development of the personality and to impart skills which allow adolescents to participate in social life.[31] Primary school is an important place to acquire social values and to develop social skills. From a social point of view, it is an exigent concern for the primary schools to reach this pedagogical goal, precisely in a period of loosening social coherence.

For this reason, the Swiss Supreme Court changed its position in 2008 with the decision BGE 135 I 79. In a similar case to the one in 1993, the request of a dispensation was not granted. In this opinion, the Swiss Supreme Court points out that physical education provides an important basis for the socialization of the students. Furthermore, the school has an important function in the process of the social integration of migrants. As a result *integration* was given priority over the freedom of religion. The cantonal school boards have begun to adjust their directives concerning the practice of granting dispensations.[32] In everyday life at school, dispensations for religious holidays are less

28. BGE 119 Ia 184.

29. Cavelti, U. J., "Die Religionsfreiheit in Sonderstatusverhältnissen," Pahud de Mortanges, R. (ed.), *Religiöse Minderheiten und Recht, Freiburg* i. Ue. 1998 (= Freiburger Veröffentlichungen zum Religionsrecht, volume 1), 51; Angehrn, M., *Volksschulen und lokale Schulbehörden vor neuen Herausforderungen*, dissertation St. Gallen 2004, 162 ff.

30. BGE 117 Ia 311.

31. See, e.g., art. 3 of the Gesetz über den Kindergart.en, die Primarschule und die Orientierungshilfe des Kantons Freiburg vom 23. Mai 1985 (SGF 411.0.1).

32. For the canton of Zurich, cf. *Neue Zürcher Zeitung* n. 203 of 3 September 2009, 48.

problematical than dispensations for certain types of school activities, because they are part of a longstanding practice, arising from the time Saturdays were still school days. It was primarily students of Jewish faith but also members of the Seventh-day Adventists who benefitted from such codes of practice.[33] The cantonal school law often has a legal foundation and a frequently used code of practice.

D. Strict Religious Neutrality: No Headscarf for Female Teachers in Primary Schools

In BGE 123 I 296 ff. the Swiss Supreme Court protected the decision of the cantonal council of Geneva in which it prohibited a female primary school teacher's wearing an Islamic headscarf.[34] It was uncontested that the headscarf as a religious symbol was protected by the freedom of conscience or belief. However, the Swiss Supreme Court had to evaluate if the conditions for a restriction of the fundamental right were present. In particular, the question had to be resolved if the obligation of denominational neutrality as a public interest trumped the private interest of the appellant. The court pointed out that denominational neutrality has particular importance in public schools because school is compulsory for everyone, no matter from what religious background the person is. It shall be guaranteed that the sensitivies of different convictions are respected. At the same time, it shall be avoided that school becomes a place of conflicts between different convictions. Schools should not identify with certain religious convictions to the detriment of members of other denominations. From this point of view the position of the teacher plays an important role. The teacher is able to influence the students by his or her behavior. Furthermore, he or she is a role model for the students, who are very impressionable due to their adolescence, the daily relationship, and the hierarchic nature of the relationship.[35] In this particular case, the Swiss Supreme Court also considered that the canton of Geneva was, unlike other cantons, historically bound to a strict secularism.

Like the first swimming lessons case, this decision was intensely debated[36] and was not met with unanimous approval. Some questioned whether the person's behavior should not have been taken into account in the balancing of interests. It is conceivable that a teacher who wears a headscarf comes closer to religious neutrality because of her tolerant attitude and her openness than a "neutrally" dressed person who, in one way or another, reveals sympathy or antipathy for a certain religion.[37] Others raised the question as to whether the state might not be honoring atheism by enforcing a too-strict obligation of neutrality which in banning religious signs from the public space.[38]

In this context, it was pointed out that the obligation of denominational neutrality could theoretically address not only teachers but also students, especially when the wearing of clothes with religious symbolism at school is so widespread as to provoke conflicts with members of other religions. If certain students wear a headscarf, as it is the case in some places, religious neutrality is indeed not yet affected and the religious peace not yet endangered. To current Swiss thinking, a general ban on headscarves for students would be regarded as a disproportional response.[39]

The changed practice of the Swiss Supreme Court concerning the swimming lessons

33. BGE 114 Ia 129; 117 Ia 311; cf. Plotke, H., *Schweizerisches Schulrecht*, 2nd edition Bern 2003, 402 ff.

34. Code of practice of the Swiss Supreme Court 47 (1998), 295.

35. *Code of Practice of the Swiss Supreme Court* 47 (1998), 307.

36. See Auer, A., "Le crucifix et le foulard devant le juge constitutionnel suisse," Mieth, D./Pahud de Mortanges, R. (ed.), *Recht. Ethik. Religion, Festgabe für Bundesrichter Giusep Nay zum 60. Geburtstag*, Lucerne 2002, 210 ff.; Hangartner, Y., "Bemerkungen zu BGE 119 Ia 178," *AJP/PJA* 5 (1994), 662 ff.; *idem.*, "Bemerkungen zu BGE 123 I 296", *AJP/PJA* 9 (1998), 599 ff.; Richli, P., "Berufsverbot für Primarlehrerin wegen islamischen Kopftuchs?," *ZBJV* 134 (1998), 228 ff.; Wyss, M. P., "Vom Umgang mit Transzendentem," in: recht 16 (1998), 173 ff.; Zweifel, P., "Religiöse Symbole und Kleidervorschriften im Zwielicht," *ZBJV* 131 (1995), 591 ff.

37. Epiney, A./ Mosters, R./ Gross, D., "Islamisches Kopftuch und religiöse Neutralität an der öffentlichen Schule," Pahud de Mortanges/Tanner (ann. 6), 141.

38. Nay, G., "Rechtsprechung des Bundesgerichts zwischen positiver und negativer Neutralität des Staates," Pahud de Mortanges/Tanner (ann. 5), 242

39. Cf. Gloor (ann. 21), 2; Aubert, J. F., "L'islam à l'école publique," *Ehrenzeller, B.* u.a. (ed.), *Festschrift für Yvo Hangartener*, St. Gallen 1998, 479 ff.; Epiney/Mosters/Gross (ann. 36), 137 f.

and the ban on headscarves for a teacher can also be understood as an attempt of the state to preserve its secularism. Actually, those rather new decisions are in line with others in which the state by trend repressed the role of religion in the state area.

E. No Dominant Religious Symbols in Public Space: Prohibition of Crucifixes at School

The crucifix decision of the Swiss Supreme Court (BGE 116 Ia 252) may serve as an example for how the secular state deals with religious symbols. In 1990, the Swiss Supreme Court committed the Ticino Community Cadro to remove the crucifixes from the classrooms of the public primary schools. Ticino is an area of strong Catholic influence, and various non-Catholic parents had taken offense at this Catholic symbol. The Swiss Supreme Court pointed out that the religious neutrality prevents a state from expressing its connectivity with a denomination at school. It cannot be denied that a person may feel personally offended by the permanent presence of a symbol of a religion to which he does not belong to. Such a situation may have significant impact on the intellectual development of the students. The Swiss Supreme Court conclusively said that it would have decided differently if the crucifix had been placed in the shared rooms of the school, for example, in the assembly hall or the hallways or the cafeteria.

This decision is consistent with the above-mentioned headscarf case. Because the state is religiously neutral, those who act for the state are not allowed to use invasive symbols of a religion or denomination. This does not mean that state employees are not allowed to wear religious symbols at all, rather that they should be be worn discreetly (for example a little cross on the reverse side of the jacket). The wearing of religious symbols and clothes by private persons is protected by freedom of religion. In the Catholic areas of Switzerland in particular, there are some crosses and crucifixes on the wayside. If and how this is compatible with the religious tradition has not yet been publicly discussed.

V. LEGAL CONTEXT II: RECOGNITION UNDER PUBLIC LAW ACCORDING TO CANTONAL LAW

The responsibility to regulate the relationship between the state and religious communities lies, as previously described, with the cantons. Even if 26 state church legal regulations exist, the systems of most of the cantons – except for the cantons of Geneva and Neuchâtel – are similar. The system is characterized by the fact that the two major denominations, the Roman Catholic and the Protestant churches, are recognized under public law. Until the 19th century, there was one state church in most of places, and the other denomination was tolerated at best. Successively, the two churches were put on par by removing the exclusive title of one of the two churches and enhancing the status of the other church. Thus, nearly equal circumstances were created for the Roman Catholic and the Protestant Church in many places; they have both become cantonal *churches recognized under public law*, a notion which was received from the German state church law. The recognition under public law is related to the creation of a corporate body similar to that under German law, though there are also differences.

By the recognition under public law, a new legal personality under cantonal public law emerges. The religious community is lifted out of the circle of entities organized under private law.[40] By this legal act, the state places itself closer to a religious community. The notion of *recognition* expresses the significance of the concerned religious community for the state; the addition *under public law* specifies the legal organization of this community.

Regulation by public law has different effects for the religious communities. Briefly summarized, they are the following: An important right of the religious communities is the right to raise taxes from their members. Where the canton raises church taxes from juristic persons,[41] the religious communities partake in the tax revenue. To enforce their

40. Famos (ann. 12), 42.

41. See Interkantonale Kommission für Steueraufklärung (ed.), *Die Kirchensteuern*, Bern 1999, 25.

invoices, the state has means of coercion at their disposal. The church tax is usually raised by the state together with the cantonal and communal tax.

In different cantons the recognized communities are subsidized by the state with general tax money which is often based on a historical convention. In the cantons of Zurich, Bern, and Vaud, for example, the state pays part of the salary of the clergy. The activities of the churches are also supported financially in the interest of the general public. Furthermore, the recognized communities are exempt from taxation; because of Article 56 of the DGB;[42] the ecclesiastical municipalities are exempt from the payment of the direct federal tax; something similar applies for the cantonal taxes.

Moreover, the recognized religious communities have the opporunity to offer spiritual guidance for their members in establishments like hospitals, schools, and jails. To some extent, they are supported financially by the state, for example by financing a spiritual guidance center.

Furthermore, the religious communities normally have the right to participate in the religious studies at school[43] and to use the school facilities for their own denominational classes.

The recognized communities also have a right to access a report on their members by the municipality; thus they get informed on arrivals and departures of their members.[44]

In particular with the fiscal law the state delegates part of its sovereignty. This explains the constraints which are often combined with the recognition under public law:

Usually, the state has the supervision on the activities of the religious communities and some oversight of finances. Furthermore, the religious communities are obligated to adopt democratic decision-making structures and to let their members participate in the election of their office holders. Following the tradition of direct democracy in Switzerland, church members have the right to take part in decisions on the percentage and the category of usage of the raised church taxes. The Catholic Church therefore had to create additional structures besides the existing hierarchic organs of the canonical law in charge of the finances.

Not all effects connected with recognition under public law are imperatively reserved to the recognized churches. The cantons of Geneva and Neuchâtel, unlike others, have a strict laical tradition which partially derives from the French example. Here, the big churches were granted different rights by means of a *convention*. In Geneva, the Roman Catholic, the Protestant, and the Christ-Catholic Churches are not recognized under public law, though recognized publicly since 1994.The right to collect a *contribution ecclésiastique* from the state together with the general taxes is connected with public recognition. Nevertheless, the state is not going to use coercion if the taxes are not paid.[45] The churches fare worse under this regime. The canton of Neuchâtel, which has a new Constitution since 2002, also publicly recognizes the three churches and collects a voluntary *contribution ecclésiastique*. The canton is obligated to pay an additional annual contribution by a concordat which the canton has concluded with the churches.[46]

In some other cantons the churches organized under private law, and other religious communities may apply for a tax exemption. To obtain fiscal sovereignty, a church must be recognized under public law, however. After what has been said it becomes obvious that the relation of the state and religion is regulated predominantly *by law* in Switzerland. The *contractual* regulation of the relation between the state and religion only concerns individual questions. In some dioceses there are concordats under international law dating

42. Bundesgesetz über die direkte Bundessteuer vom 14. Dezember 1990 (SR 642.11).

43. The churches usually have a right to participate in the creation of the curriculum as well as to provide teachers. In this area, great diversity of state regulations exists which is different from canton to canton. The religious studies are in a period of Switzerland-wide transition at the moment.

44. See Pahud de Mortanges, R., "Datentransfer und Datenschutz an der Schnittstelle zwischen Staat und Religionsgemeinschaften," Pahud de Mortanges/Tanner (ann. 5), 595 ff.

45. Loi autorisant le Conseil d'Etat à percevoir pour les Eglises reconnues qui lui en font la demande une contribution ecclésiastique du 7 juillet 1945 (RSG D 3 75).

46. Concordat entre l'Etat de Neuchâtel et l'Eglise réformée évangélique du canton de Neuchâtel, l'Eglise catholique romaine et l'Eglise catholique chretienne du 2 mai 2001 (RSN 181.10).

from the 19th century concerning the participation of state committees in the nomination of the bishop. Treaties that were not concluded under international law concern the faculties of theology, the religious education at school, and spiritual guidance in a public establishment (hospital, jail).[47]

VI. Legal Context III: Revisions of Cantonal Constitutions

In the wake of the revision of the Federal Constitution, several cantons have revised their cantonal Constitutions in the past few years. In the cantons of St. Gallen (2001), Neuchâtel (2002), Vaud (2003), Fribourg (2004), Zurich (2005), Basel-Stadt (2005) and Lucerne (2007), new Constitutions came into effect. The revision of the Constitution put the preparing commission of the parliament and the constitutional council in a position to moot the effective religious constitutional law.[48] In some cantons, a system change was discussed, but was not enacted afterwards. A development in small and pragmatic steps is thus favored. The separation of the state and the churches, which was proposed in Fribourg following the example of Neuchâtel, was soon abandoned. A mandate tax which was discussed in Fribourg and in Basel-Stadt following the Italian example was also abandoned. What was changed instead of that? If we want to talk about tendencies, the following could be mentioned without making the claim to be complete:

Traces of inequalities between the Roman Catholic and Protestant churches are removed. In the canton of Vaud, the Protestant Church was a state church until the revision of the constitution, while the Roman Catholic Church was a simple society; with the revision, both of the churches became *institutions de droit public*. The canton of Vaud thus became the last Swiss canton to dismiss the state church situation.

Concerns regarding the church taxes for juristic persons expressed by experts in constitutional law, by the economic community as well as by politicians, are taken into account with a *negative appropriation* of the taxes. In BGE 126 I 122, the Swiss Supreme Court abstained from changing its longstanding legal practice in this area, but nevertheless pointed out that the cantons are responsible for changing their laws concerning this matter. A few cantons signaled a willingness to make advances by setting limits to the use of that tax. The revenues from the church tax shall not be used for cultic purpose, but for social and cultural activities of the churches. Thus, everyone benefits, not only the members of the churches.[49]

The recognition under public law is opened up to the Jewish communities. This is the second rather small religious community which is going to be recognized under public law beside the state churches. In nine cantons, the Christ-Catholic Church is recognized under public law apart from the two big churches. In four cantons, the local Jewish communities have been recognized publicly or under public law since the 1980s (Basel-Stadt, St. Gallen, Fribourg, and Bern). Apparently, this is sort of a compensation for a religious minority which was discriminated against for a long time. The cantons of Vaud and Zurich now follow this example. The granted status is "customized" according to the possibilities and the needs of the local Jewish communities.[50]

Concerning the opening of the recognition under public law of other religious communities, the situation is still rather varied. More than half of the 26 cantonal constitutions contain a legal basis for the recognition of "further" religious communities, indeed,[51] but the law which is required for that purpose is not enacted yet apart from some

47. All relevant concordats and church conventions which the state has concluded with churches recognized under public or organized under private law are assembled in Winzeler, C., *Schweizerische Kirchenrechtsquellen III: Konkordate und weitere Verträge*, Bern 2004 (=Schweizerisches Jahrbuch für Kirchenrecht, supplement 5).

48. Cf. Pahud de Mortanges, R., "Kantonale Verfassungsrevision und Religionsrecht in der Westschweiz," *Mensch und Staat. Festgabe der rechtswissenschaftlichen Fakultät der Universität Freiburg für Thomas Fleiner zum 65. Geburtstag*, edited by Hänni, P., Freiburg i. Ue. 2003, 147-160.

49. This is the case in Fribourg, Zurich and Lucerne.

50. Cf. Gesetz über die Anerkennung der israelitischen Kultusgemeinde des Kantons Freiburg vom 3. Oktober 1999 (SGF 193.1).

51. Cf. Pahud de Mortanges, R., "Zur Anerkennung und Gleichbehandlung von Religionsgemeinschaften," *Friederich/Campiche/Pahud de Mortanges/Winzeler* (ann. 8), 58.

rare exceptions.[52] There is indeed an interest of several religious communities which are organized under private law on a public recognition or recognition under public law.[53] This would in particular be reasonable for different Christian non-denominational churches. Apparently, the political will does not (yet) exist. In particular the request from Islamic organizations in this regard seems to be not capable of winning a political majority.

In the doctrine, but also among the state and churchly authorities, the perception establishes that the future of the Swiss state church law will not lie in the strict separation of the state and the churches and in state secularism, but in the cooperation of the two social powers. On the side of the state authorities, an increased readiness becomes obvious to take seriously the churches and other religious communities as social powers as well as to recognize and compensate their social and cultural efforts. Currently, the doctrine increasingly deliberates on the legal framework and the individual subject areas of this cooperation.[54]

VII. (NO) CIVIL EFFECTS OF RELIGIOUS ACTS

In 1874, the marriage law was secularized and the ecclesiastical jurisdiction was abrogated in Switzerland.[55] This was done to avoid Catholic marriage tribunals discriminating against Protestants in intermarriages. The religious jurisdiction of Catholics, Jews, or Muslims, for example, is absolutely voluntary today. The decisions of religious courts, for example decisions concerning conjugal matters, are irrelevant for the state. A religious marriage is only possible *after* the civil marriage (compulsory civil marriage).[56] Correspondingly, a religious dissolution of a marriage is irrelevant for the state. The decisions of religious courts are not enforced with state aid.

International private law is an exception to that rule. When the facts of a case touch two national legal systems, the Swiss court may be obligated to apply foreign laws because of the international private law.[57] This foreign law is possibly influenced by religious convictions. For example, consider a marriage that is dissolved according to a religious ritual (for example by a unilateral repudiation, *talaq*) in an Islamic country. The state in which the divorce took place acknowledges this action as valid in its jurisdiction. One of the spouses comes to Switzerland and demands the acknowledgement of the divorce here. The Swiss judge can only refuse this if the divorce according to the Islamic ritual contravenes the Swiss *ordre public*.

VIII. OFFENSES AGAINST RELIGION

The offenses against religion are found in the Swiss Criminal Code (SCC)[58] in the 12th title (of 20) under the so-called *offenses against the public order*. Among them are also a variety of provisions, such as "affright of the population," "creation of a criminal organization," and "financing of terrorism."

The Swiss Criminal Code includes three offenses concerning religion and the exercise of religion:

1. Article 261 SCC (disturbance of the freedom of belief and the freedom of cult)
This clause contains four alternative statements of facts:

52. See, e.g., art. 28 ff. of the Gesetz über die Beziehungen zwischen den Kirchen und dem Staat des Kantons Freiburg vom 26. September 1990 (SGF 190.1)

53. Cf. the different opinions of representatives of the religious communities in Pahud de Mortanges, R./Rutz, G. A./Winzeler, C. (ed.), *Die Zukunft der öffentlich-rechtlichen Anerkennung von Religionsgemeinschaften*, Freiburg i. Ue. 2000 (=Freiburger Veröffentlichungen zum Religionsrecht, volume 8), 169 ff.

54. See *Pahud de Mortanges/Tanner*, (ann. 5), 35 ff.

55. Cf. art. 58 para. 2 of the Federal Consitution of 1874.

56. Cf. art. 93 para. 3 of the Swiss Civil Code (SR 210).

57. Cf. Bundesgesetz über das Internationale Privatrecht (SR 291).

58. SR 311.

1) The public revilement or mocking of convictions of others in religious matters;
2) the dishonoring of objects of religious adoration (for example through revilement; mocking, contamination)
3) the malicious disturbance or obstruction or public mocking of a cult activity guaranteed by the Constitution (this refers to Article 15, Paragraph 2 Cst.);
4) the dishonoring of a location or an object which is designed for a cult activity (for example churches, funeral halls, liturgical vestment, cult objects). The protected object is not God or the relationship of humans with God, the religion or certain convictions by itself. The legally protected interest is rather the respect for fellow men and their convictions in religious matters.

2. Article 261 bis SCC (racial discrimination)
Here religion is one of several imaginable characteristics of discrimination besides race and ethnicity. The protected legal interest of this clause is not religion or a religious conviction itself, but the *human dignity*.
3. Article 262 SCC (perturbation of the peace of the dead)
Here, different alternatives of the perturbation of the peace of the dead are treated. Grave robberies are not unusual in practice. As far as they are suitable, these offenses can also be committed via internet.

EMRE ÖKTEM
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IACL National Report: The Republic of Turkey

I. SOCIAL CONTEXT

Unfortunately, official records lack any clear and comprehensive study on the religious and ethnic demographics of the Republic of Turkey. Any such record that might exist is regrettably not available for public use. Consequently, figures that one might articulate during the entire study are themselves rough estimates expressed by various sources, which might be in truth speculative in nature.

With a land area of 301,383 square miles, Turkey has an estimated population of 71.5 million people.[1] A quasi-total of the population is Muslim (99.8 percent)[2], with minor groups of non-Muslims present, mostly comprised of Christians and Jews. The large majority of the Muslim population adheres to the *Hanafi* school of Islam. The rest of the Muslim population is *Alevis,* a heterodox version of Islam as considered by some, and is estimated by various actors to be between 10 to 20 million people. Tensions have existed between the *Alevi* and *Sunni* societies, and some consider *Alevism* outside of Islam.

Other religious groups are mostly concentrated in Istanbul and other large cities. As expressed above, lacking exact adherent figures we can state that these groups include approximately 65,000 Armenian Orthodox Christians, 23,000 Jews, and up to 4,000 Greek Orthodox Christians.[3] Although the "Lausanne Treaty of 1923" (Lausanne Treaty herein) refers broadly to "non-Muslim minorities" without enumerating any specific group, official interpretation has since exclusively granted this special minority status to these three recognized groups. Within this context, the Bulgarian Orthodox Church, through a 1945 bilateral agreement, is considered under the ecclesiastical authority of the Greek Orthodox Ecumenical Patriarchate in Istanbul (and Greece), but the Bulgarian Orthodox Church has its own foundation.

According to the International Religious Freedom Report of 2008 released by the U.S. Department of State[4], there are also an approximate of 500,000 Shiite Caferis; 10,000 Baha'is; 15,000 Syrian Orthodox (Syriac) Christians; 5,000 Yezidis; 3,300 Jehovah's Witnesses; 3,000 Protestants; and a small, undetermined number of Bulgarian, Chaldean, Nestorian, Georgian, Roman Catholics, and Maronite Christians present in Turkey. Among these minority religious communities is a significant number of Iraqi refugees, including 3,000 Chaldean Christians.

II. THEORETICAL AND SCHOLARLY CONTEXT

The Turkish Republic is based on a strict legal understanding of constitutional laicism,[5] which substantially originates from the relevant French doctrine, focusing essentially on the withdrawal of the educational and instructional domains from the sphere

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1. The population has a near to equal percentage of males and females, and 75 percent of the population live in urban areas. National Census of 2008, Turkish Institute on Statistics, www.tuik.gov.tr/PreHaberBultenleri. do?id=3992, 5 August 2009.

2. The CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html, 5 August 2009.

3. These include Greek-speaking Orthodox practitioners living in Istanbul and the Turkish islands of the Aegean and Arabic-speaking Orthodox practitioners living in the cities near Syria.

4. See Turkey, International Religious Freedom Report 2008, U. S. Department of State, http://www.state. gov/g/ drl/rls/irf/2008/108476.htm. Herein, International Religious Freedom Report 2008.

4. See infra, Section III. Constitutional Context.

5. Id.

of religious influence.[6] Yet, although based on the French model, its interpretation by the state apparatus has differed due to historical reasons. As underlined by the European Court of Human Rights (ECtHR herein)[7], this historical, *sui generis* conception of laicism[8] has been the central point of difference between the major actors in daily political life.

Within this sense, there is an ongoing debate on the laic model and its application. Defenders of an orthodox *Kemalist* interpretation are staunchly opposed to any change in the original model and consider any attempt of reform as deviation towards a *Sharia*-inspired political system. The Constitutional Court, a natural defender of this model, has clarified the importance of laicism on more than one occasion. According to the Court, its importance does not stem from its definition *sensu strictu*, but from the historical evolution of the concept and the major value that this evolution carries for the Republic.[9]

On the other hand, more West-prone liberal intellectuals are in favor of a shift from French-style laicism to Anglo-Saxon secularism. Islamist intellectuals are profoundly divided on the issue. For some, laicism is simply tantamount of atheism or paganism. Others are eager to preserve the model but require a more "religion-friendly" system. Consequently, the latter implicitly support the liberal stance. Some Islamist thinkers and politicians have proposed a model of peaceful co-existence inspired by the "Medina Agreement", of the Prophetic period, which had given the Jewish and polytheist communities the right to live according to their own legal systems and not according to Islamic law. For these intellectuals, each religious group would be free to choose its own legal system on the basis of the "Medina Agreement Model."[10] Yet, according to the ECtHR[11] such a model would give ground to a plurality of legal systems, which by definition cannot conform to the necessities of democracy.

III. CONSTITUTIONAL CONTEXT

A. Historical Perspective of the Relations between State and Religion

The Ottoman Empire, the predecessor state to the Republic of Turkey, was based on a social construct according to which nationals were strictly divided under religious affiliations. For example, while Turks, Albanians, and Arabs were regulated as one single national unit (the Muslim nation), the non-Muslim communities were within themselves perceived according to their own churches; so that while the Armenians were separated as Catholic Armenians and Protestant Armenians, the Bulgarians and Romanians were seen as one single nation[12]. Within this context, there existed an important legal distinction between the Muslim and non-Muslim communities. The Empire itself was based on Islam; and general civil offices, with specific exceptions foreseen, were reserved for citizens belonging to the Muslim nation.[13]

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6. Tanör Bülent, 1982 Anayasasına Göre Türk Anayasa Hukuku – 2004 Değişikliklerine Göre, 6. Baskı, Beta, Istanbul, 2004, 76.

7. See *Şahin v. Turkey* [GC], no. 44774/98, Eur. Ct. H.R. 2005-XI.

8. Öktem A. E., *La Spécificité de la Laicité Turque*, Islamochristiana, 29, 2003, 94.

9. Turkish Constitutional Court 7, E. 1989/1, K. 1989/12 March 1989.

10. For further information see MERÇİL Ipek, "Le projet de 'Pacte de Médine', pour 'vivre ensemble avec nos différences' " in Les annales de l'autre Islam, No. 6, Formes nouvelles de l'Islam en Turquie, ERISM, Paris, 1999, pp.211-220, Ugur A. , "Etat, religion et société civile en TURQUIE : La laïcité face à un projet communautariste islamiste" in Cahiers d'études sur la méditerranée orientale et le monde turco-iranien, No. 19, 1995, pp. 97-128, ORTAYLI İlber, "Ordre du Millet Dans l'Empire Ottomon (Structure Classique Jusqu'au 16eme Siecle)" in Seminaire sur la racism et l'antisemitisme, Istanbul, 19-20 Janvier, 1995, COE, Doc. SEM/IST/95/11, 7; ORTAYLI İlber, "Non-Muslim Communities in the Ottoman Empire and in Republican Turkey" in Revum Novorum, New Conditions of Life in a Changing World, International Colloquial Istanbul – Ankara, March 30 – April 2 1992, Ankara, 1993, p .181.

11. See *Refah Partisi and others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98, and 41344/98, Eur. Ct. H.R. 2003-II; *Şahin v. Turkey* [GC], supra n. 7.

12. Ortayli I., "Osmanlı Devletinde Laiklik Hareketleri Üzerine," in Prof. Dr. Ümit Doğanay'ın Anısına Armağan, Istanbul, 1982, 501.

13. Üçok Ç., Mumcu A., Türk Hukuk Tarihi, Ankara, 1981, 206-207. Another such distinction was the "*Jizye"* tax imposed on non-Muslim communities in return for exception from compulsory military service.

On the other hand, the religious autonomy of non-Muslim communities was protected to a large extent[14]; and a safeguard of their rights, including cultural and religious rights, were guaranteed by the State.[15] The highest administrative council in which state affairs were discussed was open to the plea of all, without distinction based on race, religion, nation, gender, or social class.[16] Within the state administration, the Muslim clergy possessed prerogative, for the supreme leader of the Empire, the Sultan, also had the active duty of the protection of the Sunni public order.[17] Within this framework, the advisory opinions (*fetva*) of the *Şeyhülislam* (Chief Religious Leader in the Empire) acted as a legal check and balance to the Sultan's prerogatives.[18] On the lower level offices, the religious clergy formed the judiciary and made decisions according to Islamic law (*Sharia*). With the conquest of Egypt and the transfer of the Caliphate institution to the Empire, the legal character of the Empire fused more with religious identity and the Sultan, as Caliph, became the highest religious authority within the Muslim world.[19]

It was not until the *Tanzimat* period (the era of administrative reforms) beginning in 1839, that the Empire was influenced from Western enlightenment and the new Western human rights doctrines.[20] Within the framework of these reforms, major modifications to the legal understanding took place, such as equality before law for Muslims and non-Muslims and the opening of general civil service to non-Muslims. Other major aspects of the reforms were the formation of the *Nizamiye* courts, which limited the jurisdiction of the *Şer'iye* courts[21]; the formation of modern education institutions besides the religious *Medrasah*'s[22] and the adoption of the *Mecelle*, the new civil code. Nevertheless, all reforms adopted during this period did not change the fundamental religious character of the Empire *per se*. During the War of National Liberation, after World War I, the Ankara government (National Liberation Government), headed by Mustafa Kemal Atatürk, felt it necessary to clearly differentiate its own legal status from that the Empire, which was under foreign occupation. The Ankara government foresaw the formation of a new Republic and on 20 January 1921 adopted the First Constitution of the Republic. Article 3 of the Constitution declared that sovereignty resided in the Nation, thus secularizing the source of sovereignty. The Ankara government declared through decisions no. 307 and 308 the abolishment of the Sultanate and the end of the Ottoman Empire, but due to continuing foreign occupation, postponed any act that would abolish the caliphate until 1924. On the 3 March 1924 the Caliphate and the Ministry on Religion and Religious Foundations were abolished with Law no. 431. Law no. 430, on the Unification of the Educational System, the duality of laic and religious education was put to an end; and on the 8 April 1924 the unification of the Judiciary was established.[23]

On the 20 April 1924 the Second Constitution was adopted. Although Article 2 of the Constitution embraced Islam as the official religion of the State, Article 80 guaranteed freedom of conscience. Later, legal reforms such as the adoption of the Law on the Closure of Dervish Monasteries and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles on 30 November 1925, the Law on the Wearing of Hats on 28 November 1925 and the adoption of the Turkish Civil

14. For example, after the conquest of Istanbul, the Empire guaranteed that non-Muslims would keep their places of worship and that the Greek Patriarchate and Churches would be able to deal with civil issues according to their own tradition. See Ergin O., Türk Tarihinde Evkaf, Belediye ve Patrikhaneler, İstanbul, 1937, cited in Dinçkol (Vural) B., 1982 Anayasası Çerçevesinde ve Anayasa Mahkemesi Kararlarında Laiklik, Kazancı editions, Istanbul, 1992, 27.

15. Macar E. and Gökçati. M. A., Discussions and Recommendations on the Future of the Halkı Seminary, Foreign Policy Analysis Series No. 3, TESEV Publications, Istanbul, 2009, 14.

16. See Versan V., Amme İdaresi (Siyasi ve İdari Teşkilat), İstanbul, 1957,189-195; cited in Dinçkol, supra n. 14 at 26.

17. Üçok, Ç., supra n. 13 at 212-216.

18. Id., 217.

19. Timur, T., Osmanlı Devlet Düzeni, Ankara, 1979, s.101-102. Cited in Dinçkol, supra n. 14 at 27.

20. Id., 28.

21. Id., 29.

22. Sayar, N. S., Türkiye İmparatorluk Dönemi, Siyasi, Askeri, İdari ve Mali Olayları, İkinci Baskı, İstanbul, 1978, 182.

23. Dinçkol, supra n. 14 at 34.

Code, the Commercial Code and Criminal Code in 1926 paved the way for the laicization of the state and society. The Constitution was amended in 1928, removing the reference to Islam as the official State religion and on the 5 February 1937, under Law No. 3115, the second article of the Constitution was amended to include laicism as a main principle of state administration. Although the constitutions of 1961 and 1982 have both included without question to this day the principle, the debate on its application, and the exercise of specific legal dispositions that incarnate the principal have been and are under constant debate in the social and political spheres.

B. Constitutional Provisions on the Relations between State and Religion

The principle of laicism is heavily present both in letter and spirit within the constitutional text. This presence can be observed clearly in the Preamble of the Constitution, which forms "*an integral part of the Constitution*" (Article176/1). It recognizes that, "no protection shall be accorded to an activity contrary to…the nationalism, principles, reforms and modernism of Atatürk and that, as required by the principle of laicism"[24] and clearly states that "there shall be no interference whatsoever by sacred religious feelings in state affairs and politics" (par.5).

As a Republic (declared so in Article 1), the Turkish State is "a democratic, laic and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble" (Article2).

Within the context of the *"*Irrevocable Provisions*"* regime set forth in Article 4 of the Constitution, "[t]he provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic … shall not be amended, nor shall their amendment be proposed." In this respect, the principle of laicism, separating all religious aspects of life from state governance, is afforded legal safeguard against any constitutional initiatives that might aspire to distort its presence within the text. Taking into consideration attempts to modify indirectly the functioning of the principle, the Constitution also foresees a self-preservation clause in Article 174, with the essential intent of protecting legislation in force which incarnate *in concreto* the principle of laicism and the "Reform Laws." Under Article 174, "No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform Laws indicated below, which aim to raise Turkish society above the level of contemporary civilization and to safeguard the laic character of the Republic, and which were in force on the date of the adoption by referendum of the Constitution of Turkey."

The laws and principles that are afforded under Article 174 are the Law on the Unification of the Educational System; the Law on the Wearing of Hats; the Law on the Closure of Dervish Monasteries and Tombs, the Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles; the Principle of civil marriage according to which the marriage act shall be concluded in the presence of the competent official, adopted with the Turkish Civil Code of 1926; the Law on the Adoption of International Numerals; the Law on the Adoption and Application of the Turkish Alphabet; the Law on the Abolition of Titles and Appellations such as *Efendi*, *Bey* or *Paşa*; and the Law on the Prohibition of the Wearing of Certain Garments.

Within the context of the above-cited constitutional dispositions and under the non-discrimination regime set forth by Article 10 of the Constitution,[25] the state apparatus is construed legal as being "religion free."

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24. The original text of the Constitution uses the expression "*laik,*" while official translations use the expression "secularism". We have chosen to use the expression "laicism" to retain consistency and to avoid confusion.

25. Article 10 states that "All individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such considerations" (par.1). It also affirms the obligation of the state "to ensure that this equality exists in practice" (par. 2); and expresses that all State organs and administrative authorities must "act in compliance with the principle of equality before the law in all their proceedings" (par. 3).

Under the Constitution, the State also carries the legal duty to actively keep religious elements out of state administration and to direct the balance between the religious and political spheres of daily life. Within this framework, the State has an effective role in the administration of religious affairs through the Directorate of Religious Affairs, construed according to Article 136 of the Constitution.[26] Thus, from the constitutional perspective, even though the effects of religion are explicitly removed from the state construct on one hand, and religion itself is comprehensively dealt within the terms of the human rights regime; on the other hand, the effects of state administration are not completely removed from religious life.

Religious freedom itself is set forth clearly and comprehensively in Article 24 of the Constitution entitled "Freedom of Religion and Conscience"; foreseeing both the individual freedom and safeguards against potential clashes with the principal of laicism. According to the article:

Everyone has the right to freedom of conscience, religious belief and conviction.

Acts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Article 14.[27]

No one shall be compelled to worship, or to participate in religious ceremonies and rites, to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions.

Education and instruction in religion and ethics shall be conducted under state supervision and control. Instruction in religious culture and moral education shall be compulsory in the curricula of primary and secondary schools. Other religious education and instruction shall be subject to the individual's own desire, and in the case of minors, to the request of their legal representatives.

No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets.

Article 24 explicitly protects the *forum internum* of the freedom of religion, belief, and conscience from all kind of interventions. However, it allows through direct reference to the "abuse of rights" clause in Article 14 the limitation of the *forum externum*, those aspects of the freedom that surpass the individual domain and manifests in social life. Within this respect, it is possible to restrict the freedom for the protection of public order, public safety, public interest, and laicism.

Beyond Article 24, issues that might relate to the freedom of religion might be also protected indirectly through other fundamental human rights, such as the right to the privacy of individual life (Article 20), the right to the inviolability of the domicile (Article21), the freedom of communication (Article 22), freedom of movement (Article 23), freedom of thought and opinion (Article 25), freedom of expression and dissemination of thought (Article 26), freedom of the press (Article28), freedom of association (Article 33) and assembly (Article 34).

However, as can be expected, this protection through exercise of various rights and freedoms is also subject to the various restrictions detailed within each specific provision. In any case, the "abuse of rights" clause under Article 14 can be used as a mean of restriction.

Another important provision relevant for the practice of the freedom of religion is the

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26. See infra, Section IV B.

27. Article 14 (Prohibition of Abuse of Fundamental Rights and Freedoms): "None of the rights and freedoms embodies in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republics based upon human rights.

No Provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution.

The sanctions to be applied against those who perpetrate these activities in conflict with these provisions shall be determined by law."

"right and duty of training and education" stipulated in Article 42 of the Constitution. According to Article 42, all have the right and freedom of not being "deprived of the right of learning and education" (par. 1), the scope of which is defined and regulated by law (par. 2). Under paragraph 3 of the article, "Training and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods, under the supervision and control of the state."[28] Paragraph 4 foresees the duty of loyalty to the Constitution to individuals during the practice of the right and the last paragraph of the article stipulates that in all circumstances, "the provisions of international treaties are reserved." However, it must be noted at this point that in practice – in order to protect the Unitarian educational system – Turkey has adopted reservations to the provisions of international treaties that deal with right to education. For example, Turkey placed during the adoption of Protocol No. I to the European Convention on Human Rights, in 10 March 1954, a reservation through Article 3 of Law No. 6366 according to which "[t]he second article of the Additional Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms cannot breach the provisions of Law No. 430 adopted in 3 March 1924 on the Unification of the Educational System."[29]

C. Specific Points

Beyond the constitutional norms cited above, more specific issues dealing with the constitutional and legal framework of the regulation of the relation between the State and religion, as well as current issues concerning education, autonomy, and actual areas of conflict are discussed in detail throughout the various headings in this Report.

IV. LEGAL CONTEXT

A. Laws and Case Law on Religion and Religious Freedom

The main legal context on the relations between the State and religion is detailed within the Constitution itself and has been briefly described above. Due to the heavy presence of the principle of laicism within the Constitutional text and it being a founding characteristic of the State, it is directly and indirectly present in all legislation. In cases in which specific provisions have no reference to laicism directly or indirectly, the judiciary has chosen to interpret norms within the confines of a laic legal understanding. For example, the second section of Chapter II of Book Two (arts. 175-178) of the Former Penal Code was reserved to offences against the freedom of religion and criminalized the violation of the freedom of religion (Article 175), attacks on holy religious relics and clergy (Article 176), attacks on places of worship and cemeteries (Article 177) and insulting the dead (Article 178). The Constitutional Court expressed that the protected legal interest within these provisions was not religion *per se* but the religious feelings and convictions of the person.[30]

In addition to that of the Constitutional Court, the jurisprudence of all judicial bodies and especially that of the High Administrative Court (*Danıştay*) refers to the Constitutional Provisions on laicism extensively while dealing with state administration and the exercise of individual rights and freedoms.

For the Constitutional Court, laicism contains these essential elements[31]:

a) The Adoption of the principal that religion should not be sovereign and effective in State affairs,

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28. Paragraph 4 of the article.

29. Official Gazette, 19 March 1954, n.8662.

30. The New Criminal Code does not contain a separate section for Offences against the Freedom of Religion, but the aforementioned clauses are dispersed within the Code in various different sections and have been updated to be in line with the European Convention on Human Rights.

30.Turkish Constitutional Court Judgment, E: 1970/ , K: 1971/765321 October 1971.

31.Id.

b) Religion should be constitutionally protected, recognizing that the area of religion which deals with the spiritual life of individuals should be, without discrimination, an unrestricted freedom,

c) Restrictions should be accepted in order to protect public order safety and interests and prohibit the abuse of religion for the aspects of religion, which exceed individuals' spiritual life, affect their social acts and behaviors,

d) Recognize to the State, as the protector of public order and rights, the competence of supervision over religious rights and freedoms….

Within this understanding, all state authorities, under the primary obligation of non-discrimination in all their acts, also possess the legal capacity of protecting the principle of laicism; if necessary through active interventionism on the external manifestation of the freedom of religion.

B. State Organs on Religious Affairs

Under Article 136 of the Constitution, the Directorate of Religious Affairs (*Diyanet İşleri Başkanlığı)*, a public entity under the Prime Ministry, "shall exercise its duties prescribed in its particular law, in accordance with the principles of laicism, removed from all political views and ideas, and aiming at national solidarity and integrity." Within this framework, the Directorate constitutes the main spiritual authority for the Muslim community, but enjoys no autonomy. Beyond the Directorate, the Muslim population does not possess any other form of overall legally recognized organization. Within this respect and according to Law No. 633 concerning the "Foundation and Duties of the Directorate on Religious Affairs," the Directorate has the duty to "[a]dminister affairs related to the beliefs, worship and moral ground of the Islam Religion, to enlighten the community about religion and to govern places of worship" (Article 1).

The Presidency of the Directorate, a government appointee, is responsible for all decisions regarding the appointment of "*imam*s" and "*muftis*"; the latter being charged with the administration of religion within defined districts such as large towns, cities, and other administrative units while the prior are only in charge of particular mosques. With regards to status, these personnel are government employed. The Directorate also appoints *imams* in prisons and hospitals, but in practice these personnel have a limited role in function such as conducting funeral ceremonies. In non-Muslim religious hospitals and other institutions, priests and rabbis are free to offer their own spiritual service to their own communities. They are usually nominated by their own churches or synagogues. Within the army, *imams* and other religious staff do not possess any active role.

The Directorate, financed through the central budget, has seen over the few years a massive increase in its annual share. With a total budget of 2,291,550,016 TRY foreseen in 2010, compared to a budget of 1,015,172,959 in 2004; the Directorate's total spending accounts for near 4-4.5 percent of the general budget, surpassing the share of many other state agencies.[32]

One major problem that derives from this is due to the heavily Sunni-Islam oriented construct of the Directorate; for, in official practice, the Directorate only provides services to the Sunni Muslim community and finances the *imam*'s and mosques of this denomination. While, Alevis have argued relentlessly that their places of worship, the *Cemevi*s, should be given official status[33] and that they also should be represented within the Directorate. The State has gradually refused the requests, alleging such requests do not conform to the laws in force.[34] Similarly, non-Muslim communities are not represented

32. See Erdoğdu M., Yenigün E., Türkiye'de Sosyal Bütçe, TESEV, Istanbul 2008.

33. *Alevi* intellectuals, as well as some segments of the laic society, have argued that either the Directorate should include *Alevi* representation or the formation of a separate *Alevi* body. See Uğur A., "L'ordalie de la democratie en Turquie, le Projet "Communautarien Islamique" d'Ali Bulaç et Laicite", in Cemoti (Cahiers d'etudes sur la Mediterranee Orientale et le monde Turco-Iranien, no. 19, 1995, Laicites en France et en Turquie, 110.

34. Judgment of 12 January 2008, 6th Administrative Court of Ankara. See also Massicard E., L'autre Turquie, Le Mouvement Aleviste et Ses Territoires, PUF, Paris, 2005.

within the Directorate and are not directly associated to the State. They possess under the Lausanne Treaty, a certain and relative degree of autonomy, organized under communities and foundations.[35]

C. Bilateral Relations between the State and Religious Communities

From the legal point of view, there are no bilateral relations between the State and religious communities. Such communities do not possess any legal personality *per se*; [36] and, as discussed above, the State has been stripped constitutionally of any kind of religious affiliation whatsoever. Thus, any sort of formal relations between State entities and religious communities are not to be based on a legal foundation. Nonetheless, it is a widely known and a much controversial fact that *in concreto*, informal relations exist between religious communities, state entities and most – if not all – political actors.

Within this respect, the influence of religious communities – mostly Hanefi Sunni brotherhoods – is widely observed in day-to-day state administration and has become a focal point in the political debate surrounding the effective practice of laicism. To cite just one example, the Prime Minister and the Chairman of the leading Welfare Party (*Refah Partisi*) *Necmettin Erbakan*, known for his pro-Islam affiliations, held a Ramadan dinner in 1997 at the official Prime Ministry Residence to which leaders of well-known religious sects and brotherhoods attended, most in religious clothing. This occasion, interpreted as an official recognition and approval the existence of these religious groups, was to be used later by the Constitutional Court in its judgment on the dissolution of the Party.[37] It functioned as supporting evidence illustrating that the Party had become a hub of activities that opposed the fundamental principles of the Laic Republic.

V. THE STATE AND RELIGIOUS AUTONOMY

As mentioned above, the Muslim community is legally under the spiritual authority of the Directorate of Religious Affairs and lacks any kind of autonomy or form of overall organization apart from it. Yet, Islamic communities, usually known as brotherhoods, have always occupied an important place within Turkish social and political life; as they used to during the Ottoman Empire. For even though the *Kemalist* Revolution, with its principles based on the French bourgeois revolution, had suppressed and sequestered the funds of such organizations[38], they have remained present, largely operating through closely knit communities and have become after the 1950s important voter basis for right-wing conservative political parties.

On the other hand, non-Muslim communities enjoy certain autonomy as defined by the Lausanne Treaty, which is considered the international birth certificate of the Republic. The Treaty provisions on minorities are in fact in line with similar treaties concluded during the era of the League of Nations[39]; the only exception being that the provisions in the Lausanne Treaty provide guarantees only for non-Muslim minorities.[40] Section III (Protection of Minorities-Article 37-45) of the Treaty is based on two principles: equality and non-discrimination. The first principle is implemented through

35. Infra, Section V. The State and Religious Autonomy.

36. Law No. 677 of 30 November 1925, is one of the protected Reform Laws and abolishes all Muslim dervish lodges and prohibits all religious brotherhoods and honorary religious titles (e.g., Sheikh, dervish, and *dede*) under severe penalty.

37.Turkish Constitutional Court Judgement, 16.01.1998, E. 1997/1, K.1998/1. The Court's judgment was to be found not in violation of the European Convention on Human Rights by the ECtHR. See Case of *Refah Partisi and Others v. Turkey*, supra n. 11,

38. See Batur, Y. M. & Öktem, E., "Note-Arrêt I. A. contre Turquie devant la Cour européenne des droits de l'homme" in Droit et religions, Annuaire, Vol. 2(Tome II) Année 2006-2007, 748.

39. For the "model" Polish treaty, see Traité concernant la reconnaissance de l'indépendance de la Pologne et la protection des minorités, signé à Versailles le 28 juin 1919, in Droit international et Histoire diplomatique, Documents choisis par C. A. Colliard et A. Manin, Tome II Europe, éd. Montchrétien, Paris, 1970, 62.

40. See Mandelstam, A., "La protection des minorités" in Recueil des cours de l'Académie de droit international, tome 1, 1923, 418; RECHID Ahmed, "Les droits minoritaires en Turquie dans le passé et le présent" in Revue générale de droit international public, tome XLII, 1935, 299.

Articles 38 and 39 (negative rights) and the latter, through Articles 40-43 (positive rights).[41] According to Article 44, these provisions constitute obligations of international interest and are placed under the guarantee of the League of Nations system.

Non-Muslim minorities are organized into foundations, which constitute the only legal non-Muslim entity. These religious minorities established under the Lausanne Treaty and their affiliated churches, monasteries, and religious schools are regulated by a separate government agency: the Directorate of Foundations (*Vakıflar Genel Müdürlüğü*).[42] The Directorate has the power of approval for the entire operation of all churches, monasteries, synagogues, minority schools, hospitals, and orphanages.

Because they are required to be established in the form of foundations, the religious leadership organs of religious minorities (e.g., Greek and Armenian Patriarchates and Chief-Rabbinate) do not possess legal personality *per se*. This lack of legal status has been interpreted as a variety of passive personality and has given rise to a number of paradoxical situations. For example, the Patriarchates were not able to resort to any legal procedures before domestic courts because they enjoyed no *locus standi*; whilst administrative authorities had the possibility to lodge cases against them. A recent judgment by the ECtHR[43] – in which it not only admitted a request[44] lodged by the Greek Patriarchate, but also concluded that the right of property had been breached due to the confiscation of an orphanage belonging to the Patriarchate – seems to bring a new dimension to this issue. Another issue related to the Greek Patriarchate involves its ecumenical status. It has been government policy not to recognize the ecumenical status of the Greek Orthodox Patriarch. Instead, it has been preferred to acknowledge him only as the head of the country's Greek Orthodox community. It has been often asserted publicly by high-level members of government that the use of the term "ecumenical" in reference to the Patriarch is in fact a clear violation of the Lausanne Treaty. However, again, the above cited judgment seems to be particularly consequential, because it is affirmed within the judgment that the Ecumenical Patriarchate is an orthodox church established in Istanbul, enjoying honorary primacy and a role of initiative and coordination over the entire orthodox world.[45]

The non-Muslim minority foundations have also been facing difficulties regarding their property. Since the Lausanne Treaty entered into force, the judiciary and administrative authorities have adopted a narrow interpretation of the minority provisions. This has impeded the minority foundations to acquire any property other than those listed in their respective 1936 declarations.[46] Within the context of the legal "harmonization packages" adopted within the European Union accession process, a number of laws have been promulgated in order to allow and facilitate the acquisition of property for such foundations.

One such legislation is Law No. 5735 on Foundations, dated 20 February 2008. This new law does comprise of favorable provisions for the solution of property issues of these minority foundations.[47] These provisions facilitate the return of properties of foundations expropriated as the result of the judicial practice that stemmed from the 1974 jurisprudence of the Court of Cassation (*Yargıtay*).[48] However, it does not account for

41. Cf. Akgönül, S., "Les Grecs d'Istanbul" in Mésogeios - Méditerranée, 6 (1999), 66.

42. The Directorate's competence is not limited with non-Muslim foundations, but rather includes all foundations.

43. See, Case of *Fener Rum Patrikliği (Patriarcat Oecumenique) v. Turkey*, no. 14340/05, Eur. Ct. H.R., 2008. Text in French.

44. ECtHR, App. No.14340/05, Admissibility decision, 12 June 2007, text in French.

45. Case of *Fener Rum* Patrikliği (Patriarcat Oecumenique) v. Turkey, supra n. 43.

46. See infra, fn. 48.

47. For an in-depth analysis see Öktem, E., "Statut juridique des fondations des communautés non-musulmanes en Turquie – la nouvelle loi sur les fondations," in Quaderni di diritto e di politica ecclesiastica, Milano, 2008/2.

48. Through its judgment of 8 May, 1974, the Court of Cassation decided that the declarations of these foundations in 1936 should be considered as constitutive, and thus without an explicit clause within these declarations on the possibility to acquire new properties, the properties of these foundations should be presumed to be limited to only those enumerated within the declarations.

properties that have been sold to third parties or to those expropriated when the associated foundations had been taken under government control, which due to the community's small population, *in concreto* applies to the majority of expropriated Greek Orthodox properties. Thus, insufficient to repair true material past losses suffered by these foundations, it would not be too artificial if we anticipate that the ECtHR will find more continuing violations of the right to property.[49]

VI. Religion and the Autonomy of the State

Even though the overwhelming majority of the population in Turkey is deemed to be Muslim, the affiliations of all Muslims are not homogeneous. For instance, there is a strong *Alevi* presence in Turkey.[50] *Alevism* is a branch of Islam with deep roots within Turkish society and the history. It represents one of the most prevalent faiths actively practiced within the boundaries of the Turkey. Although it comprises of many similarities with the Shiite faith, *Alevism* does not embrace all Shiite traditions and rites.

Beyond the Shiite teachings, *Alevism* has been influenced by certain pre-Islamic beliefs and Christian heresies, such as "dualist Paulicianism," as well as by the great Sufis of the 12th and 14th centuries. Its religious practices differ in certain aspects from those teachings uttered by the Sunni schools, such as the practice of prayer, fasting, and pilgrimage. In particular, *Alevis* do not practice the daily prayers as the Sunnis do, but instead express their devotion through religious songs and dances (*semah*). Similarly they do not attend mosques, but meet regularly in their own places of worship called the *cemevi* (meeting and worship rooms).[51]

The intransigent secularist legal system presupposes a perfect neutrality of the State vis-à-vis these various denominations. However, the state apparatus and the political discourse have both been progressively soaked by Sunnite Islam. *Alevis* have traditionally supported the *Kemalist* Republic because only through the Republic have they had an equal footing with Sunnis. Ironically, today, the State almost completely ignores the *Alevi* identity. *Alevis* are not represented in the Directorate of Religious Affairs, and adherents have sometimes faced difficulties in civil employment.

Because *Alevis* cannot create separate legal entities of religious character, they have come to organize within their communities through folkloric associations in order to obtain collective rights and to establish prayer houses. Some municipalities have granted *Alevi* communities buildings or lands to be used for prayer homes, but no uniform practice can be observed.

Numerous requests by *Alevi* associations and foundations to local authorities (e.g., municipalities, governorships, and ministries) to this respect (obtaining approval for the construction of *Alevi* prayer homes necessary for the performance of their religious rituals such as the *Semah*) have received as we see fit to put it. Aristotelian replies: "Muslims go to the Mosque; since *Alevis* are Muslim, they should go to the Mosque."It is clear that such an approach is hardly compatible with the principles established by the jurisprudence of the ECtHR, which requires non-discrimination and state neutrality towards different denominations and prohibits state intervention into the internal affairs of religious communities.[52]

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49. Previous jurisprudence of the ECtHR on the subject include, but are not limited to *Fener Rum Erkek Lisesi Vakfı* v. Turkey, no. 34478/97, Eur. Ct. H.R. 2007, text in French; *Yedikule Surp Pırgiç Ermeni Hastanesi Vakfı* v. Turkey, no. 36165/02, Eur. Ct. H.R., 2008, text in French; *Samatya Surp Kevork Ermeni Kilisei, Mektebi ve Mezarlığı Vakfı Yönetim Kurulu* v. Turkey, no. 1480/03, Eur. Ct. H.R., 2008, text in French.

50. *Alevi* leaders declare an approximate of 30 million adherents, while a figure of 12-15 *Alevis* is more probable when international statistics are taken into account.

51. For more information on *Alevism* see Melikoff I., Hadji B.: Un Mythe et Ses Avatars: Genese et Evolution du Soufisme Populaire en Turque, Islamic History and Civilazation Studies and Texts, v. 20, Brill, 1998.

52. See *Serif v. Greece* [GC], no. 38178/97, § 45, Eur. Ct. H.R., 1999; *Hasan ve Chaush v. Bulgaria* [GC], no. 30985/96 Eur. Ct. H.R., 2000, § 86; *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99, § 115, 123, Eur. Ct. H.R. 2001.

VII. Legal Regulation of Religion as a Social Phenomenon

The legal regulation of religion, especially its *forum externum* has been interpreted by the State as a *sine qua non* for the healthy function of the system. Unlike secular systems that adopt religious neutrality and the principle of non-intervention in their practices, the laic State feels it necessary for the proper function of government and democracy to intervene actively in religious and social relations. In the case of Turkey, as underlined by the Constitutional Court, this is due to the historical evolution of Turkish laicism, its relation with Islam, and the Republican order. As stated by the Court in its *Refah* Judgment of 1998[53]:

> The exercise of laicism in Turkey is different from the exercise of laicism in some western countries. It is natural that the principle of laicism is inspired by the conditions of each country and by the characteristics of each religion, and that the conformity or non-conformity between these conditions and characteristics project themselves on to the understanding of laicism creating different qualities and practices. In spite of the classic definition of laicism as the separation of religious and state affairs, due to the differences between the Islamic and Christian religions characteristics, the situations and results in our country and in western countries have differed. The adoption of the same understanding and level of practice of laicism in countries with a total different understanding of religious and religion understanding cannot be expected. This situation is due to the contract between the conditions and rules. Moreover, the laicism understanding in western countries embracing the same religion has differed. It has also been possible to interpret the concept of laicism differently, not only in different countries, but also in different eras, by different segments according to their own understandings and their political choices. Not only as a philosophical concept, but as an institution which has gained a legal character through laws, laicism is effected by the religious, social and political conditions of the country that it is practiced. Laicism which carries importance for Turkey due to the difference of the historical evolution, is a principle adopted and protected by the Constitution.

From this perspective, the State is active in intervening in the social evolution of religion and its relation with the State and individuals and between individuals. As expressed by some, state regulation of social norms is not only limited through education but also through religion.[54]

VIII. State Financial Support for Religion

As cited above, although the State has no official religion and state aid to religion is legally non-existent, the Islamic "clergy" of the Sunni community are state-employed and under the supervision of the Directorate of Religious Affairs.[55] On the other hand, non-Sunni Muslim communities and non-official Sunni brotherhoods and sects do not get a share from the general budget or any official state aid. This is also true for all non-Muslim communities. These groups tend to rely heavily on their members for the expenses of their religious activities, including the salaries of the personnel. While it is true that a state may provide a specific denomination financial aid, either directly or indirectly through the exemption of taxes,[56] these practices in Turkey has been criticized largely by non-Sunni groups.

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53. Turkish Constitutional Court, Judgment of 16.01.1998, E. 1997/1, K.1998/1.

54. Uğur, A., supra n. 33 at 101.

55. See supra Heading IV *B, State Organs on Religious Affairs.*

56. *Iglesia Bautisti 'el Salvador' and Ortega Moratilla v. Spain*, no. 17522/90, 11 January 1992, DR 72, 258-259.

IX. Civil Legal Effects of Religious Acts

In general, the laic legal system recognizes the exclusive jurisdiction of civil courts. Religious courts or similar institutions do not exist and acts performed according to religious law are not accorded legal effect. Nevertheless, the system also recognizes in theory officially recognized non-Muslim communities derogation from the general procedures. By virtue of Article 43 of the Lausanne Treaty, the government undertook the obligation to adopt all necessary measures for the regulation of the family or personal statuses of non-Muslim minorities according to the customs of these groups. These measures were to be elaborated by a mixed commission, composed equally of representatives from the government and of the relevant minority groups. But, by late May in 1925 whilst the National Assembly actively being discussed the reception of the Swiss Civil Code, the Jewish Community of Turkey declared to the Ministry of Justice that the reception of the Code would render any regulation providing a special status for Jews unnecessary.[57] On the 15 September 1925, a group of Jewish elite met at the Chief-Rabbinate in order to notify officially to the Ministry of Justice that the Jewish community in Turkey had renounced the rights recognized under Article 42, al. 1 and 2 of the Lausanne Treaty. The chain reaction generated by this initiative forced both the Armenian and Greek communities in Turkey to put a stop to their own works on the elaboration of special provisions.[58]

Within this context, there is presently a uniform and exclusive civil legal system in force in Turkey, which confers no legal validity to religious acts – be they Muslim or non-Muslim. However, the validity of the declarations put forth by these minority communities in 1925 is highly debatable from a strict legal perspective. For, it can at least be discussed in theory if a group of individuals can renounce, without any temporal restriction and with effects on future generations, rights recognized through an international treaty concluded between States.

X. Religious Education of the Youth

A. The Operation of Schools

The Turkish education system was laicized with the adoption of Law No. 430 on the Unification of the Educational System. This legislation brought all educational institutions under the sole authority of the Ministry of Education. With the inclusion of Article 4 of the Law, which foresees the foundation of theology faculties in universities and vocational religious high schools to train religious personnel, *Madrasah*s and other religious educational institutions became obsolete. This law, which is still in force today, is protected under Article 174 of the Constitution and forms the moral and material basis of the Turkish educational system.

The Fundamental Law on National Education (Law No. 1739) refers directly to laicism in Articles 2, 10, and 12, stating the principal as being one of the major aims of national education and governing its overall function. Yet, Article 32 of the Law also foresees the formation of vocational religious high schools (*İmam-Hatip Lisesi*) in order to train the necessary religious personnel.

These religious high schools were granted more and more importance in the education system during the last decades due to the perception of these schools by right-wing political parties as a future basis of conservative votes. The laic state establishment, and especially the National Security Council, dominated by the presence of the Military establishment introduced measures in February 1997 to contain the rise in religious fundamentalism. One such measure was the introduction of compulsory eight year laic education.

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57. Bilsel, C., "Medeni Kanun ve Lozan Muahedesi," in Medeni Kanunun XV. Yıl dönümü için, Kenan matbaası, Istanbul, 1944, 43.

58. Bali, R. N., Cumhuriyet Yıllarında Türkiye Yahudileri-Bir Türkleştirme Serüveni, (1923-1945) 3rd edition, İletişim, Istanbul, 2000, 64-65.

These measures were also known as the "28 February Process," which has been perceived by some to be a "covert-coup" in nature. They not only started the dissolution process of the pro-Islamist *Refah* Party Government, but also initiated the closure of the secondary school divisions of these high schools. Thus, it is now only possible for students to pursue education in these schools after completing eight years of compulsory laic education. The problems of the necessity of these high schools and the situation of their graduates are still important issues discussed within the public sphere.[59] Beyond the official school system, there is no restriction on private religious instruction.

Another important issue relating to religion and laicism in the education system deals with the compulsory religion classes. Religious education is probably the area where the dichotomy between written law and actual practice is most flagrant. From the legal perspective, under the secular education system, Muslim religious communities do not have the right to found private schools with recognized curricula and diplomas. Yet, in practice, it is widely known that a broad range of Muslim groups[60] have been able to operate their own private educational institutions that have been, at least on paper, adapted to the central education system.

Concerning non-Muslim religious communities, only officially recognized religious minorities may operate schools; and in any case they fall under the supervision of the Ministry of Education. The curriculum of these schools includes Greek Orthodox, Armenian Orthodox, and Jewish instruction. However, regulations have made it somewhat difficult for non-Muslims to register and attend these schools. The affiliation of a child's mother or father to a minority community is reportedly checked by the Ministry of Education before the child could enroll in such a school; and moreover, non-Muslim minorities that are not officially recognized do not have the right to operate schools of their own.[61]

B. Courses on Religion

The central education system includes mandatory courses on religious culture and ethical education within the primary and secondary school levels, as laid down in Article 24 of the Constitution. The initial purpose of this provision was to provide a general religious culture to all students of all beliefs under the laic model of the State and, if properly applied, could be considered beneficial for social harmony and solidarity. However, in practice, these courses have undergone a progressive transformation towards becoming an Islamic catechism, in its Sunnite version, including such practices as Koranic memorization. The Ministry of Education has been indifferent and unresponsive to what has become a blatant inconsistency in the laic educational system. For example, it was recognized with a decision adopted on 3 October 1986 by the "Supreme Council of Education and Instruction" of the Ministry of Education that Christian and Jewish students, though expected to attend these courses, could be exempted from the memorization of Muslim prayers and the instructions on the fulfillments of Islam's basic requirements.[62]

On July 1990, another decision exempted children "of Turkish nationality who belong to the Christian or Jewish religion" from religious culture and ethics lessons altogether. This is a tacit recognition that students of Muslim origin are obliged to perform such practice, regardless of their denomination or personal convictions. From the

59. One such issue relates to the co-efficient applied to the graduates of technical high schools during university entry exams. If students apply to educational programs not related to their technical education, they receive a limited co-efficient, which restricts their chances of entry. It has been argued by conservative groups that this gives rise to discrimination in the access to education, while laic segments of the society clearly see these high schools as a threat and question the necessity of such a great number of these schools. Just so that the dialects are better understood, a simplified version of the main public argument is: "These schools are meant to prepare *Imams*; but there are more graduates then there are mosques". Is this a quote?

60. These groups range from traditional religious orders such as the "*Naqshbendiye"* to the more religious networks such as the "*Fethullah Gülen"* community.

61. Also see International Religious Freedom Report 2008.

62. Dinçkol, supra n. 14 at 143.

legal perspective, this decision is in itself contrary to Article 24, which dictates the compulsory nature of teaching religious culture and moral education in primary and secondary schools. Yet, it is interesting to observe that until now, no steps have been taken to bring the aforementioned decisions before administrative jurisdictions. Rather, the legal struggle was conducted against the content of religious education.

The issue was brought before the ECtHR by an *Alevi* student and her father. In *Hasan and Eylem Zengin v. Turkey*,[63] the ECtHR held unanimously that there had been a violation of the right to education guaranteed by Article 2 of Protocol No. 1 of the European Convention on Human Rights. The Court found that the syllabus and textbooks for teaching in primary schools and the first cycle of secondary schools gave a decisively greater priority to knowledge of Islam than that of other religions and philosophies. In addition, the textbooks not only gave a general overview of religions, but provided specific instructions on the major principles of the Sunnite Muslim faith, including its cultural rites such as the profession of faith, the five daily prayers, the Ramadan, the Pilgrimage, concepts of angels and invisible creatures, and belief in a world after death. Meanwhile, pupils received no teachings on the confessional or ritual specifics of the *Alevi* faith, although its followers represented a large proportion of the Turkish population. Although information with regards to the *Alevi* faith was taught in the ninth grade, the ECtHR accepted the claims put forth of the applicants. The applicants argued successfully that the instructions on the life and philosophy of the two great Sufis, who had had a major impact on the *Alevi* movement, were taught at an extremely late stage of children's education, making it insufficient compensation for the shortcomings of the primary and secondary school religious teaching.

The ECtHR came to the conclusion that the religious culture and ethics courses in Turkey could not be considered to meet the criteria of objectivity and pluralism necessary for education in a democratic society and for the development of pupils' religious critical thought. The ECtHR also criticized the existence of appropriate measures in the Turkish educational system that would ensure respect for parent's convictions. State officials have expressed explicitly that the ECtHR decision on religious courses would not be binding on their own understanding and practice[64]. In a speech, the President of the Directorate on Religious Affairs went so far as to criticize blatantly a High Administrative Court judgment that reinstated the ECtHR's jurisprudence on the issue. He expressed that the judges had not only re-expressed the faulty rationale of the ECtHR, but that when it comes to religious education the reference point should be the Directorate because it had the competence and knowledge concerning the issue.[65]

This argument virtually promotes the Directorate's status to the *de facto* "chief religious authority" within the State apparatus and is in clear violation of the laicism foreseen by the Constitution. Indeed, under this vision, as a Sunni-Muslim dominated structure, the Directorate *de facto* incorporates discriminatory state practice and casts doubt on the non-religious character of the State.

C. Restrictions on Training Non-Muslim Religious Teaching Staff

A major problem for the educational rights for non-Muslim minorities is the education of the clergy. The Jewish community seems to be satisfied with sending young rabbis to Israel for religious instruction. The Christian communities suffer from the lack of any active seminary. The Government has been long proposing to open a department of Christian Theology within an existing faculty of theology to train Christian clergy. While the Armenian Patriarchate seems eager to accept this proposal, the Greek Patriarchate is hostile to any solution other than the re-opening of the *Halki* seminary on the island of *Heybeli* in the Sea of Marmara. The seminary was closed in 1971 after the Patriarchate, in

63. *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, Eur. Ct. H.R. 2007.

64. Regrettably, according to the Ministry of Education, no entity including the European Union has the competence to force measures on the State when it comes to religious education. KOTAN Betül, Radikal Newspaper, 11 October 2007.

65. *Milliyet* Newspaper, 7 March 2008.

order to avoid being administered by the State, chose not to comply with a state requirement to nationalize[66]. The possibility and the modalities of the re-opening are highly debated subjects in contemporary politics and have international implications[67]: once opened, the Seminary will train not only the young priests of the Turkish Greek community, but also novices coming from all over the Orthodox world. Such a center of gravity could easily shift the balance of power between Orthodox ecclesiastical authorities.

XI. Religious Symbols in Public Places

Although the use of religious symbols in public places is not restricted in general for individuals, specific limitations do exists for public employees, some categories of individuals and during the provision of public services.

A. Freedom to Wear Religious Symbols in Public Places

There exists no constitutional provision prohibiting the use of religious symbols by individuals in the private sphere of daily life. Individuals may freely use religious symbols both in the street and in the enjoyment of public services, as long as this use is not deemed contrary to the prohibition on the abuse of right provision under Article 14 of the Constitution.

1. General Restrictions

Beyond the Constitution, there are two general laws prohibiting the use of certain religious symbols for individuals. First, Law No. 671, on the Wearing of Hats, prohibits the use of traditional and religious headwear such as the *fes* and *turban* by individuals. It was adopted in 1925 in order to modernize the society and to breach the relation with the past. This law, although still in force and protected under Article 174 of the Constitution, has become null and void in practice. Second, Law No. 2596, on the Prohibition on the Wearing of Certain Garments of 1934, is still in force; and similar to Law No. 671, has constitutional protection under Article 174. Under Article 1 of Law No. 2596, clergy, of whatever denomination, cannot use religious clothing outside of places of worship and rituals. Any such use requires government approval. This legislation is practiced.

Beyond these two general laws, the sole limitation on the use of religious symbols in public involves the domain of education and the use of these symbols by public employees. The legal limitation of the use of religious symbols in education institutions may be divided into two categories: higher education and primary and secondary education. These two categories will be addressed separately due to the different legal background of the limitations in force. Similarly, the limitations brought to public employees within the framework of institutional use of religious Symbols in public facilities will be addressed. Except for the restrictions cited above and detailed below, religious symbols may be used freely by individuals in other public spaces such as hospitals and court rooms.

2. Use of Religious Symbols in Primary and Secondary Schools

The main legislation concerning the limitation of religious symbols in primary and secondary schools is the regulation on the "Attire of Staff and Students in Schools Subject to the Ministry of National Education and Other Ministries" of 7 December 1981. The regulation provides a detailed description with regards to the uniforms and attire to be used by students in various types of primary and secondary educational institutions. Within the context of the regulation, no religious symbol whatsoever can be used during education. The only exception foreseen by the regulation concerns attire at vocational

66. See International Religious Freedom Report 2008.

67. In a historical address given at the Turkish Parliament on 6 April 2009, the President of the United States of America, Barrack Obama did not hesitate to raise this issue. For the text of the speech see http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/06_04_09_obamaspeech.pdf.

religious high schools. Under Article 12 of the regulation, only during courses on the Koran may female students cover their hair with an Islamic veil.

3. Use of Religious Symbols in Higher Education Establishments[68]

The use of religious symbols in higher education establishments has become a complex problem in Turkey with many paradigms. For example, there exists an operational ban on religious clothing in higher educational establishments that is based on a complex legal matrix of constitutional interpretation. This ban is applied especially to clothing that shows heavy Islamic affiliation, such as the Islamic veil. From the legal point of view, there exists no constitutional disposition or law that brings such a prohibition. The prohibition started through various regulations and circulars adopted by different universities in reaction to the proliferation of the use of religious symbols by students. These acts were not only perceived as the exercise of the freedom of religion but also were deemed to represent the deepening organization of political Islam. The state establishment perceiving this rise as a threat to the laic state proceeded a ban on the wearing of religious symbols in classes and exams. There was great concern that after graduation these students would continue to demand for the right to use such attire while in public employment.

The growing debate around the issue forced the National Assembly to adopt Law No. 3511 in 1989, which inserted additional Article 16 to Law No. 2547 on Higher Education. Article 16 stipulated that "[w]ithin higher education establishments, classrooms, laboratories, clinics, and policlinics and in corridors it is obligatory to be in modern clothing and looks. The closing of the neck and hair with a cloth or with a turban due to religious reasons is unrestricted". The legislation was taken to the Constitutional Court, which annulled the Law on 7 March 1989, finding it contrary to the Preamble and Articles 2, 10, 24, and 174 of the Constitution.[69]

To bypass this judgment, the National Assembly adopted in 1990 Law No. 3670, inserting additional Article 17 into the Higher Education Law and bringing a general amnesty for students sanctioned because of the use of religious symbols. Under additional Article 17, "[w]ithout being contrary to legislation in force, clothing and attire is unrestricted in higher education establishments". Lacking a clear prohibition in the Constitution, this simple provision would allow the use of religious clothing and attire in higher education establishments. Again, the legislation was taken before the Constitutional Court. This time it found, naturally, that the law in question was not contrary in letter to the Constitution.[70] However, the reasoning of the Court directly forced an interpretative restriction on the executive branch. Under Article 153 of the Constitution, "[t]he Constitutional Court Judgments… are binding on the legislature, executive and judiciary, administrative offices, natural and legal persons". Within this perspective, because additional Article 17 contained the clause "without being contrary to legislation in force" it also included the principals set forth in the Constitution and the Court's jurisprudence. In view of the fact that the Court's jurisprudence of 1989 was clear on the issue, the freedom brought through additional Article 17 could only be construed "as not including the closing of the neck and hair with a cloth or turban due to religious beliefs."

Today, this interpretation of the Court is still the main reference for higher education establishments; and the prohibition on religious symbols, especially the Islamic veil, is actively exercised. In 2008, the National Assembly tried to amend the Constitution directly in order to force a constitutional interpretation on the Court. Law No. 5735 adopted by a vast majority foresaw a two step formula to the equation. First, the phrase

68. For a brief but more developed work on this issue see UZUN Mehmet Cengiz, "The Turkish Constitutional Court and The Use of Religious Symbols in Higher Education Establishments: The Case of 5 June 2008." Working Paper, International Association of Law Schools Conference on Constitutional Law, September 11-12, 2009, Hosted by American University Washington College of Law, Georgetown University Law Center, Washington DC, http://www.ialsnet.org/meetings/constit/papers/MasterBookletConLaw.pdf.

69. Turkish Constitutional Court, Judgment of 7 March 1989, E: 1989/1 K: 1989/12.

70. Turkish Constitutional Court, Judgment of 9 April 1991, E: 1990/36, K: 1991/8.

"and in all enjoyment of public services" would be added to the Article 10/4 of the constitution, amending the text to read "State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings and in all enjoyment of public services". Because education is a right under Article 42 of the Constitution, civil employees would not be able to discriminate due to attire during its enjoyment. The second step involved inserting the provision "No one can be denied, for any reason at all, the right to higher education in cases not openly stipulated by law. The limitations of the use of this right are defined by law" after paragraph 6 in Article 42. Hence, the Court would have to re-examine its own jurisprudence in face of the non-existent "openly stipulated law" and higher education establishments would have to annul their own circulars prohibiting the use of religious symbols.

The issue of Law No. 5735 as an amendment to the Constitution was taken to the Court, which, amidst vast public debate on jurisdictional issues, annulled the law, finding it contrary to the Constitution.[71] Although under Article 148/1 of the Constitution "Constitutional amendments shall be examined and verified only with regard to their form…", the Court cited its own jurisprudence,[72] in which it had already stated that "no law can be proposed or adopted which aim to change these principles [laid down in Article 2] through direct or indirect amendments to them or to other provisions of the Constitution. Any law adopted contrary to these conditions cannot at all effect and amend present provisions of the Constitution nor bring a Constitutional rule."

Having bypassed the jurisdictional problem through jurisprudence,[73] the Court found that the proposed constitutional amendments had the main aim of un-restricting religious symbols in higher education institutions without eliminating public fears, foreseeing safeguards against abuses and inputting measures necessary for the protection of third party rights. According to the Court, the unlimited use of the religious symbols would create pressure on non-believers and on Muslim females and would also damage state neutrality by opening a pathway for religion to be used for political purposes. According to the Court, in light of both its own and the ECtHR's standing jurisprudence,[74] the proposed amendment could not be proposed under Article 4 of the Constitution. Thus, today, the operative ban on the use of "expressive" religious symbols such as the Islamic veil in higher education establishments is still applied.

B. Institutional Use of Religious Symbols in Public Facilities

In the public sphere, under additional Article 19 of Law No. 657 on Public Employees, public employees must observe the rules of attire regulated under laws and regulations. To this end, under Article 1 of the "Regulation on the Clothing and Attire of Staff Working in Public Establishments and Institutions" of 25 October 1982, public employees must dress in conformity with the reforms and principles of Atatürk's Revolution. The regulation stipulates in great detail the attire and garments that public employees, both male and female, may wear and use during their public work. Within this respect, public employees cannot wear or use any sort of clothing (including clothing, jewelry, veils, and other objects) that may comprise religious meanings. However, emblems or badges of the establishment or of schools may be worn. Under Article 15 of the regulation, the attire of the Directorate of Religious Affairs staff is to be decided by

71. Turkish Constitutional Court, Judgment of 5 June 2008, K: 2008/116, E: 2008/16.

72. Turkish Constitutional Court, Judgment of 16 June 1970, K: 1970/31.

73. Some of its judgments accepting its jurisdiction on constitutional amendments are 16 June 1970, K:1970/31; 13 April 1971, K: 1971/37; 15 April 1975, K: 1975/87; 23 March 1976, K: 1976/19; 12 October 1976, K: 1976/46; 27 January 1977, K: 1977/4; 27 September 1977 ,K: 1977/117.

74. *Dahlab v. Switzerland*, no. 42393/98, Eur. Ct. H.R. 2001; *Refah Partisi and others v. Turkey*, supra n. 11; *Şahin v. Turkey*, supra n. 7. Especially the *Şahin* jurisprudence has been criticized by some due to the extensive interpretation of the margin of appreciation doctrine, withdrawing European supervision from the relation between state and religion. See Bennoune, K., "Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality under International Law," in *Columbia Journal of Transnational Law* 2007, 45, n. 2, 381; Bottoni, R., "The Origins of Secularism in Turkey," in *The Ecclesiastical Law Journal* 2007, 9, 176.

the Directorate and the Prime Ministry, as long as no conflict exists with Law No.2596 on the "Restriction of the Use of Certain Garments." Within this sense, the use of religious symbols by the staff of any establishment or institution that provides public service is restricted. For example, under Article 6 and 7 of the regulation on the "Attire of Staff and Students in School's Subject to the Ministry of National Education and Other Ministry's" of 7 December 1981, all staff, including temporary staff, must abide by the regulations set forth by the "Regulation on the Clothing and Attire of Staff Working in Public Establishments and Institutions." Similarly, other professionals who provide civil service, such as lawyers, judges, and prosecutors, cannot use religious symbols during work.

XII. Freedom of Expression and Offenses against Religion

Even though under Article 26 of the Constitution "[e]veryone has the right to express and disseminate this thoughts and opinion by speech, in writing or in picture or through other media, individually or collectively", this right "may be restricted for the purposes of protecting… the reputation and rights and private and family life of others," or if it is used in violation of the abuse of rights regime under Article 14 of the Constitution. In this context, paragraphs 3 and 4 of Article 175 of the Former Penal Code sanctioned the crime of blasphemy. According to the article,

> Whoever blasphemes against God, a religion, a prophet, a denomination or a sacred book (…) or vilipends or outrages any person because of his beliefs or the fulfillment of his religious duties (…) shall be imprisoned for 6 months to a year and be punished by a fine of 5 000 to 25 000 Turkish liras.
>
> The secondary penalty attached to the crime defined at the 3rd paragraph shall be doubled in case the crime is committed by publication…

Subsequent to the adoption of the Constitution of 1982, Law No. 3255 amended the article on 9 January 1986 so that it only protected "celestial" (monotheistic-abrahamic) religions against the crime of blasphemy. The amendment was deemed contrary to the Constitution by the Constitutional Court.[75] The Court found that the discriminatory character of the article, which differentiated between believers of celestial and non-celestial religions, violated the principle of equality laid down in Article 10 of the Constitution and it was incompatible with the principles of the laic Republic (Article 2) and the freedom of religion (Article 24). On the other hand, the Court of Cassation had already adopted a restrictive interpretation of Article 175 of the Penal Code. According to this interpretation, as far as the expression did not directly target the sacred values of the individual as such, but rather was directed towards "the God, the Holy Book, the Prophet" of the victim, the moral element required by the article was esteemed to be inexistent. It is for this reason that jurisprudence relating to Article 175 is quite scarce.

Within the framework of the European Union accession process, and the reforms implemented for this end, Turkey adopted Law No.5237 (also known as the New Penal Code) on 26 September 2004, entering into force on 1 June 2005. Unlike the Former Penal Code, which framed blasphemy under crimes against the freedom of religion, the problem of blasphemy is treated under the provisions devoted to "Crimes against honor" as an aggravated form of insult, specified in Section 8 of the second chapter of the second book. Paragraph b and e of Article 125 foresee a sentence of up to a year of imprisonment for the crime of insult when "the crime is committed against a person because of the expression and the diffusion of his ideas or his religious, social, political and philosophical beliefs or the change of these latter, or his behavior according to the requirements of a religion"; or when "the crime is committed by reference to the values considered as sacred by the religion that the victim belongs to."

75. Turkish Constitutional Court, Judgment of 4 November 1986, K: 1986/26, E: 1986/11.

GENNADIY DRUZENKO

Religion and the Secular State in Ukraine

I. SOCIAL CONTEXT

Historically, Ukraine is a religiously diverse country with a fairly high level of religious freedom and a rather religious population. Within a regional scope, Ukraine might be described as one of the most religious countries in Europe.[1] According to recent studies, between 74.7 percent[2] and 89.5 percent[3] of Ukrainians declare themselves as believers and almost three-fourths of the Ukrainian population deems that every religion should be respected.[4]

Sociological surveys show that religious organizations enjoy great trust within Ukrainian society: since 2000, when regular surveys were launched, between 60 and 70 percent of respondents have expressed that they trust or almost trust the Church[5] (in this context, term "the Church" is used as a collective name for religious institutions and not for a specific religious denomination). However, Ukrainians could hardly be described as devout, since only 22.4 percent of believers attend church at least once a month, more than 57 percent attend religious services once or several times a year, and 20.3 percent never or very rarely take part in public worship.[6] More than one-third of people who declare themselves believers never pray or pray only several times a year, whereas an additional 16.1 percent prays several times a month.[7] Moreover, 44 percent of respondents stated that they believe in their own way to communicate with God beyond any church or religious service.[8] Thus, it is not surprising that more than 56 percent of Ukrainian believers consider themselves as moderately religious.[9]

Perhaps such internal, non-institutionalized faith, coupled with religious tolerance, is one of the principal peculiarities of Ukrainian religiosity. Religious diversity is another Ukrainian feature. Today more than 32,600 registered and more than 1,800 unregistered religious organizations operate in Ukraine.[10] It is quite difficult to count the exact number

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1. According to the European Social Survey carried out in 2006 [hereinafter ESS-2006], Ukraine occupies seventh place in Europe in terms of the share of people who declare that they belong to some religion, and fifth/sixth place in terms of a self-estimation as to the extent that they are religious. The data is accessible at: http://www.europeansocialsurvey.org .

2. According to the ESS-2006, supra n. 1.

3. According to the survey carried out by Kyiv International Institute for Sociology within the framework of the International Social Survey Program (ISSP) in October 2008. The outcome of this research was published under the title "Religion and Religiousness in Ukraine" (Kyiv, 2009) 18 [hereinafter ISSP Survey], accessible at: http://www.kiis.com.ua/txt/doc/02042009/brosh.pdf (in Ukrainian). Hereafter all references to this survey quotes data given by the aforementioned book.

4. ISSP Survey, supra n. 3 at 58.

5. The cumulative results of the research carried out by the Razumkov Center since 2000. It is accessible at the Center's web-site: http://razumkov.org.ua/ukr/poll.php?poll_id=83 (in Ukrainian). According to the ISSP Survey, almost 66 percent of respondents entirely or to a great extent "rather trust" the Church.

6. ISSP Survey, supra n. 3 at 44.

7. ISSP Survey, supra n. 3 at 41–42.

8. ISSP Survey, supra n. 3 at 37.

9. ISSP Survey, supra n. 3 at 26.

10. If not indicated otherwise, statistical data concerning the number of religious organizations in Ukraine are presented according to the official reports of the State Committee of Ukraine on Nationalities, Migrations and Religion Affairs [hereinafter SCU NMRA], accessible at: http://risu.org.ua/ukr/resourses/statistics/. The number

of the religious denominations that act in Ukraine, as they are obliged neither to register nor to notify authorities about the very fact of their existence and functioning in the country.[11] The State Committee for National and Religious Affairs affirms that fifty-five denominations operate in Ukraine.[12]

Christians of different denominations undoubtedly dominate in Ukraine.[13] The vast majority of all Christians declare their affiliation to the Orthodox Church.[14] However, no one institutionalized Orthodox Church enjoys a majority either among Christians or among Orthodox believers. A little less than one-fourth of all Orthodox Christians belongs to each the Ukrainian Orthodox Church affiliated with the Moscow Patriarchate and the Ukrainian Orthodox Church of Kyiv Patriarchate; about 53 percent of all Orthodox Christians admit that they are "generally Orthodox," but do not belong to a specific church or denomination.[15] Sociological surveys show that Catholics of the Eastern Rite constitute 7.7 percent of all believers, and Protestants a little more than 1 percent.[16] At the same time, Orthodox religious organizations amount to only about half of all religious communities in Ukraine; Catholic communities (both of the Latin and Eastern Rite) amount up to 15 percent of religious organizations acting in the country; Protestant institutions constitute about 27 percent.[17] The last figure shows that the Protestant minority is far better organized and structured than the Orthodox majority in Ukraine. Jewish and Muslim religious networks are also well represented in Ukraine, embracing more than three hundred Jewish communities and more than a thousand Muslim communities.[18] There are also some non-traditional religions in Ukraine, such as the Church of Jesus Christ of Latter-day Saints (Mormonism), Buddhism, and Krishnaism.

Therefore, the Ukrainian religious landscape might be properly described as diverse and without a predominant institutionalized Church, but with the overwhelming majority identifying themselves as "Orthodox." Yet the share of "unaffiliated Orthodox Christians" suggests that a considerable part of believers perceives Orthodoxy as a national tradition and/or some type of spirituality hardly related to what the Orthodox Church could expect from its adherents. Such religious flexibility and tolerance flows from the painful historical experience of the nation. Ukrainian national identity was only once grounded in religion. The national liberation war in the seventeenth century was run under the Orthodox banner and led to decades of slaughter between Catholics and Orthodox Christians on Ukrainian lands; it finally resulted in the annexation of most Ukrainian territories by Muscovy and then the Russian Empire. Later, while the Ukrainian Orthodox Church had been subdued by the Moscow Patriarchate, and consequently almost lost its national character, the Catholic Church of the Eastern Rite remained the heart of Ukrainian national life under Austrian and later under Polish rule on the western Ukrainian lands. Therefore, modern Ukrainian national identity, while not atheistic, does not intertwine with any religion and from this standpoint is similar to the American experience.

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after the word "Report" indicates the relevant year.

11. Article 14 of the Law of Ukraine on the Freedom of Conscience and Religious Organizations, № 987-XII (April 23, 1991) [hereinafter Law on Freedom of Conscience]) does not provide for the very possibility to register confessions ("religious unions" or "associations of religious organizations"). All Ukrainian legislative and administrative acts as well as the Constitutional Court of Ukraine's decisions mentioned hereafter can be found (in Ukrainian) through the official legislation database of the Parliament of Ukraine, accessible at: http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi . See n. 53, *infra*, for an English translation of the Law on Freedom of Conscience available online.

12. See Committee of Ukraine for Nationalities and Religious Affairs, Information Report of 2009on the State and Trends of the Religious Situation and the State-confessions Relationship in Ukraine, accessible in Ukrainian at: http://risu.org.ua/ukr/resourses/otherresourses/informzvit/.

13. According to the ISSP Survey, Christians constitute 91 percent of all believers. Supra n. 3 at 21.

14. Orthodox Christians (or rather people who consider themselves as Orthodox Christians) constitute 82.6 percent of all believers.

15. ISSP survey, supra n. 3 at 22.

16. Id .

17. SCU NMRA Report 2009, supra n. 10.

18. Id .

Finally, a geographical remark is worth making. The population of western Ukraine is more religious than their fellow countrymen from other parts of the country. The density of religious communities, percentage of believers, intensity of religious practices, observance of religious instructions, etc., is greater in the west than the east or south of Ukraine.[19] There are two denominations in Ukraine with clear-cut regional locations: the Catholics of the Eastern Rite (one of the biggest Catholic Churches of the Eastern Rite in the world) constitute a majority within the western region, where 94 percent of their organizations were set up and function, and the Muslims concentrated in the Crimea, the historic motherland of the Crimean Tatar people and the location of more than four-fifths of their establishments.[20] Other religious denominations are more or less spread throughout Ukraine.

II. THEORETICAL AND SCHOLARLY CONTEXT

Most Ukrainian experts and scholars who work in the field of religious freedom and state-church relations acknowledge that separation of Church and State is an indisputable foundation of interaction between religious organizations and the government at all possible levels.[21] It is remarkable that leaders of the so-called "traditional," and thus most influential, denominations in Ukraine explicitly declare their commitment to the principle of a secular state.[22] However, there is an enduring discussion concerning the best possible wording of said principle, which will be addressed below.[23]

Another dispute bears on to what extent, in which areas, and in which forms co-operation between public authorities and religious organizations is appropriate in the secular state.[24] Scholars and experts generally concur with the opinion that education, charities (particularly social rehabilitation), and the conservation and maintenance of religious-cultural heritage sites are proper spheres for effective state-church cooperation.[25] The possibility of financing religious organizations from public sources to carry out socially useful projects is another point at issue.[26]

As could be seen from the foregoing, all key topics of the current public and

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19. ISSP Survey, supra n. 3.

20. SCU NMRA Report 2009, supra n. 10.

21. E.g., Dr. Petro Rabinovych, "The Human Right to the Freedom of Religion and Problems of its Ensuring by State," *Human Rights in Ukraine*, 15 (1996) (in Ukrainian) accessible at: http://library.khpg.org/files/docs/Prava_Lud15.pdf . Professor Rabinovich claims that "Ukraine must be secular." Id. at 23. Another Ukrainian expert, Vsevolod Rechickiy, who published his article "*Freedom, Faith and State*" in the same collection, backs Professor Rabinovich's imperative statement in the following words: "Certainly, the stance of the state on inter-confessional policy should be tolerant, balanced, but adhering to principles at the same time, actually secular." Id . at 24.

22. See, e.g., Speech of Metropolitan Volodymyr (Sabodan), Head of Ukrainian Orthodox Church, on the occasion of the ceremony of the bestowal of an honorary doctoral degree upon him at the Warsaw Christian Theology Academia on February 18, 2008. The Metropolitan Volodymyr clearly stated: "We can regard the notion of a secular state in different ways, discuss its advantages and drawbacks, however we should recognize that nowadays this concept virtually completely dominates in all European countries (including those where the Church is not formally separated from State), and in the majority of non-European countries. In the multi-confessional Ukraine there is no alternative to such an approach." Accessible at: http://orthodox.org.ua/uk/dopovid_predstoyatelya/2008/02/22/2719.html (in Ukrainian).

23. See, e.g., Religious and Society Institute at the Ukrainian Catholic University, Notes and Proposals to the Draft of the Conception of State-Confessional Interrelations, point 5, accessible at: http://risu.org.ua/ukr/study/research_conference/churchstateconception/remark_01/; Dr. Viktor Yelensky, "Constitution Has Been Approved. What next?," *Man and World* (Людина і світ). — 1996. — № 9.

24. See, e.g., Gennadiy Druzenko, *Freedom of Conscience Institution: International Standards and Ukrainian Legislation*, 105–06, accessible at: http://www.risu.org.ua/library/doc/Druzenko_book.rtf (in Ukrainian).

25. See, e.g., Dr. Olexandr Sagan, then-Head of State Committee of Ukraine for Nationalities and Religious Affairs, Web-conference of March 25, 2008, accessible at: http://www.risu.org.ua/ukr/religion.and.society/web-conference/article;21434/. The cumulative views of experts on this issue can be found at: http://www.risu.org.ua/freedom/analytics/expertopinions/03/, answer to question # 10 (in Ukrainian).

26. See, e.g., Yuriy Reshetnikov, *Legislation on Freedom of Conscience: New Hopes and New Fears*, accessible at: http://www.risu.org.ua/ukr/religion.and.society/analysis/article;11032/ (in Ukranian); Gennadiy Druzenko, *Legal-Religious Reflections on Religious-Political Visit*, accessible at: http://risu.org.ua/ukr/religion.and.society/analysis/article;30919/ (in Ukrainian).

scholarly discussion in Ukraine do not question the very concept of secularism. Moreover, the majority of politicians, experts, and religious leaders agree that a non-antagonistic separation between the State and Church envisaging the possibility of mutually beneficial co-operation between the two is the best possible solution for Ukraine. The grave challenge for this general consensus concerning the desirability of separation between the State and Church is the attempt of some Ukrainian politicians to promote the unification of all Orthodox believers in Ukraine into a consolidated Ukrainian Orthodox Church which – in the politicians' eyes – should serve as a spiritual foundation for the nation.[27] However, there has been no sound ideological or academic basis for such efforts. Moreover, all such endeavors have been taken along with a decelerated commitment to religious freedom and the principle of a secular state.[28]

III. CONSTITUTIONAL CONTEXT

Before examining the constitutional framework of the state-church relationship in Ukraine, an important reservation should be made. Unlike traditional Western democracies, Ukraine is not a traditional rule-of-law state and thus a significant gap between the written formal Constitution and the real foundations of Ukrainian society (sometimes referred to as a "real Constitution") exists. Due to widespread legal nihilism, the written Constitution and the factual rules of the game in Ukraine are quite far from one another. Therefore, before examining formal law, it is worth giving a brief history of the state-church relationship in Ukraine, which has determined the framework of the "real Constitution."

First and foremost one should bear in mind that modern Ukraine is the successor to both the Russian Empire/Soviet Union heritage and a separate Ukrainian original tradition. The foundations of Ukrainian tradition were laid down in the time of Kyivan Rus, particularly since Rus became Christian in the late tenth century. The model of the state-church relationship developed in Kyivan Rus in the eleventh and twelfth centuries can be described as *mutatis mutandis* cooperative model where neither secular authorities nor clergy dominated, but both collaborated in mutual interrelation.[29] Another particularity of Kyivan Christianity was its openness to and interaction with the Western Church, especially after the Great Schism of 1054.[30]

Since the loss of statehood in thirteenth century, the Orthodox Church became the core of national cultural life and one of the features of national identity. Therefore, when Rzeczpospolita (the Polish-Lithuanian Commonwealth) urged Ukrainians (then usually

27. This trend of strengthening national identity through furthering Orthodox Churches' unification in Ukrainian policies is analyzed in Gennadiy Druzenko, *Messiahship Test*, accessible at: http://risu.org.ua/ukr/religion.and.society/analysis/article;8812/ (in Ukrainian).

28. A good instance of such an ambivalent stance is offered by Ukrainian President Yushchenko in his Address on the Occasion of Anniversary of Rus-Ukraine Baptism of 25 July 2009. He stated *inter alia*: "I believe that consolidation of the United Local Orthodox Church will be a great historical truth and justice for Ukraine. That is not merely an abstract issue, but a matter of unification of our spiritual life and of the whole society. . . . The state does not interfere into ecclesial matters. However a state which values unity of its nation may not stay apart." Accessible at: http://www.president.gov.ua/news/14474.html# (in Ukrainian).

29. See the masterpiece of contemporary literature and the ideological manifest *The Sermon on Law and Grace* by Metropolitan Hilarion (English translation accessible at: http://www.dur.ac.uk/a.k.harrington/ilarion.html) and classical study of Kievan Christianity by George Fedotov, *The Russian Religious Mind: Kievan Christianity, the Tenth to the Thirteenth Centuries* (Cambridge: Harvard University Press, 1946). Modern scholar Wallace L. Daniel describes church-state relation in Kyivan Rus in the following words: "In Kievan Rus' the prince did not exercise unlimited authority, but shared this responsibility with the head of the church, in *symphonia*, in harmony. *Symphonia* expressed a harmonious interaction between the political leader and the priesthood, a harmony toward which each should strive. In such a harmonious relationship, princes and priests each bore responsibilities toward the other – to support and respect each other and to interact in such a way that would work to the total welfare of all the people of the realm." *The Orthodox Church and Civil Society in Russia* (College Station: Texas A&M University Press, 2006), 12.

30. The openness and even "universalism" of Kievan Christianity is well-founded and illustrated in Mykola Chubatyi (Микола Чубатий), *History of Christianity on Rus-Ukraine*. *Volume I: From Beginning till 1353* (Історія християнства на Руси-Україні. Том І: від початку до 1353 року) (Rome and New York: Ukrainian Catholic University Press, 1965).

called Ruthenians) to convert to Catholicism, the reaction was two-fold: religious brotherhoods (associations of active laymen) provided the protection and financial support to establish the Ukrainian Catholic Church of the Eastern Rite in 1596 and the Ukrainian Orthodoxy; and the Cossacks experienced the Renaissance in the first half of seventeenth century. At that time, Protestantism was also coming onto the scene, making it one of the most religiously diverse and pluralistic epochs in Ukrainian history, which was broken off by the Ukrainian liberation war.

As mentioned above, the liberation war in the middle of seventeenth century was run under the Orthodox banner and entailed fratricidal slaughter, which led to the desolation of Ukraine and was known as the Great Ruin. It eventually led to the conquest of most ethnic Ukrainian lands by Muscovy. It was only after the Kyivan Orthodox Metropolis was taken over by the Moscow Patriarchate from Constantinople in 1685 that the scope of religious freedom in Ukrainian lands within the Russian Empire began to continually contract, since the latter perceived Orthodoxy as an official ideology and state religion.[31] Therefore, from the beginning of the eighteenth until the early twentieth century, the Orthodox Church in Ukraine gradually became a more and more inherent part of the alien empire's machinery, known as the "Department of Orthodox matters."[32] From the 1820s, such a state-church merger was mirrored in the Russian Empire's official motto of "Orthodoxy-Autocracy-Nationality," perceived as the three principal foundations of the Russian Empire. Thus, to be a Russian (Ukrainians were not recognized as a separate nation by the Tsar's government) also meant to be Orthodox.[33]

A short period of comparative religious freedom in the Russian Empire lasted a little more than ten years, from 1905[34] to 1918. The rivals of communism, the Ukrainian pro-independence governments of 1918–1919, in every way possible backed the establishment of an independent Ukrainian Church and finally passed the special *Law on Supreme Government of Ukrainian Orthodox Autocephalous Synodical Church*, which provided for full independence for the Orthodox Church in Ukraine and laid down the principles of the Church's structure and governance.[35] After the Ukrainian People's Republic was defeated in 1920, comparative religious freedom endured in Soviet Ukraine through the end of the 1920s, after which Stalin's anti-religious terror developed in full force.[36] This marked one of the severest persecutions against religion ever in Ukraine. Despite a declaration concerning its secularity,[37] the Ukrainian Socialist Soviet Republic

31. Prominent Russian philosopher and theologian Sergiy Bulgakov summarized the regrettable outcome of the enslavement of the Orthodox Church by the Russian Empire as follows: "Age-long offences against freedom of conscience weigh heavy on historical conscience of [the] Russian Church". Bulgakov S.N. (Булгаков С.Н.) Christian Socialism (Христианский социализм). — М., 1991. —, 28.

32. Establishment of the Holy Governing Synod by Peter the Great in 1721 meant the end of the Orthodox Church's autonomy within the Russian Empire. The members of the Synod included a temporal Chief Procurator, the "Emperor's eye within [the] Synod", and were appointed by the Emperor; the whole institution was subordinated to him. The Holy Governing Synod was thoroughly embedded in the state machinery of the Russian Empire.

33. The Criminal and Correctional Punishment Code (Уложение о наказаниях уголовных и исправительных) of the Russian Empire of 1845, for instance, provided for criminal punishment for defection from the faith (articles 190-205); altogether, more than eighty articles of the Code (as in force in 1885) were devoted to offensives against faith.

34. The Manifesto on the Improvement of the State Order (Высочайший Манифест *Об усовершенствовании государственного порядка*) of 17 October 1905 declared freedom of conscience in the Russian Empire (English translation of the Manifesto accessible at: http://euphrates.wpunj.edu/courses/hist330-60/Supplementary%20Material/HTML/October%20Manifesto.html.) In 1906, the criminal punishment for defection from the faith was repealed, but the State Duma (then the lower house of the Russian Empire parliament) never passed the bill on Freedom of Conscience.

35. The text of the Law is accessible in Ukrainian at: http://www.cerkva.info/2009/01/04/zakon_ avtokefalia.html.

36. Particularly, the Ukrainian Autocephalous Orthodox Church was suppressed and declared unlawful in 1930.

37. See Constitution of the Ukrainian Socialist Soviet Republic of 1919, art. XXIII (accessible in Russian, original language of the act, at: http://vi-leghas.ua/content/view/1841/193/); Constitution of the USSR of 1936, art. CXXIV (accessible in Russian at: http://www.nbuv.gov.ua/articles/history/1936cnst.htm#10); Constitution of the USSR of 1977, art. LII (accessible in Russian at: http://www.hist.msu.ru/ER/Etext/cnst1977.htm).

(part of the Soviet Union from 1923[38]) espoused assaultive, anti-religious ideology. The Soviet regime was by no means religiously neutral nor even tolerant toward religion; rather, it thrust upon the Ukrainian people its communist ideology with religious eagerness.[39]

The Western Ukrainian lands which constituted part of the Austrian and later Austro-Hungarian Empire from 1772 to 1918 enjoyed a more favorable position compared to that under the Russian Empire, particularly with regards to freedom of religion.[40] The Austro-Hungarian Empire did not aim at assimilation of the Galician Ukrainians (Ruthenians), and therefore allowed the Ukrainian Catholic Church of the Eastern Rite to develop into the leading Ukrainian religion within Galicia. The Catholic Church of the Eastern Rite went through the oppression of Polish rule in the 1920s and 30s and was suppressed by the Soviet government in 1946 and declared illegal in the USSR. Later, in the course of and after World War II, the Soviet regime shifted its policy from outright persecution to subordination and marginalization of the Church. In 1943 and 1944, Stalin ordered the creation of two government bodies: the Council on Russian Orthodox Church Affairs and the Council on Religious Faiths. Since then, the Communist authorities endeavored to keep a tight rein on recognized religions like the Russian Orthodox Church and to manipulate them, while severely repressing forbidden confessions such as the Ukrainian Catholic Church of the Eastern Rite, almost until the collapse of the Soviet Union.[41]

The foregoing digression into Ukrainian history is necessary to understand the current perception of the Constitution in modern Ukraine. The Soviet and, to a lesser extent, Russian imperial heritage accustomed people to perceive the law first and foremost as a means of punishment,[42] but also as a dissimulation, particularly in the human rights field,[43] which has nothing in common with real life. There has never been rule of law on Ukrainian lands, except, perhaps, the "golden age" of Joseph II of Austria's reign over Galicia. However, Ukraine and Ukrainians several times in their history have experienced the blossoming of religious freedom; their religious tolerance is determined by the very religious diversity of the nation.

It is useful to highlight that most Ukrainian achievements in the development of religious freedom resulted from the "real Constitution," i.e., Ukrainian mentality and custom – from a painful national historical experience and not from respect for the law or voluntary obedience to the formal Constitution. Having made such caveats, now is the time to resume examination of the constitutional provisions concerning religion and state.

The Constitution of Ukraine sets forth the founding principles of state-church interrelation in Article 35, which states as follows:

> Everyone has the right to freedom of personal philosophy and religion. This right includes the freedom to profess or not to profess any religion, to perform alone or collectively and without constraint religious rites and ceremonial rituals, and to conduct religious activity.
>
> The exercise of this right may be restricted by law only in the interests of protecting public order, the health and morality of the population, or protecting the rights and freedoms of other persons.
>
> The Church and religious organizations in Ukraine are separated from the State, and the school – from the Church. No religion shall be recognized by the State as mandatory.

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38. The Ukrainian Socialist Soviet Republic was one of four original constituents of the Soviet Union,1922.

39. See disclosure of the religious nature of Russian Communism in Nicolas Berdyaev, *The Origin of Russian Communism* (London, 1948).

40. In 1781, Joseph II of Austria issued the *Patent of Toleration*, which extended religious freedom to non-Catholic Christians living in Habsburg lands, including Lutherans, Calvinists, and the Greek Orthodox. It also granted Jews freedom of worship.

41. The USSR's Law on the Freedom of Conscience which substituted Lenin's Decree of 1918 was adopted only on 1 October 1990.

42. Criminal law was the principal constituent and core of Soviet law.

43. Soviet constitutions of 1936 and 1977 included much more comprehensive bills of rights than U.S. or other liberal basic laws.

> No one shall be relieved of his or her duties before the State or refuse to perform the laws for reasons of religious beliefs. In the event that the performance of military duty is contrary to the religious beliefs of a citizen, the performance of this duty shall be replaced by alternative (non-military) service.[44]

This constitutional wording mirrors the controversial Ukrainian constitutional tradition of the last century. On the one hand, it utilizes the dated expression "separation of the Church *from* the State, and the school – *from* the Church" (emphasis added) referencing the French *Loi concernant la séparation des Eglises et de l'Etat* of December 9, 1905,[45] and the early Soviet Russian *Decree on separation of the Church from the State and school – from the Church* of January 20, 1918,[46] both atheistic in their essence. The Constitution thus includes inherent anti-religious connotations.

On the other hand, the first, second and fourth paragraphs of the Article primarily reproduce wording of contemporary international and European human rights instruments like the European Convention on Human Rights, the Universal Declaration of Human Right or International Covenant on Civil and Political Rights. However, the wording of the Ukrainian Constitution omits some common wording for international human rights instruments on the elaboration of religious freedom, including the rights "to have or to adopt a religion or belief of his choice"[47] and "to change his religion or belief."[48] These elaborations are made in the *Law on Freedom of Conscience and Religious Organizations*, discussed below.

Other constitutional provisions which refer to religion are as follows:

> The State promotes the consolidation and development of the Ukrainian nation, of its historical consciousness, traditions and culture, and also the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine.[49]

Such a tie between a particular nationality and religion is mirrored in the Ukrainian government framework: despite continuing development, a government body responsible for nationalities' matters has often also been responsible for religious affairs.[50]

Article 24 of the Constitution prohibits any discrimination (either positive or negative) based on, *inter alia*, religious beliefs, and Article 37 forbids the establishment and activity of political parties and associations aimed at, in particular, stirring up religious hatred.

It is worth mentioning that the Ukrainian Constitutional Court once dealt with an MP's request to interpret the term "the Church" in the context of Article 35(3) of the Constitution.[51] The Court reached the conclusion that the terms "the Church" and "religious organizations" referred to in Article 35(3) of the Constitution and in the *Law on Freedom of Conscience and Religious Organizations* are not identical and that there are some contradictions in the terms' employment throughout legislation, but the bench declined to deliver the requested interpretation, arguing that clarification of the term

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44. An English translation of the Constitution of Ukraine is accessible at the Religion and Law Consortium website at: http://beta.religlaw.org/document.php?DocumentID=51 .

45. The French text is accessible at: http://beta.religlaw.org/document.php?DocumentID=2573 .

46. Decree of the Council of People's Commissars of the RSFSR *on Separation the Church from the State and School – from the Church* (Декрет Совета народных комиссаров РСФСР *Об отделении церкви от государства и школы от церкви*) (20 January 1918), accessible at: http://law.edu.ru/norm/norm.asp?normID=1119186 (in Russian).

47. See International Covenant on Civil and Political Rights, art. 18(1).

48. See Universal Declaration of Human Rights, art. 18; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9(1).

49. Constitution of Ukraine of 28 June 1996, art. XI, supra n. 44.

50. From 1994 to 1996 there was the Ministry of Ukraine for Nationalities, Migration and Religious Affairs; in 2006–2009 there was the State Committee of Ukraine for Nationalities, Migration and Religious Affairs; and since 2009 there is the State Committee of Ukraine for Nationalities and Religious Affairs.

51. See Decision of the Constitutional Court of Ukraine, № 32-y/2002 (5 June 2002).

"Church" falls within the legislature's responsibility.[52] However, the term has not been officially explained so far.

IV. LEGAL CONTEXT

Ukraine belongs to the group of civil law countries, so written legislation is assumed to be the principal legal framework of social relations. There is a special law which governs freedom of conscience issues and state-church relations, namely the *Law of Ukraine on Freedom of Conscience and Religious Organizations*[53] (hereafter *Law on Freedom of Conscience*). It was passed in April 23, 1991, about half a year before Ukraine became independent. So, it is not surprising that this legal act closely reproduced the law of the USSR of October 1, 1990 with the same name. Without a doubt, at that time both acts were a revolutionary step forward toward religious freedom; it is enough to mention that for the first time since 1918, religious organizations were granted legal personality and accordingly the right to acquire property, the right to stand before court, and the right to preach in public.

The *Law on Freedom of Conscience* consists of five articles: 1) General Provisions, 2) Religious Organizations in Ukraine, 3) Property Status of Religious Organizations, 4) Religious Organizations' and Citizens' Rights Related to the Freedom of Faith, 5) Labor Activity in Religious Organizations and at Their Enterprises, 6) Governmental Authorities and Religious Organizations. The first sets forth objectives of the Law and basic principles in the field of religious freedom, one of which is the secular character of the educational system in Ukraine.[54] The entire Article 5 elaborates on the principle of secularity of the Ukrainian State. It reproduces constitutional provisions on separation of the church from the state[55] and goes on: "[t]he state shall consider and respect the traditions and internal rules of religious organizations provided that they do not contravene the current legislation."[56] Furthermore:

> The State shall not intrude into the activity of the religious organizations executed within the limits of the law and shall not provide any financial support to the organizations established on the basis of the religious distinction.
> All religions denominations and religious organizations shall be equal to the law. Any privileges or restrictions for any religion, denomination or religious organization may not be established or imposed.
> The religious organizations shall not perform any state functions.[57]

The cited provisions are explicit and strong enough to insist that from the formal legal standpoint, Ukraine is an entirely secular state. Some fears can arise not from the blending of state and church, but from some unnecessary restrictions on religious freedom. In particular, the Law restrains believers from setting up religious organizations in whichever form founders find desirable, arbitrarily limiting their choice to seven specific types of organizations, which are selected on an unclear basis.[58]

The Parliamentary Assembly of the Council of Europe pointed out other shortcomings of the Law:

> 1) it requires ten adults to have the status of a registered religious organization, "whereas the same requirement for other civic associations is [three] persons"; 2) it "prohibits the creation of local or regional divisions," such as branches and

52. Id ., para. 4 of the grounds.

53. An English translation of the Law on Freedom of Conscience is accessible at: http://www.iupdp.org/index.php?option=com_content&view=article&id=68:30e-l1-law-of-ukraine-on-the-freedom-of-conscience-and-religious-organizations-april-23-1991&catid=40:effective-laws-and-subordinate-legislation&Itemid=75 .

54. Id . art, 6(1). It is interesting that the Ukrainian legislature has applied the term "secular" exclusively to educational matters.

55. Id ., art. 5(2).

56. Id ., art. 5(3).

57. Id ., art. 5(4), 5(5), 5(6).

58. Id ., art. 7(2)(3).

subsidiaries, "without legal entity status"; 3) it lacks any mechanism to award legal entity status to religious associations, i.e., unions, such as the Catholic or Orthodox Churches; 4) it "discriminates against foreigners and stateless persons"; 5) it "[lacks] clarity with regard to which organizations [are required to register with] regional state administrations and which [with] the State Committee on Religious Affairs"; 6) finally, "[t]he law also contains a number of other ambiguous provisions, which leave a wide discretion to the implementing authorities."[59]

Another controversial provision of the Law is Article 30, which provides for a special state authority for religious affairs designed to assure implementation of state policy in respect of religion and church.[60] The doubt concerns whether a secular state needs a particular official body to deal with religious organizations and to implement policy which should arguably consist first and foremost in religious neutrality. Why is the state able to manage its relationship with other types of private non-profit associations without establishing a special body, while it must set up such a body to handle religious matters? There was an attempt to eliminate the State Committee of Ukraine for Religious Affairs in 2005, and it was indeed downgraded to a department of the Ministry of Justice of Ukraine,[61] but eventually a separate state authority for religious affairs was resumed.[62]

The most questionable power conferred upon the current State Committee of Ukraine for Nationalities and Religious Affairs is to carry out so-called "religious scrutiny," without any goals or procedural and methodological frameworks set forth by law for such examination.[63] Based on Article 7(2) and (3) of the *Law on Freedom of Conscience*,[64] it could be reasonably assumed that the primary aim of "religious scrutiny" is to determine whether an organization is in its essence a religious one and,, therefore to determine which state body has authority to register an organization's charter and grant it the status of legal entity. However, such examination is doomed to be arbitrary since there is no conventional definition of the very notion of religion.[65]

Outlined above, the Law's drawbacks could be interpreted partly as a consequence of the Law's obsolescence. Since its adoption, Ukraine has joined the Council of Europe (1995), adopted a new Constitution (1996), and enacted the Civil Code (2004), but during its eighteen-year history, the Law concerned has not been adjusted to the new legal landscape and new challenges other than a few negligible amendments.[66] Therefore, Mrs. Severinsen and Mrs. Wohlwend, the former Monitoring Committee co-reporters of the Parliamentary Assembly of the Council of Europe PACE reached an unsurprising conclusion: "the quite progressive law for the time of its adoption now requires significant rewording."[67]

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59. Eur. Parl. Ass., *Honouring of Obligations and Commitments by Ukraine*, Doc. No. 10676, § 269 (2005), accessible at: http://assembly.coe.int/Documents/WorkingDocs/ doc05/EDOC10676.htm .

60. Law on Freedom of Conscience, supra n. 53, art. 30(1).

61. See Cabinet of Ministers of Ukraine Decree № 390 (26 May 2005).

62. See Cabinet of Ministers of Ukraine Decree № 1575 (8 November 2006).

63. Based on intent 8 of article 30(2) of the Law on Freedom of Conscience, *Regulations for the State Committee of Ukraine for Nationalities and Religious Affairs* (approved by the Cabinet of Ministers of Ukraine Decree of February 14, 2007 № 201 as subsequently amended) determine that the Committee "shall assure religious scrutiny of religious organizations' charters," para. 4, subpara. 15, and provide for establishment for this purpose of the Council of experts which composition and rule of procedure shall be determined by the Head of the Committee, para. 11. However, there is neither rule of procedures nor any information of the very existence of such Council in open sources at the time of this report (November 2009).

64. Article 7(2) and 7(3) provide as follows: The religious organizations in Ukraine are religious communities, administrations and centers, monasteries, religious brotherhoods, missionary societies (missions), spiritual educational establishments as well as associations which consist of aforementioned religious organizations. Religious associations are represented by their centers (administrations). The scope of application of this Law does not cover other organization established on religious basis. Law on Freedom of Conscience, supra n. 53.

65. Prominent present-day Orthodox theologian Christos Yannaras reiterates in his works that Christianity is not a religion, but a live Church. See, e.g., *Elements of Faith*, (Edinburgh: T&T Clark, 1991).

66. See detailed critique of the Law in Gennadiy Druzenko, "Svato-Mykhaylivska Parafiya v. Ukraine: A Thing Done by Halves?," 2009 *B.Y.U. L. Rev.* 555.

67. Eur. Parl. Ass., *Honouring of Obligations and Commitments by Ukraine*, supra n. 59.

In 1996, the All-Ukraine Council of Churches and Religious Organizations was established under the auspice of the then State Committee for Religious Affairs to debate urgent inter-faith and church-state issues and work out the common position of religious organizations. In 2005, the Council liberated itself from the paternalism of the State Committee and became an effective independent body which represents the interests of the overwhelming majority of religious organizations in Ukraine.[68] The Council often sets out its opinion as to current legislation and legislative proposals.[69]

It is worth mentioning that the Council prefers to lobby for the common economic interests of its participants, like reduced tariffs for religious organizations,[70] rather than to discuss the subject matter of legislative proposals.[71] Nevertheless, the Council should be recognized as an effective umbrella organization and the main transparent communication channel between the government and the religious communities of Ukraine beyond the informal and separate relations enjoyed by every large Ukrainian denomination with the government.

Even though the Ukrainian legislation in force provides legal grounds for contractual relationships between state bodies and religious centers which act on behalf of religious denominations,[72] there have been no general agreements concluded between the state and particular churches of a concordat nature. However, agreements have been made between particular denominations and state bodies, especially between paramilitary authorities and major orthodox churches.[73] Notwithstanding, such agreements could hardly be deemed as legally binding instruments; they are rather agreements of understanding. Therefore, such practice of state-church formal co-operation could be attacked from the secular state standpoint concerning the lack of transparent criteria on which state bodies have based their choice of religious partners.

V. THE STATE AND RELIGIOUS AUTONOMY

As outlined above, Ukraine declares itself as a secular state which does not intervene in religious life unless religious communities ask the State to settle a dispute between them, request protection of their rights, initiate co-operation, or break the law. In actuality, however, the state interferes in religious matters. The most glaring example of such intervention is the backing by various Ukrainian presidents for consolidation of the Orthodox Churches in Ukraine. Since 1686, the Kyivan Metropolis, which had been the biggest autonomous diocese within the Constantinople Church for almost 700 years, was subjugated to the Moscow Patriarchy. Gradually, its autonomy within the Moscow Church has been eroded. However, three times in the last century – in the 20s, 40s, and late 80s – the independent (so-called autocephalous) Ukrainian Orthodox Church (UAOC) was restored simultaneously with the intensification of the national movement in Ukraine. All three times the UAOC has carried out its business in parallel competition with the Moscow Orthodox Church in Ukraine.

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68. Today, the Council unites nineteen major religious denominations of Ukraine which embody more than 90 percent of religious organizations.

69. For example, on October 16, 2009, the Council addressed their view to the President and Prime Minister of Ukraine regarding the priority of consideration and approval of some bills in the religious field.

70. A recent instance of such successful lobbying is the reduction of gas prices for religious organizations (in Ukraine gas prices are regulated by the government) in consequence of a meeting with the Prime Minister of Ukraine on July 13, 2009 where the Council raised the issue in question.

71. The Council twice (in 2006 and 2009) without any objection on merits opposed amendments to the Law on Freedom of Conscience aimed at rectifying the Law's shortcomings and welcomed by the Venice Commission (see Venice Commission, Opinion No 391/2006 of 18 October 2006 accessible at: http://www.venice.coe.int/site/ dynamics /N_Opinion_ef.asp?L=E&OID=391).

72. See Law on Freedom of Conscience, supra n. 53, art. 9(3).

73. See, e.g., Common Agreement on Co-operation between the Ukrainian Orthodox Church and Ministry of Ukraine of Emergencies and Population Protection from the Consequences of the Chornobyl Catastrophe (14 February 2007), accessible at: http://orthodox.org.ua/ru/tserkov_i_gosudarstvo/sovmestnye_tserkovno_ gosudarstvennye_dokumenty/2 (in Ukrainian); See also Common Agreement on Interrelations between Ukrainian Orthodox Church of Kyiv Patriarchate and Internal Military Forces of the Ministry of Internal Affairs of Ukraine (undated), accessible at: http://kievpatrarmy.org.ua/partner/mvd/ (in Ukranian).

As had been the case in 1919, when the government had passed the law on the Ukrainian Orthodox Church's independence from Moscow, all three Ukrainian presidents since independence in 1991 have furthered the consolidation of all major branches of Ukrainian Orthodoxy into one independent united denomination.

In 1992, then-Ukrainian President Leonid Kravchuk ordered the dismissal of then-head of the Council for Religious Affairs Mr. Mykola Kolesnyk,[74] as the latter opposed legitimization of the legally dubious[75] merger between the Ukrainian Orthodox Church affiliated with the Moscow Patriarchate (UOC) and the Ukrainian Autocephalous Orthodox Church and likewise the establishment of the Ukrainian Orthodox Church of Kyiv Patriarchate (UOC-KP), which was rejected by the overwhelming majority of believers and bishops of the UOC and partly by UAOC adherents.[76] So, in 1992–94, high-level Ukrainian officials, including the Ukrainian President, explicitly urged establishment of the consolidated Ukrainian Orthodox Church through the merger of the UOC and UAOC.[77]

The Kuchma[78] era in Ukraine was more religiously neutral despite the fact that his administration favored and sometimes openly backed the UOC.[79] It would be wrong to affirm that President Kuchma gave up the very idea of establishing a consolidated Ukrainian Orthodox Church independent of Moscow. Particularly in 2000, the second Ukrainian President took some steps toward this goal.[80]

The third Ukrainian President, Viktor Yushchenko, returned to a more active policy of Orthodox Church consolidation. He has reiterated that a consolidated and independent Orthodox Church was and is the foundation of national identity and national spirituality.[81] President Yushchenko even insisted (although in vain) on insertion into the Declaration [Universal] of National Unity[82] a provision on "support of the aspiration to establish a united local Ukrainian Orthodox Church."[83] However, President Yushchenko's strategy

74. See Decree of the Cabinet of Ministers of Ukraine, № 463 (12 August 1992).

75. For a legal probe of this denominations' merger, see Holovaty Serhiy, "When Pharisees Become Legislators," *Ukrainian Voice* (5 May 1993), accessible at: http://www.pravoslavye.org.ua/index.php?r_type=article& action=fullinfo&id=5726 (in Ukrainian).

76. Mr. Kolesnyk's successor, Mr. Arsen Zinchenko, enthusiastic proponent of the Ukrainian Orthodoxy independence from Moscow, was appointed to the position of First Deputy Chairman of the Council for Religious Affairs on July 14, 1993; on July 20, 1993, Mr. Zinchenko, instead of then-chief Mr. Kolesnyk, signed the Council's Decree on the UOC-UAOC merger registration and on August 12 took over the position of Head of the Council. The General Prosecutor's Office of Ukraine twice (in 1993 and 2002) filed protests against the Council's July 20 Decreebut both times to no effect.

77. Both the OUC and the UAOC have eventually survived as denominations separate from UOC-KP. Moreover, the UOC remains the biggest Ukrainian Church so far. However, both Churches experienced severe persecution from 1992–1994. The UAOC was legitimized as a religious association separate from the UOC-KP only in 1995.

78. Mr. Leonid Kuchma was the second Ukrainian President and headed the country from 1994 to 2005.

79. A bright instance of the infringement of the religious neutrality principle by Kuchma's administration is given in the *Svato-Mykhaylivska Parafiya* case which was brought before the European Court of Human Rights and in which Ukraine finally lost. For an explanation and critique of the case see Druzenko Gennadiy, "Svato-Mykhaylivska Parafiya v. Ukraine: A Thing Done by Halves?," supra n. 66.

80. In his speech on the occasion of the 2000th anniversary of Christianity, President Kuchma clearly called for consolidation of all Ukrainian Orthodox Churches into a United Local Church. See L. Kuchma, "Imperishable and Everlasting Christian Values," *Governmental Courier*, January 25, 2000, at 3. Also, on 24 January 24 2000, he met with Ecumenical Patriarch Bartholomew I of Constantinople in Istanbul to discuss possibilities and ways to set up a United Local Orthodox Church in Ukraine. In August 2000, President Kuchma sent a telegram to the Patriarch of Moscow and all Rus Alexiy II requesting a grant of autonomous status to the Ukrainian Orthodox Church. However, soon Mr. Kuchma was thrown into the so-called "Kuchmagate" and lost interest in the project of Church unification.

81. In his speech at the IV World Ukrainian Forum on August 18, 2006, President Yushchenko emphasized: "I want to stress when we talk about political understanding the point is local church. I hardly perceive how it is possible to discuss spiritual independence of a nation lacking the local church." The speech is available at: http://www.president.gov.ua/news/3881.html (in Ukrainian). See also supra n. 28.

82. The Declaration is a political agreement finally concluded between the President and the rival Parliamentary coalition on 3 August 2006 and anticipated to be a road map for leading Ukrainian politicians in office.

83. The Universal draft proposed by Yushchenko is accessible at: http://www.khpg.org/index.php?id=1154065883 (in Ukrainian). See id. para. 12.

toward Orthodox consolidation in Ukraine was cleverer than his predecessors'. He has strived to make use of Ecumenical Patriarch Bartholomew I of Constantinople to influence the Orthodox world. The President's efforts arrived at their climax in July 2008, when the Ecumenical Patriarch visited Ukraine on the occasion of 1020th anniversary of the Rus-Ukraine Conversion. Bartholomew I came to Ukraine at the personal invitation of President Yushchenko and was in every possible way honored by the President. The impressive celebration of this in fact insignificant anniversary resembled an embodiment of the Byzantine concept of "Symphony" in church-state relations rather than the stance of a modern secular state toward the Church.

Certainly, unification of Ukrainian Orthodoxy is not the only challenge (or rather temptation) for the secularity of the Ukrainian state. However, it is indeed the core test for commitment to religious freedom and neutrality as set forth in the Ukrainian Constitution and legislation. Another major challenge is restitution of the former church's property that was nationalized by the Soviet government.[84] The *Law on Religious Freedom* (both the Soviet law of 1990 and the Ukrainian law of 1991) granted the status of legal personality to religious organizations[85] and provided for the possibility of transferring property from state and municipal ownership to religious organizations.[86] However, neither law set forth any legally binding criteria for such restitution. Moreover there are two ways of property conveyance provided by the Ukrainian law, without any guideline on how to choose between them: transfer of ownership to a religious organization, or property free-of-charge use by the organization.[87] Therefore, state and municipal authorities have full discretion in restitution matters[88] and naturally have used it to back favored denominations and handicap others, as well as to manipulate both of them.[89] Despite the commitment made in 1995 to introduce "a legal solution for the restitution of church property,"[90] the several attempts to enact or even draft a law on restitution have failed.[91] The state and local authorities continue to utilize "optional restitution" as a means of gaining religious organizations' allegiance or direct support and to in fact discriminate against "wrong" religious denominations. Although religious organizations have already restored their property rights to a good number of their temples[92] by hook or by crook, enactment of transparent and fair rules of restitution of former ecclesial property remains an urgent task for the Ukrainian government.

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84. Decree of the Council of People's Commissars of the RSFSR *on Separation the Church from the State and School* embodied the following provisions: 12. No one ecclesial or religious society is entitled to the enjoyment of any possession. They also do not enjoy the right of legal personality. 13. All possession in Russia owned by ecclesial or religious societies are declared property of the people. Supra n. 46.

85. Article 13 of both Laws.

86. Article 17 of both Laws.

87. See Law of Religious Freedom (Ukraine), art. 17(2). The Act of the Parliament on Enacting the Law of Freedom of Conscience and Religious Organizations, № 988-XII (23 April 1991), para. 6, provides for some criteria, yet the legal status of that Act became at least ambivalent and it has never been strictly observed by authorities.

88. It should be born in mind that most Ukrainian temples and other ecclesial property, particularly in Western Ukraine, have changed their owners many times. For instance the National Shrine, the St. Sophia Cathedral in Kyiv, has been owned or used in turn by the Kyivan Orthodox Metropolis affiliated with Constantinople Patriarchate, the Ukrainian Catholic Church of the Eastern Rite, the Ukrainian, Kyivan Orthodox Metropolis under the auspice of the Moscow Patriarchate and the Ukrainian Autocephalous Orthodox Church.

89. For a detailed critique of such an issue, see Gennadiy Druzenko, "Ukrainian-style Restitution: Restoration of Historical Justice or Trap for the Church," *Legal Journal*, 21, № 3 (2004) (in Ukrainian).

90. See Opinion of the Parliamentary Assembly of the Council of Europe № 190 (1995), para. 11(xi) (on the application by Ukraine for membership in the Council of Europe), accessible at: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta95/EOPI190.htm .

91. On January 20, 2006, President Yushchenko commissioned the Ministry of Justice of Ukraine with improvement of the regulations governing the restitution of the church property to religious organizations. Presidential Edict № 39/2006 (20 January 2006). The Ministry prepared a respective draft of the law (justly castigated by experts), but there has been no legislative outcome of this work hitherto.

92. According to the official statistical figures of the State Committee of Ukraine for Nationalities and Religious Affairs 10,411 religious buildings have been transferred into ecclesial ownership and 4,540 transferred for free-of-charge use by central and local governments through 1 January 2009. All relative data is accessible at: http://www.scnm.gov.ua/control/uk/publish/article?art_id=131562&cat_id=131554 (in Ukrainian).

VI. RELIGION AND AUTONOMY OF THE STATE

Do religious organizations intervene in the policy-making of Ukraine? Are they integrated into state machinery? From a formal point of view, the answer to both questions is negative. Ukrainian legislation sets forth explicit principles designed to govern the matters in question, namely:

> Religious organizations shall not perform any state functions. . . .
> Religious organizations shall not take part in the activity of any political parties and may not provide any financial support to the political parties as well as shall not nominate any candidates to the state organs, propagate or finance the election campaign of the candidates to these organs. The clergy equally with the other citizens shall be entitled with the right to participate in the political life of the country.[93]

In the course of the eighteen years of Ukrainian Parliamentary history, some professional clergymen have been elected to the Legislature.[94] Others have become members of local councils.[95] However, they have constituted a negligible quantity within the respective representative bodies and thus their influence on policy-making is hardly remarkable. Moreover, at least two major denominations in Ukraine, namely the Ukrainian Catholic Church of the Eastern Rite and the Ukrainian Autocephalous Orthodox Church have officially forbidden their clergies from placing their names in nomination for parliament.[96] It is worth mentioning that in the course of the 2004 presidential election campaign, the Ukrainian Orthodox Church was entangled in the strong backing of a specific candidate and even utilized traditional ecclesial means like church sermons to persuade believers to vote for him. However, the outcome of such Church support was rather negligible: the "church's candidate" failed in regions where the UOC had most of their parishes. In turn, the Church has never been punished for its manifest disobedience of the law.

On the other hand, some leading Ukrainian politicians explicitly declare their strong commitment to particular religious denominations and actively participate in worship.[97] Yet again, there are no signs of direct or implicit intervention into policy-making or policy implementation by the churches that have high-level officials affiliated with them.

Perhaps there are two spheres which might raise doubts concerning the religious neutrality of the Ukrainian state. First is the embedding of major Orthodox festivals – namely Christmas, Easter, and the Pentecost – into the list of state holidays.[98] Such "nationalization" of Christian religious traditions does not by itself infringe on the religious neutrality of the state, since this tradition is inherent in the national culture, but the difficulty is that the Orthodox Churches in Ukraine and the Ukrainian Catholic Church of the Eastern Rite celebrate all mentioned festivals in accordance with the so-called Old Style (Julian) calendar while other Christian denominations observe the New Style (Gregorian) calendar and therefore meet some inconveniences caused by the

93. Law on Freedom of Conscience, supra n. 53, arts. 5(6), 5(8).

94. To the best of the author's knowledge, only the Metropolitan of the UOC Agafangel (Oleksiy Savvin) in 1990–1994, and the priest of the UAOC Yuriy Boyko in 2002–2006, were members of the National Parliament.

95. Now, for example, the aforementioned Metropolitan of the UOC Agafangel (Oleksiy Savvin) is a member of the Odessa Region Council; his fellow Archbishop Pavlo (Petro Lebid) is currently a member of a Kyiv City Council.

96. See *The Pastoral of the Hierarchy of the Ukrainian Greek-Catholic Church on the Occasion of Early Election to the Verkhovna Rada (Parliament) of Ukraine 1994*; Enactments of Holy Synod of UGCC (January 16, 2006); Enactments of the Bishop's Council of the UAOC (26 February 1998). There was information in the mass-media that the UOC also forbade their clergyman to nominate themselves or to accept the nomination for Member of Parliament. See http://www.pravoslavie.ru/news/16458.htm .

97. The most outstanding examples are the current First Vice Prime Minister and former Head of Security Service of Ukraine, Dr. Olexander Turchynov, the "preacher" of the Kyiv Baptist Church, "The Word of Life"; incumbent Kyiv Mayor, Mr. Leonid Chernovetsky, the adherent of the charismatic protestant church "Embassy of God"; and the present Head of the State Committee of Ukraine for Nationalities and Religious Affairs, Yuriy Reshetnikov, alumnus of the Odessa Theological Seminary of the Evangelical Christian Baptist Union.

98. Labor Code of Ukraine № 322-VIII (10 December 1971), art. 73(1).

legitimization of the Old Style festival's schedule. However, Ukrainian legislation provides for some compensation for non-Orthodox believers:

> By application of religious communities of non-Orthodox denominations registered in Ukraine management of companies, establishments and organizations shall grant to persons who belong to relevant religions leave up to three days a year for celebrating their major festivals subject to further work-off.[99]

VII. Legal Regulation of Religion as a Social Phenomenon

As was stated above, Ukrainian legislation contains special law which regulates state-church issues, particularly arrangements for state registration of religious organizations' charters. Some Ukrainian experts question the very idea of such separate pieces of legislation for religious entities.[100] It is even more dubious in the light of the European Court of Human Rights' case-law, which manifestly insists that religious organizations are the kind of associations in the meaning of Article 11 of the European Convention on Human Rights and thus Article 9 (freedom of religion) of the Convention should be read in the light of Article 11 (freedom of assembly).[101]

At least one discriminative outcome results directly from the two laws outlined above: to establish religious organizations, ten adult persons are required while to set up other private non-profit civic organization or private profit making companies, three people (or sometimes even one person) are enough.[102] Apart from that, religious organizations in Ukraine enjoy legal status similar to that of other non-profit associations. In particular, they are entitled to all property rights, the right to *locus standi*, contract rights, the right to set up enterprises, and so forth. Moreover, Ukrainian legislation sets forth special provision for the particular protection of religious property:" Property of solely religious purposes belonging to religious organizations may not be withdrawn upon the claims of the creditors."[103]

In February 2009, registered religious organizations gained the right of permanent use of land necessary for the construction and maintenance of religious premises;[104] still, they have not yet been allowed to own the land unless for agricultural purposes.[105]

Ukrainian legislation explicitly forbids any indication of a person's religious affiliation in official documents.[106] Believers in Ukraine enjoy the right to gain income without obtaining an individual tax number (numerical identification for tax purposes),[107] which some Christians deem as the Antichrist's mark mentioned in the Book of Revelation.[108] The faithful, although not all, are also entitled to exemption from military service on the basis of conscientious objection.[109] Still, this exemption does not cover those who reject the armed service by virtue of his/her philosophical convictions[110] and is limited to only those who formally belong to denominations listed by the government.[111]

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99. Id . art. 73(2).

100. For example, Dr. Lesya Kovalenko, Director of the Institute of Religion and Society, Ukrainian Catholic University. The author shares this doubt.

101. See, e.g., *Svato-Mykhaylivska Parafiya v. Ukraine*: Since religious communities traditionally exist in the form of organized structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference.

Svato-Mykhaylivska Parafiya v. Ukraine (ECtHR), para. 112.

102. Law on Freedom of Conscience, supra n. 53, art. 14(1). This drawback of Ukrainian legislation was pointed out by the PACE report on Ukraine. See supra n. 61).

103. Law on Freedom of Conscience, supra n. 53, art. 20(3).

104. See Land Code of Ukraine № 2768-III (October 25, 2001), art. 92(1) в).

105. Id . art. 22(2) г).

106. See Law on Freedom of Conscience, supra n. 53, art. 4(1)

107. See Law of Ukraine on State Register of Natural Persons –Taxpayers, № 320/94-ВР (22 December 1994), art. 5(2).

108. Cf. Revelation of St. John 13:16–18.

109. See Law of Ukraine on Alternative (Non-Military) Service, № 1975-XII (12 December 1991).

110. Id., art. 2.

111. List approved by Cabinet of Ministers of Ukraine Decree № 2066 (101999), includes 10 denominations.

VIII. STATE FINANCIAL SUPPORT FOR RELIGION

Ukrainian legislation provides for an unequivocal ban on state financial support for religious communities: "The State . . . shall not provide any financial support to the organizations established on the basis of religious distinction."[112] However, central and local governments do restore and even erect temples at public expense. This is a two-fold issue: on the one hand, the Communist government demolished or damaged thousands of religious buildings in Ukraine. Atheism failed as an official state ideology almost simultaneously with the declaration of Ukrainian independence in the early 90s. For the next 20 years, several iconic churches like the Dormition Cathedral of Kyiv Caves Monastery or the temple complex of St. Michael Monastery in Kyiv were restored at public expense. Since both of them, like tens of others, were and are the sites of a national cultural heritage destroyed by the legal predecessor of Ukraine,[113] it was justified to renovate them by public budgetary means. It also seems lawful to maintain heritage-listed religious premises owned by the state (or local communities) and used by religious organizations partly through public expenditure. But it is far more questionable when state-owned companies or establishments have built and maintained new temples without any legal grounds for such spending.[114] Despite the prohibition on direct financial support for religious organizations, the law set forth some tax waivers for religious organizations. They particularly enjoy exemption from corporate tax (subject to their registration as a non-profit organization by the Tax Administration),[115] exemption from the VAT[116] for the selling of some religious articles and services listed by the government,[117] and all donations to the Church are not taxable.[118] However, a donor is allowed to transfer to religious organizations only 2 percent of its profit without paying the corporate tax on the sum of such a donation.[119] Ukrainian legislation allows and even provides for financial support for civic non-profit organization activities.[120] Yet, as it was pointed out above, providing funding for religious organizations is explicitly banned by Ukrainian law, although legislators are able to and often do carry out socially useful projects *pari passu* with civic organizations. And that raises concerns about discriminatory treatment against religious entities in comparison to other non-profit private organizations.[121]

IX. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

Since the legal force of the Decree on Separation of the Church from the State[122] was expanded into Ukraine in 1919, religious acts lost any legal effect.[123]

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112. Law on Freedom of Conscience, supra n. 53, art. 5(4).

113. From a legal standpoint, Ukraine is the legal successor to the former Ukrainian Soviet Socialist Republic, one of the founders of the USSR. See Law of Ukraine on Legal Succession of Ukraine, № 1543-XII (12 September 1991).

114. For example, the Orthodox temple of St. George the Victory-Bearer near Kyiv Central Railroad Station was built at the cost of state monopoly "Ukrainian Railways"; the Orthodox church of St. Nicolas was built within the National University of the State Tax Administration of Ukraine at state budget expense; the Orthodox Church of St. George the Victory-Bearer at the Central Hospital of the Ministry of Internal Affairs of Ukraine was constructed by Ministry means, etc.

115. See Law of Ukraine on Corporate Tax, № 334/94-BP (28 December 1994), art. 7.11.

116. See Law of Ukraine on Value Added Tax, № 168/97-BP (3 April 1997), art. 5.1.14.

117. The list of such articles and services was approved by the Cabinet of Ministers of Ukraine Decree № 1010 (12 September 1997).

118. Law on Freedom of Conscience, supra n. 53, art. 18(6).

119. Law of Ukraine on Corporate Tax, supra n. 115, art. 5.2.2.

120. The Budgetary Code of Ukraine, № 2542-III (June 21, 2001) provides for state financial support for certain kinds of civic organizations or for financing certain categories of state programs realized by them. Id . atarts. 87(9), 87(10). Arrangements for financing concrete programs fall within the competence of the government.

121. The substantially amended edition of the Law on Freedom of Conscience, supra n. 71, drafted originally by the Ministry of Justice of Ukraine in 2006 and later amended by the State Committee of Ukraine for Nationalities and Religious Affairs in 2009, addresses the outlined issue intending to equalize religious organizations with other non-profit private organizations, but it has not been considered by the Parliament yet.

122. Supra n. 48.

123. See Law of Ukraine on Civil Registration Bodies, № 3807-XII (24 December 1993), particularly art. 1.

X. RELIGIOUS EDUCATION

The system of religious education in Ukraine is separated from the secular educational network. The *Law on Education*[124] contains several strict "separating" provisions. The Law firstly emphasizes the secular nature of education and educational establishments in Ukraine[125] and continues: "Educational process in the educational establishments shall be free from political parties', religious or civic organizations' interference."[126] This approach, embedded in the national legislation, has prevented religious organizations from establishing educational units empowered to provide compulsory or higher education recognized by the state. It has also banned universities from setting up theological departments or providing divinity training. Multiple attempts to equalize religious organizations with other private legal persons in the educational field have failed.[127]

On the other hand, religious organizations in Ukraine are entitled to establish so-called "spiritual educational establishments"[128] for training their future clergymen or other professionals for the church's needs. There have been almost 200 religious educational institutions registered hitherto.[129] Their students "enjoy the same rights and benefits concerning postponement of military service, taxation, inclusion period spent for study into work record under the same terms and conditions with students of state educational establishments."[130] Therefore, the problem consists of the absence of a legal effect of education obtained from a religious educational unit[131] and not in obstacles to obtaining such an education. Sometimes churches circumvent legal barriers and create two-in-one institutions registered both as a "spiritual educational establishment" and as a private university;[132] however, such tricks do not solve the very substance of the problem.

Besides professional religious education, ecclesial institutions are free to provide religious classes for adults and minors – subject to respect for religious tolerance and parental rights to bring up and educate children in accordance with the parent's faith and beliefs.[133] For example, Ukrainian schools recently have introduced the Basics of Christian Ethics and similar optional courses[134] aimed to address the moral heritage of Christianity and other religions. Study of those courses might be substituted for the learning of secular ethics at a parent's request.[135]

All teachers in Ukrainian public schools are appointed and paid by local authorities regardless of what courses they teach. To gain a license to operate, private schools are required to employ teachers which meet the standards laid down in the law. Yet "spiritual educational establishments" are completely free in their pedagogical hiring decisions, since as was pointed out above, the Ukrainian state does not recognize religious education and thus does not establish any requirement for it. Both private and religious schools pay teachers from their own resources.

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124. Law of Ukraine on Education, № 1060-XII (13 May 1991), accessible at http://www.cepes.ro/hed/policy/legislation/pdf/Ukraine.pdf (in English).

125. Article 6 stresses "secular nature" as one of the basic principles of education in Ukraine, and Article 9 states that "Educational establishments in Ukraine whatever [their] pattern of ownership are of [a] secular nature unless they are established by religious organizations." Id .

126. Id . art. 8(1).

127. In the course of activity of the Ukrainian Parliament of convocations V and VI, MPs have initiated at least three bills aimed at solving the outlined issue: № 2020 (August 30, 2006), № 3160 (February 12, 2007), and № 2729 (September 2, 2008). All three of them have not even received approval of the relevant Parliamentary Committees and thus have not been referred for Parliamentary consideration.

128. Law on Freedom of Conscience, supra n. 53, art. 11.

129. See, SCU NMRA, supra n. 10.

130. Law on Freedom of Conscience, supra n. 53, art. 11(2).

131. Since secondary education is compulsory in Ukraine, religious education at this level may be only of a supplementary nature. Likewise, Ukrainian law requires a university degree for obtaining certain offices—for example, to become a member of the National Broadcasting Council of Ukraine—and thus prevents individuals who have graduated from religious institutions from holding certain positions.

132. That is the case with the Ukrainian Catholic University in Lviv.

133. Law on Freedom of Conscience, supra n. 53, arts. 3(3), 6(4), 6(5).

134. See Order of the Ministry of Education and Science of Ukraine, № 437 (26 July 2005).

135. Id.. para. 4.

XI. RELIGIOUS SYMBOLS IN PUBLIC PLACES

Generally, there are no restrictions in Ukrainian legislation on the placement of religious symbols in public areas. It could be concluded from the declared secular character of the Ukrainian state that religious symbols are not allowed in or on governmental premises. The opening of an Orthodox chapel in the parliamentary building at the beginning of 2008 raised severe criticism from various political forces. The Parliamentary Committee for Rules of Procedure and Parliamentary Ethics found no legal grounds for the transformation of a parliamentary office into a temple; the Committee issued a decision requiring Parliament staff to take measures returning the reconstructed premises to its original condition and prohibiting the establishment of religious areas in the Ukrainian Parliament hereafter.[136] However, the scandal was hushed up and the "parliamentary chapel" continues in operation at the time of the writing of this report.[137] It is a sound illustration of the gap that exists between the written and factual Constitutions outlined above. Ukrainian legislation also contains several provisions which directly ban non-religious organizations to utilize religious symbols.[138] There are no legislative or factual constraints on individuals carrying or wearing religious symbols or traditional religious garments in Ukraine.

XII. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

Freedom of expression is ensured by Article 34 of the Ukrainian Constitution. However, there are no provisions in Ukrainian legislation or caselaw which may serve as a guideline on how to balance respect for religious feelings and beliefs with freedom of expression. A review of religious tolerance in the Ukrainian mass-media, carried out by the project "Monitoring of Religious Freedom in Ukraine: 2005-2007," does not raise any serious concerns, although some offensive publications were identified and there is a lot of room for legislative improvements in this delicate sphere.[139]

Ukrainian legislation criminalizes some offences against religion. Article 161 of the Criminal Code of Ukraine provides for criminal punishment for infringement of a citizen's equality on the basis of his or her religious beliefs; Article 178 and 179 – for crimes against religious property; Article 180 – for impeding worship. In turn, Article 181 penalizes for infringement of one's health under the pretext of performing a sermon or worship. Some other articles of the Criminal Code regard the presence of religious motives for the commitment of a crime or infringement of religious freedom or equality as an aggravating circumstance.[140]

XIII. CONCLUSION

Ukraine is religiously diverse and tolerant of that diversity. The Ukrainian state declares itself (and predominantly is) secular. Various religious denominations are treated equally *by law*. In practice, however, Orthodoxy (and the Catholic Church of the Eastern Rite in Western Ukraine) enjoys some preferences and governmental support. Even though current legislation in the field of religious freedom and state-church relations is generally not of a discriminatory nature, it requires review and elaboration.

Still, the judicial system in Ukraine is young and highly corrupted; there is no comprehensive caselaw in religion-linked fields. Customs and shady political deals are often substituted for legal regulation and thus influence the church-state relationship more than written provisions. However, due to great religious diversity and the absence of a

136. The decision can be found at: http://www.pravda.com.ua/news/2008/3/7/72815.htm (in Ukrainian).

137. I.e., November, 2009.

138. See Law of Ukraine on Trade Unions, their Rights and Warranties of their Activities, № 1045-XIV (15 September 1999), art. 17(3); Law of Ukraine on Associations of Citizens, № 2460-XII (16 June 1992), art. 18(3).

139. See Taras Antoshevskiy and Lesya Kovalenko, *Monitoring of Religious Freedom in Ukraine: 2005–2007* (Lviv, 2008): 163–67.

140. See Criminal Code of Ukraine, № 2341-III (05 April 2001), arts. 67(3), 110.

dominant institutionalized church, Ukraine remains one of the most successful states on the post-communist era from the standpoint of religious freedom.

ANTHONY BRADNEY

Religion and the Secular State in the United Kingdom

I. THE SOCIAL CONTEXT

The United Kingdom is divided into three separate legal jurisdictions, England and Wales, Scotland (which together with England and Wales constitute Great Britain), and Northern Ireland. When considering the place that religion has in society, it is normal to consider Northern Ireland separately from Great Britain because "Northern Ireland . . . – more like the Irish Republic than mainland Britain – manifests markedly higher levels of religious practice than almost all other European countries." [1]

In 2001, for the first time, the national census included a voluntary question about religious identity in all three jurisdictions. In Northern Ireland, 86 percent of those responding said that they identified with a religion, in England and Wales the percentage was 77 percent while in Scotland it was 67 percent.[2] In each jurisdiction, the vast majority of respondents reported a Christian identity.[3] However, even though these statistics in themselves show a divergence between Northern Ireland and Great Britain, they do not indicate the real degree of difference.

It is clear that the majority of the population of Great Britain have some sense of the numinous.[4] However, for the majority, institutionalized religion has little place in their lives. Voas and Crockett note that by the end of the twentieth century those attending a religious service constituted only one-twelfth of the total population.[5] Gill argues, more generally, that "because people are no longer socialized within churches or Sunday Schools . . . they find Christian beliefs, values and practices strange and implausible."[6] Moreover, for most people in Britain even their own personal religiosity, if it exists, is of little consequence to them.

Nearly twenty years ago, when the level of attendance at a place of religious worship in Great Britain was far higher than it is now, "forty per cent of people questioned in a British Social Attitudes Survey said that their religious beliefs made no difference in their lives."[7] In a 2001 Home Office survey on citizenship in England and Wales, only 20 percent of people questioned listed religion as being important to their sense of self-identity.[8] In Great Britain, most churches report both declining membership and

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1. G. Davie, *Religion in Britain Since 1945* (Oxford: Basil Blackwell, 1994), 14.

2. Religion in the UK, April 2001, http://www.statistics.gov.uk/cci/nugget.asp?id=293.

3. In both England and Wales and Scotland, the next biggest religious group is Islam. The figures for non-Christian groups in Northern Ireland were not broken down, but even taken together constituted a very small percentage of the population. Although Islam is the second largest religion in the United Kingdom, it has little more than 1.5 million adherents. Christianity had over 42 million adherents, whilst over 9 million declared themselves as having no religion. Religion in the UK, April 2001,available at http://www.statistics.gov.uk/cci/nugget.asp?id=293.

4. The place of religion and religiosity in Great Britain is explored in A. Bradney, *Law and Faith in a Sceptical Age* (London: Routledge, 2009), Chap. 1.

5. D. Voas and A. Crockett "Religion in Britain: Neither Believing nor Belonging," *Sociology* 11, no. 39 (2005): 19.

6. Gill, R. "A Response to Steve Bruce's 'Praying Alone'" *Journal of Contemporary Religion* 335, no. 17 (2002): 337.

7. *Social Trends 1996* (London: Her Majesty's Stationery Office, 1996), 225.

8. M. O'Beirne *Religion in England and Wales: Findings from the 2001 Home Office Citizenship Survey: Home Office Research Study 274* (London: Home Office Research and Development and Statistics Directorate,

attendance while religion figures less and less in the important events in individuals' lives.[9]

Northern Ireland presents a different picture. Mitchell, while arguing that the degree of difference between Northern Ireland and Great Britain can be exaggerated, nevertheless notes that the figures for regular attendance at a place of religious worship are considerably higher in Northern Ireland than in Great Britain.[10] More generally, drawing on a range of sources, Mitchell observes that Northern Ireland has "much higher levels of religiosity [than Great Britain] along all indicators."[11] In broad terms, Great Britain is a secularized society where neither religion nor religiosity has much place in the lives of the majority of its citizens; such place as religion does have is usually in the private life of citizens rather than in the public life of British society. By contrast, in Northern Ireland, religion, mainly taking the form of either Catholic or Protestant Christianity, remains a significant factor in both the private lives of individuals and in public life.

II. THEORETICAL AND SCHOLARLY CONTEXT

The relationship between religion and the state in the United Kingdom has, until recently, received comparatively little attention within academic circles. This is now changing, as is illustrated by the creation of the Law and Religion Scholars Network (LARN).[12] Historically, much of the work that was done in this area had little, if anything, by way of an explicit theoretical orientation. Instead, the work has either sought to analyse the doctrinal consistency of law in the area or used international law to assess the merits of domestic law.[13] Notions such as neutrality and toleration have been important in both case law and commentary.[14] These ideas relate to liberal philosophy that has a wider significance in the analysis of constitutional structures in the United Kingdom. The value of liberalism in analyzing the proper relationship between religions and the state in the United Kingdom has received more direct treatment in recent work.[15]

III. CONSTITUTIONAL CONTEXT

Analysis of the constitutional position of religion within the United Kingdom is complicated by the unwritten nature of the United Kingdom constitution. There is no foundational constitutional code. Identifying which legislation, case law, or conventions might be thought to have constitutional status is, in itself, fraught with difficulty. Historically, the protection of religious belief and practice has been dealt with in a piecemeal fashion. However, the passage of the Human Rights Act 1998, which incorporates most of the Convention Rights in the European Convention on Human Rights, including Article 9 which protects freedom of conscience and religion, into domestic law may be argued to give constitutional protection to freedom of religion.

2004) 18. There are important variations in this when considering different ethnic groups and different faith groups (see further Ibid., 19–20).

9. Thus, for example, provisional figures from the Church of England for 2006 show a drop in attendance from 2005 and also a drop in baptisms, confirmations, marriages, and funerals (Statistics for Mission 2006, http://www.cofe.anglican.org/info/statistics/2006provisionalattendance.pdf).

10. C. Mitchell, "Is Northern Ireland Abnormal?: An Extension of the Sociological Debate on Northern Ireland," *Sociology* 237, no. 38 (2004): 241. Mitchell notes that there has been a slight drop in overall attendance in Northern Ireland, but the drop is not so marked as is the case in Great Britain (Ibid.).

11. Mitchell, "Is Northern Ireland Abnormal," 243.

12. The Network is coordinated by the Centre for Law and Religion in Cardiff Law School at Cardiff University. For an examination of the history of work in this area in the United Kingdom see A. Bradney. "Politics and Sociology: New Research Agendas for the Study of Law and Religion" *Law and Religion*, eds. R. O'Dair and A. Lewis, (Oxford: Oxford University Press, 2001), 65.

13. See, for example, S. Poulter, *Ethnicity, Law and Human Rights* (Oxford: Clarendon Press, 1998).

14. See, for example, Scrutton LJ's observation that "[i]t is, I hope, unnecessary to say that the Court is perfectly neutral in matters of religion" (*Re Carroll* [1931] 1 K.B. 317 at 336) and J. Rivers, "From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom Human Rights Act," *Law and Religion*, ed. R. Ahdar (Akdershot: Ashgate, 2000).

15. See, for example, R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005) and Bradney, "Politics and Sociology."

Two churches within the United Kingdom are generally thought to be established churches, the Church of Scotland in Scotland and the Church of England in England.[16] Establishment in both cases means that the constitutional position of the church is somewhat different to the position of other religions in the United Kingdom. How significant that fact is, however, has long been a matter of debate. Writing in 1920, Holdsworth argued that

[i]t is true that there is still an Established Church, that the King is still its supreme head and defender of the faith; that its law is still the King's ecclesiastical law, and an integral part of the law of England. But, like many other parts of the law and constitution of England, these are survivals of an older order, from which all real meaning has departed . . . .[17]

Writing more recently, Bogdanor argues that "[t]he history of the relationship between the Church of England and the State . . . is one of progressive attenuation. From having been a virtual department of the state, the Church, has become almost, although not quite, one amongst many denominations . . . ."[18]

However not all commentators take this view, Mortensen suggesting, for example, that "in England and Scotland, Christianity is the national religion because the established churches are enmeshed in the culture, helped to create it, continue to play a role in defining it and are recognized, even by non-adherents, as being conservators of folkways."[19]

It is certainly true that the Church of England continues to enjoy certain privileges as compared with other religions in England. Two of its Archbishops and twenty four of its bishops sit in the House of Lords, one of the two legislative chambers in the United Kingdom. The legal manner in which the Church of England holds real property is unique to it.[20] Moreover, it sometimes attracts new legal privileges. The standing advisory councils on religious education, first created by the Education Reform Act 1988, now provided for by the Education Act 1996, must, in England, have representatives from the Church of England on them.[21] This is separate from the provision that councils must have representatives on them that reflect the principal religious traditions in an area.[22] Equally, establishment continues to mean that the state has a role in the Church of England that it does not have in other churches. The appointment of bishops is still part of the royal prerogative, exercised in practice on the advice of the Prime Minister.[23] Although the United Kingdom parliament gave the Church of England power to pass Measures, legislative acts of the Church, this is subject both to the fact that Parliament could revoke that power and the necessity for any individual Measure passed by the Church to receive the approval of Parliament.

However, legal incidents of establishment, such as these, do not capture the full nature of establishment. Olgivie has argued that establishment "is first and foremost a political word . . . most frequently [used] by church leaders in dealing with state authorities."[24] Seeing establishment as a political matter, Chandler suggests that by the middle of the 20th century, for the Church of England, "[t]he essence of establishment lay not in its [largely legal] formalities, but in its manners, its informal respects and courtesies."[25] What is in question now is the degree to which these "manners, respects and

16. The Welsh Church Act 1914 disestablished the Church of England in Wales. The Irish Church Act 1869 disestablished the Church of Ireland in what was then Ireland. For a more detailed analysis of the current state of establishment in the United Kingdom see Bradney, "Law and Faith in a Sceptical Age," Chap. 3.

17. W. Holdsworth, "The State and Religious Nonconformity: An Historical Retrospect," *Law Quarterly Review* 339, no. 36 (1920): 340.

18. V. Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995), 228.

19. R. Moretensen, "Art, Expression and the Offended Believer," *Law and Religion*, ed. R. Ahdar (Aldershot: Ashgate, 2000), 512.

20. N. Doe, *The Legal Framework of the Church of England* (Oxford: Clarendon Press, 1996), Chap. 15.

21. Education Act 1996, s.390 (4)(b).

22. Education Act 1996, s.390 (4)(a).

23. M. Hill, *Ecclesiastical Law* (Oxford: Oxford University Press, 2001), 113.

24. M. Ogilvie, "What is a Church by Law established?" *Osgood Hall Law Journal* 179, no. 28 (1990): 196.

25. A. Chandler, "The Church of England and the Obliteration Bombing of Germany in the Second World

courtesies" remain. If the contemporary Church "has in general, attempted to practice the traditional formula about political involvement: that the Church has the duty to define general principles within which human society may be ordered," while individual applications are "best left to the expertise of political leaders," others have argued that there has been a "creeping disestablishment" with a distancing between Church and state.[26] "When the 1984 Conservative party conference ... gave a standing ovation to a turbaned Indian elder who delivered a ferocious attack on the established Church, it said something definitive about the way Church-state relations were changing."[27]

It is also the case that the legal incidents of establishment are beginning to diminish in the case of the Church of England. In 2008, the Criminal Justice and Immigration Act abolished the centuries-old common law offence that had given special protection to the beliefs of the Church of England.[28]

Establishment in the case of the Church of Scotland has always meant something different from the relationship that the Church of England has enjoyed with the state. The monarch, for example, is the head of the Church of England but not the Church of Scotland, and blasphemy had, it seems, ceased to be a criminal offence in Scotland long before it was abolished in England and Wales.[29] In Scotland, as in England, establishment has always been more about the role that the Church has had in national life than legal niceties. Historically, it has been true to say that the Church of Scotland "likes to think of itself as the 'voice of Scotland'" and that "[t]he three historic Scottish institutions of the Church, education, and law are to a large extent the basis of the national identity of Scotland."[30] However, in the present day, there is no clear evidence that the Church of Scotland's pronouncements, anymore than those of the Church of England, have special weight in the eyes of either the general public or those in political life. Indeed, given the religious context noted above, it seems unlikely that either Church has particular support in the eyes of the population at large.

IV. LEGAL CONTEXT

Until the introduction of the Human Rights Act 1998, there was no general protection for religious belief under United Kingdom law. However protection did exist in specific instances. For example, in England and Wales, teachers in schools that do not have a specific religious character have for many decades received protection with respect to their religious opinions and beliefs.[31] Equally, specific groups of believers have sometimes received protection. For example, Sikhs are exempt from legislation requiring the wearing of crash-helmets while riding a motor-cycle.[32] The practice of providing specific protection in particular instances goes back at least as far as Lord Hardwicke's Act 1735, which exempted Quakers and Jews from the requirement to marry in a Church of England church.

In principle, the implementation of the Human Rights Act 1998 has radically changed the legal landscape with respect to protecting religious belief and opinion in the United Kingdom. For the first time, there is general protection for religious belief before the domestic courts.[33] How significant this is in practice is not yet clear. Academic opinion is

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War," *English Historical Review* 920, no. CCCCXXIX (1993): 921.

26. E. Norman, *Church and Society in England 1770-1970: A Historical Study* (Oxford: Clarendon Press, 1991), 457; K. Medhurst, "Reflections on the Church of England and Politics at a Moment of Transition," *Parliamentary Affairs* 240, no. 52 (1991): 256.

27. H. Young, *One of Us* (London: Macmillan London, 1991), 425.

28. Criminal Justice and Immigration Act 2008, s.79; *Gathercole's Case* (1838) "Lewin" 237.

29. G. Gordon, *The Criminal Law of Scotland* (Edinburgh: W. Green, 1978), 998.

30. J. Kellas, *The Scottish Political System* (Cambridge: Cambridge University Press, 1989), 78, 185.

31. Education Act 1944, s.30. Current protection is found in School Standards and Framework Act 1998, s.59.

32. This was originally provided for in the Motor-Cycle Crash-Helmets (Religious Exemption) Act 1976. The exemption is now found in Road Traffic Act 1988, s.16 (2).

33. United Kingdom citizens have been able to take cases under Article 9 to the European Court of Human Rights since 1966. However the decisions of the European Court are not binding under domestic law on the

divided on whether or not the advent of the Act and the new powers given to judges under the Act to interpret legislation so as to ensure that it is compatible with respecting people's Convention rights have in fact resulted in an improvement in the protection of civil liberties.[34] Although Leigh has argued that the Act is having an "accelerating impact upon religious liberty claims[,]" the litigants were unsuccessful in the end in the majority of the cases that he focuses on.[35] It is certainly the case that the Act has given litigants access to arguments that were previously not open to them; but, it is not clear how far that access will result in substantial improvements in their position.

V. THE STATE AND RELIGIOUS AUTONOMY

The degree of autonomy that religions enjoy in the United Kingdom is dependant in the first instance on whether they are established or not. In form, at least, the state continues to have a substantial degree of control over the Church of England. As noted above, its legislative acts, Measures, have to be agreed upon by Parliament and appointment of its bishops is a matter for the Royal Prerogative. However, this formal control does not reflect the Church's actual position. Measures are rarely rejected. In 2007, a change to the system of appointing Bishops was proposed by the Government whereby the Crown Nomination Commission, a body comprised of representatives of the Church of England, would forward only one nomination to the Prime Minister rather than two as in the past.[36] In *Aston Cantlow Parochial Church Council v. Wallbank*, Lord Nicolls observed that the Church of England "still has special links with central government. But the Church of England remains essentially a religious organisation."[37] In this contemporary context, one commentator has written of the "emergent autonomy of the Church of England."[38] It would seem that the Church of England is currently acquiring greater autonomy from the state with respect to its own affairs.

The other established church in the United Kingdom, the Church of Scotland, has long enjoyed autonomy from the state. Article IV of the Schedule to the Church of Scotland Act 1921 gives the Church "the right and the power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government and discipline in the Church . . . ." "[T]he Scottish Kirk is an example of a thing rare, if not unique, in Christendom, a Church that is both established and free."[39]

Religions that are not established churches enjoy full autonomy from the state. They may choose to engage in activities that require registration. For example, if they meet the appropriate legal tests, religious organisations may choose to become charitable trusts and therefore have to register with the Charity Commission.[40] However, there is no general requirement for religions to register with the state.

VI. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

The United Kingdom government keeps no record of the religious affiliation of individuals. In 2001, for the first time, questions on religious affiliation were included in the ten-yearly Census survey in all parts of the United Kingdom.[41] Answering these

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United Kingdom government although, in practice, the government has accepted them.

34. For an argument that the Human Rights Act has failed in this respect see, for example, K. Ewing, "The Futility of the Human Rights Act," *Public Law* 829 (2004) and K. Ewing and J. Tham "The Continuing Futility of the Human Rights Act," *Public Law* 668 (2008). For a response to this see A. Kavanagh, "Judging the Judges under the Human Rights Act: Deference, Disillusionment and the 'War on Terror,'" *Public Law* 287 (2009).

35. I. Leigh, "Recent Developments in Religious Liberty," *Ecclesiastical Law Journal* 65, no. 11 (2009): 65.

36. The Governance of Britain, 2007, Cm.7170 at p. 26.

37. [2004] 1 A.C. 546 at p. 555.

38. M. Hill, "Editorial," *Ecclesiastical Law Journal* 1, no. 9 (2007): 2.

39. T. Taylor, "Church and State in Scotland," *Juridical Review* 121 (1957): 137.

40. Charities Act 1993 s.3A. The 1993 Act applies to England and Wales. Similar legislation applies in Scotland and Northern Ireland. See, for example, the Charities and Trustee Investment (Scotland) Act 2005.

41. A question on religious affiliation had been included in the Census for Northern Ireland in 1991. The precise questions asked in 2001 varied between Scotland, Northern Ireland, and England and Wales. For an analysis of the different questions see P. Weller, "Identity, Politics, and the Future(s) of Religion in the UK: The

questions, unlike the other questions on the survey, was voluntary.

In some instances, religious affiliation does lead to an individual being treated differently under state law. For example, there are special regulations for both Jews and Muslims relating to the slaughter of animals that allow animals to be slaughtered in a manner that complies with the religious requirements of those two groups.[42] The practice of providing special arrangements for religious groups continues to be part of the developing law in the United Kingdom. This is illustrated by the creation of "alternative finance investment bonds" in the 2007 Finance Act.[43] These bonds are part of the Government's strategy "to promote the City of London as a centre for global Islamic finance", allowing for sharia-compliant forms of lending.[44] These special arrangements and exemptions found in the law, while accommodating religious differences, can appear to be capricious or even discriminatory. For example, the exemption from legislation requiring motor-cyclists to wear crash-helmets applies to Sikhs but not to Rastafarians despite the fact that for both groups the religious obligations for males regarding hair make wearing such helmets a physical impossibility.[45] Equally, special provisions may be made for a religion on some occasions but not others. The special arrangements now made for Islamic finance are not mirrored in legislation limiting trading on what, for most Christians, is the Sabbath. Jews who wish to observe the Jewish Sabbath are exempt from this legislation.[46] No such similar exemption has been granted to Muslims.[47]

Following the passage of the Human Rights Act 1998, when a Government minister puts a Bill before either one of the Houses of Parliament, they must publish a statement of compatibility, stating that the provisions of the Bill are compatible with Convention rights, including Article 9.[48] However, no government department is specifically charged with considering whether or not special provisions need to be made for religious groups in legislation. This means that, given the wide range of religious practices that are now found in the United Kingdom, it is possible for new legislation to inadvertently raise problems for religion, even when proposals are seemingly innocuous. An illustration of this is found in the suggestion that charities would, in certain situations, be required to pass particular resolutions following a vote. This caused a problem for British Quakers who, as a matter of principle, do not vote in their Meetings. As a result, the possibility of a resolution passed "by a decision taken without a vote and without any expression of dissent in response to the question put to a meeting" had to be introduced into the legislation.[49]

VII. State Financial Support for Religion

There is no proscription on the state supporting either religions in general or a particular religion. However, notwithstanding the existence of established churches within the United Kingdom, the financial support that religions receive from the state primarily takes an indirect form. For example, those religions that register as charities will receive certain privileges because of this. Charitable gifts do not normally have to have a specific

Case of The Religion Questions in the 2001 Decennial Census," *Journal of Contemporary Religion* 3, no. 19 (2004): 6–9.

42. For Great Britain, see the Welfare of Animals (Slaughter or Killing) Regulations 1995. For Northern Ireland, see the Welfare of Animals (Slaughter or Killing) Regulations (Northern Ireland) 1996.

43. Finance Act 2007, s.53. This legislation has subsequently been amended by paras 2, 3, 6, 8, 10, 12 and 14, Finance Act 2009, s.61. This follows on from an amendment in 2003 so as to ensure that Islamic mortgages did not have to pay double-stamp duty (Finance Act 2003, s.73).

44. Budget 2008: Stability and opportunity: building a strong, sustainable future, 2008 HC 368 at p. 46.

45. Road Traffic Act 1988, s.16 (s).

46. Sunday Trading Act 1994, s.8.

47. Such an exemption was recommended by the Crathorne Committee in 1964 when it looked at the legislation relating to Sunday which was then in force, the Shops Act 1950 (Report of the Departmental Committee on the Law of Sunday Observance, 1964, Cmnd. 2528 para. 201).

48. Human Rights Act 1998, s.19 (1). In the alternative, the Minister can say that they are unable to issue such a statement but nevertheless wish the House to proceed with consideration of the Bill (Human Rights Act 1998, s.19 (s)).

49. Charities Act 1993, s.74D (4)(b). See further F. Cranmer, "Quaker governance and charities legislation," *Ecclesiastical Law Journal* 202, no. 9 (2007): 205.

human beneficiary and, contrary to usual practice, charitable gifts may be made in perpetuity.[50] Moreover, charities are also exempt from certain taxes.[51]

The advantages that accrue to charities make the question of which religions can register as a charity particularly important. Historically in England and Wales, the advancement of religion was one of the four heads of charity with there being a rebuttable presumption that a religion was for the public benefit, this being one of the requirements for any body that wished to register as a charity.[52] Case law provided no clear definition of religion but appeared to require a theistic element to the belief system in question or some belief in a god, taken to be a supernatural or supreme being. Faith and worship also seemed to be a necessity.[53] The Charities Act 2006 has changed this situation, although the full extent of the change is, as yet, unclear. Under s. 2(2)(c) "the advancement of religion" is now a charitable purpose as is "the promotion of religious or racial harmony or equality and diversity" under s. 2(2)(h). Section 2(3)(a) states that the term religion includes "(i) a religion which involves belief in more than one god, and (ii) a religion which does not involve belief in a god."

It is still necessary for a charity to show that it is for the public benefit for it to be registered. However, there is no longer a presumption that a religion is for the public benefit.[54] In debate on the legislation, Edward Miliband, speaking for the Government, argued that the new statutory definition of religion did not fundamentally change the position found in the common law. Others, however, saw the provision as being intended to change the old test.[55] Equally, concern has been expressed about the need for a religion to demonstrate that it is for the public benefit, especially if that is to be assessed in the light of prevailing attitudes towards religion in the United Kingdom.[56] Even prior to the new, possibly more onerous, requirements under the Charities Act 2006, the notion of public benefit has caused difficulties for some religions wishing to register as charities. In 1999 the Charity Commission rejected an application for charitable status by the Church of Scientology, both on the ground that the Church did not engage in acts of worship and on the ground that its activities were not conducive to the public benefit.[57]

Religions can also receive financial support from the state for their schools. In some instances, this support will be indirect. Religions are free to set up their own schools and those schools may be registered as a charity.[58] These schools will then have the same fiscal advantages that religious charities have. However, the state also offers direct financial support for some religious schools. Religions, primarily Christian religions, were responsible for setting up many of the schools found in the United Kingdom in the nineteenth century. However, in the twentieth century these religions increasingly had difficulty in providing the necessary financial support for the schools that they

50. *Chamberlayne v. Brockett* [1872] L.R. 8 Ch. App. 206.

51. See further J. Martin, *Hanbury and Martin: Modern Equity* (London: Sweet and Maxwell, 2009), 421–422.

52. *IRC v. Pemsel* [1891] A.C. 531 at p. 583. This decision in turn drew on the preamble to the Charitable Uses Act 1601.

53. *Re South Place Ethical Society* [1980] 1 W.L.R. 1565 at p. 1573.

54. Charities Act 2006, s.3 (2).

55. Edward Miliband, Standing Committee debates, 4 July 2006, Col. 22; Andrew Turner, Standing Committee debates, 4 July 2006, Col .13.

56. See, for example, the Lord Bishop of Southwell Hansard, House of Lords, 20 January 2005. Vol. 668 Cols. 896-897 and Andrew Turner Hansard, House of Commons, 25 October 2006, Vol. 450 Cols. 1584-1585.

57. Decision of The Charity Commissioners for England and Wales, 17 November 1999, http://www.charity-commission.gov.uk/.

58. In England and Wales the advancement of education is a charitable purpose under s. 2(2)(b) of the Charities Act 2006. There are minimum legal standards that independent schools, whether religious or not, must meet and such schools have to be registered and are subject to inspection. The Education Act 2005 applies in England and Wales whilst schools are registered and inspected in Scotland under s. 98A and s. 66 of the Education (Scotland) Act 1980. Only 18 independent schools are registered in Northern Ireland though, from their names, 8 of these are religious in character (http://www.deni.gov.uk/sitemap.htm).. The current standards for schools in England are set out in the Education (Independent School Standards) (England) Regulations 2003 (SI 2003/1910). These standards have proved problematic for schools serving some religious communities. See further A. Bradney, "The Inspection of Ultra-Orthodox Jewish Schools: 'The Audit Society' and 'The Society of Scholars'," *Child and Family Law Quarterly* 133, no. 21 (2009).

established. In many instances, the state then took over all or part of that responsibility. The precise arrangements for state support for religious schools have varied between jurisdictions in the United Kingdom. In Scotland, the Education (Scotland) Act 1918 gave the churches the right to transfer schools into the state sector, the state taking over full financial responsibility for the school but the churches continuing to have the right to scrutinise the religious convictions of prospective teachers and ensure that religious instruction and observance in the school remain the same as it had been before transfer.

The Education Act 1944 created similar, if more limited provisions, for England and Wales. The Act also created a system of voluntary-aided schools that received partial state funding while remaining under denominational control.[59] In Northern Ireland the Education Act (Northern Ireland) 1923 created a system of voluntary schools and "four and two" schools with the latter having a higher level of state subsidy. However, it was not until 1968 that an amended form of these schools was accepted by the Catholic Church.[60] Present arrangements in these three jurisdictions are based on these original foundations. Given the religious history of the United Kingdom, it is not surprising that the religious schools that the state has chosen to directly finance have, in the main, been Christian in character. Historically a small number of Jewish schools have received state funding.[61] However, more recently the religious landscape of state-funded religious schools has widened with a small number of Muslim and Sikh schools receiving funding.[62]

VIII. Civil Legal Effects of Religious Acts

People are free to enter into religious marriages within the United Kingdom. However, in most instances, no legal consequence will flow from such a marriage.[63] In order for a marriage to be recognized by the state, it must comply with statute. Different statutory regimes are in force in the various jurisdictions of the United Kingdom. In some instances special arrangements exist in statute to facilitate religions being able to conduct marriage ceremonies that are both in accord with the rites of the religion and the requirements of the state. In England and Wales, for example, special provisions are in place for the Church of England, Jews, and Quakers.[64]

The change in the religious landscape of the United Kingdom has meant that an increasing number of religions seek to conduct marriage ceremonies that will be recognized by the state. Thus, for example, in 2008 152 mosques were registered as both places for public worship and places for the celebration of marriage.[65] However, not all religions will find it easy to meet the legal tests that must be passed if their place of

59. Education Act 1944, s.15 (2). The Act also provide for voluntary-controlled schools that received full state funding but where denominational control was very much reduced.

60. A. Smith, "Religious Segregation and the Emergence of Integrated Schools in Northern Ireland," *Oxford Review of Education* 559, no. 27 (2001): 561–563; T. Gallagher, "Faith Schools and Northern Ireland: A Review of Research," *Faith School: Consensus or Conflict?,* eds. J. Cairns and D. Lawton (Abingdon: RoutledgeFalmer, 2005), 159–160.

61. Jewish schools have existed in the United Kingdom for several centuries. Cohen suggests that the first Talmud Torah school was set up in 1770 and that the first "modern Jewish school," teaching both secular and religious subjects, was set up in 1811 (I. Cohen, *Contemporary Jewry: A Survey of Social, Cultural, Economic and Political Conditions* (London: Methuen, 1950), 53). Limited state funding was first given to Jewish schools in 1853 (G. Alderman, *London Jewry and London Politics: 1889–1986* (London: Routledge, 1989), 19). Some Jewish schools have been voluntary-aided schools, thus receiving state support, since the inception of the Education Act 1944.

62. Funding has also been extended to a rather wider range of Christian groups.

63. *R v. Bham [*1966] 1 Q.B. 159.

64. Marriage Act 1949, Part II, s.26 (1)(d) and s.47.

65. Hansard, House of Commons, 29 February 2008, Col 1985w). In Scotland Thomson argues that "[n]on-Christian religions, such as Moslems or Hindus are clearly included" in the provisions that allow religious bodies to nominate celebrants of marriage for official purposes (Thomson, J. Family Law in Scotland London:Butterworths/Law Society of Scotland, 1987 at p 11). See further Marriage (Scotland) Act 1977, ss.9-16. Ministers, clergymen, pastors, or priests of a prescribed religion are automatically authorised celebrants (Marriage (Scotland) Act 1977, s.8 (1)(a)(ii)). The only non-Christian religion which has been prescribed to date is "The Hebrew Congregation" (Marriage (Prescription of Religious Bodies) (Scotland) Regulations 1977, Sched. 1 para. 1).

worship is to be registered as a place of *public* worship, a prerequisite to being registered as a place for the solemnization of marriage. In *Church of Jesus-Christ of Latter-day Saints v. Henning: Valuation Officer* the courts held that a Mormon Temple is not a place of public worship because permission from a Mormon bishop is necessary before a person could worship there.[66]

The courts of the Church of England and the Church of Scotland are, because of their status as established churches, part of the state system of courts. Their jurisdiction is, however, extremely limited.[67] With these two exceptions, state courts in the United Kingdom do not recognise the validity of judgments of religious courts although the courts will sometimes acknowledge the existence of religious legal systems within the United Kingdom as being part of the facts of a case before it.[68] However, the Beth Din, while deciding cases before it on the basis of Jewish law, has for some time ensured that its hearings comply with the Arbitration Act 1996, thus meaning that its decisions are enforceable within the state courts. The Muslim Arbitration Tribunal has recently announced that it will do the same thing.[69] Very little is known about the practices of either body.

IX. RELIGIOUS EDUCATION

As has already been noted, religious groups are free to set up their own schools and these may, in some circumstances, be supported financially by the state. In England and Wales, religious education forms part of the core curriculum that must be provided in state schools.[70] That education must be taught according to an agreed syllabus that must, in the words of the statute, reflect "the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practices of the other principal religious represented in Great Britain."[71] These provisions originally formed part of the Education Reform Act 1988 and were introduced to "secure the centrality of Christian education in religious education."[72] However, in assessing the impact of these reforms, account has to be taken for provisions which allow pupils to be withdrawn from these lessons, the lack of clarity as to precisely what the provisions require, and the fact that the provisions were opposed by many of the teachers who are expected to implement them.[73] The 1988 Act also introduced to reforms to ensure that the compulsory act of worship required in state schools by the Education Act 1944 be of a "wholly or mainly of a broadly Christian character."[74] Once again, there are provisions which allow for pupils to be withdrawn from these acts of worship; yet, these provisions are unclear as to the exact requirements and they run counter to what many in the teaching profession regard as being appropriate.[75]

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66. [1964] A.C. 420. This decision was recently affirmed by the House of Lords in *Gallagher v. Church of Jesus Christ of Latter-Day Saints* [2006] E.W.C.A. Civ. 1598. The Exclusive Brethren have faced similar problems (*Broxtowe Borough Council v. Birch* [1983] 1 W.L.R. 314).

67. On the courts of the Church of England see N. Doe, *The Legal Framework of the Church of England: A Critical Study in a Comparative Context* (Oxford: Clarendon Press, 1996), Chap. 5. On the courts of the Church of Scotland see Church of Scotland Courts Act 1863.

68. See, for example, *MacCaba v. Lichenstein* [2004] E.W.H.C. 1580.

69. Available at http://www.matribunal.com/cases_commercial.html.

70. Education Act 2002, ss.80, 100, and 101. Private schools do not have to comply with these requirements.

71. Education Act 1996, s.375 (3). The statutory provisions for religious education and worship in Scotland are not a specific as to the Christian character of the worship and education (Education (Scotland) Act 1980, ss. 8-9). On the Scottish Executive's approach to these matters see Provision of Religious Observance in Scottish Schools Circular, 1/2005. However the Revised Core Syllabus for Religious Education which applies in Northern Ireland is almost exclusively Christian in character making only a limited reference to other religions in the latter stages of the curriculum (http://www.deni.gov.uk/re_core_syllabus_pdf.pdf.

72. Bishop of London, House of Lords, Hansard, 2 June 1988, Vol, 498 col. 638.

73. School Standards and Framework Act 1998, s.71 (1). On the attitudes of teachers to the provisions see further A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 64–65 and Bradney, "Law and Faith in a Sceptical Age," 124–130.

74. School Standards and Framework Act 1998, sched. 20, para. 3.

75. School Standards and Framework Act 1998, s.71 (1A). In *R. v. Secretary of State for Education ex parte R. and D.* [1994] E.L.R. 495 at p. 502 the courts held that worship which "reflected Christian sentiments"

X. Religious Symbols in Public Places

There is no general prohibition on the wearing of religious symbols in public places in the United Kingdom. However, employers, schools and others may choose to regulate this matter themselves. In doing so, they must do so in a manner which complies with relevant legislation. In *R (on the application of Begum) v. Head Teacher and Governors of Denbigh High School* [2007] 1 A.C. 100, Begum's contention that a school uniform policy that forbade her to a wear a hijab breached her Article 9 rights, protected by the Human Rights Act 1998, was rejected on the grounds that, inter alia, she could have chosen to attend a school that did permit the wearing of the hijab and that the school's uniform policy was a proportionate to it achieving its educational purposes. Similarly, in *R. (on the application of Playfoot) v. Millais School Governing Body* [2007] HRLR 34, a claim that refusing to allow a pupil to wear a "purity ring" breached her convention rights was rejected on the grounds that there were other ways in which she could manifest her religious beliefs and that the uniform policy fostered school identity.

In *Eweida v. British Airports plc* [2008] UKEAT 0123_08_2011, Eweida's argument that an order to conceal a cross that she wished to wear amounted to indirect discrimination under the Employment Equality (Religion or Belief) Regulations 2003 was rejected on the grounds that her belief concealing the cross was wrong was a personal belief not shared by others.

XI. Freedom of Religion and Offenses against Religion

As noted above, the common law offense of blasphemy which applied in England and Wales was abolished by §79 of the Criminal Justice and Immigration Act 2008. The last successful prosecution for blasphemy in England and Wales was in 1979 in *Whitehouse v. Lemon* (1979) 2 W.L.R. 281. Unsuccessful attempts to prosecute were made in 1990 in *R. v. Chief Metropolitan Magistrate ex parte Choudhury* [1991] 1 All E.R. 306 and in 2007 in *R. (on the application of Stephen Green) v. The City of Westminster Magistrates Court* [2008] HRLR 12. The last reported prosecution for blasphemy in Scotland was in 1843 in *Henry v. Robinson* (1843) 1 Brown 643. Blasphemy was part of the common law of Ireland.[76] However, it appears to have protected the beliefs of the Church of Ireland and therefore may not have survived the disestablishment of that church by the Irish Church Act 1869. There was no reported prosecution for blasphemy in Ireland after 1855, and there has been no reported case in Northern Ireland.

The Prevention of Incitement to Hatred (Northern Ireland) Act 1970 made incitement to religious hatred a criminal offense in Northern Ireland.[77] The Racial and religious Hatred Act 2006 amended the Public Order Act 1986 making it an offense to use threatening words or behaviour, or display any written material that is threatening, if a person intends thereby to stir up religious hatred.[78] The offense is generally applicable to all religions and, since "religious hatred" is defined in the Act as hatred of a group of people defined by religious belief or lack of religious belief, to those with no religious beliefs.[79] However s. 29J of the Act says "nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system."

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complied with the 1988 Act even if "[t]here was nothing in them which was explicitly Christian." On the attitudes of teachers see Bradney, "Law and Faith in a Sceptical Age."

76. *AG v. Drummond* (1842) I Or and War 353.

77. By 1998, there had only been two prosecutions under the Act; one successful, the other unsuccessful (C. White, "Law, Policing and the Criminal Justice System," *Divided Society: Ethnic Minorities and racism in Northern Ireland*, ed. P. Hainsworth (London: Pluto Press), 78).

78. Public Order Act 1986, s.29B (1).

79. Public Order Act 1986, s. 29A.

Commentators have noted that a number of other specific or general criminal offenses existed prior to the 2006 Act that could be used where expressions of religious prejudice gave rise to public order problems.[80] Given these offenses and given the very wide scope of s. 29J, it is not entirely clear what form of behaviour is now a criminal offense that was not a criminal offense before the Act. The new legislation, however, does not apply to Scotland. Here legislation allowing the courts to take account of the fact that an offence is aggravated by religious prejudice is seen as being sufficient.[81]

80. See, for example, K. Goodall. "Incitement to Religious Hatred: All Talk and No Substance?" *Modern Law Review* 89, no. 70 (2007).

81. Criminal Justice (Scotland) Act 2003, s.74 (3).

CATHERINE M.A. McCAULIFF

Religion and the Secular State†

"Congress shall make no law respecting an establishment of religion . . . or prohibiting the free exercise thereof." So provide the religion clauses of the First Amendment to the United States Constitution, referenced as the establishment clause and the free exercise clause. Their wording has remained unaltered since 1791, and their stable phraseology belies the sometimes turbulent changes in political and social attitude toward religion in this secular state. For at least forty years after the Bill of Rights amended the Constitution, it was clear to all concerned that the religion clauses prevented the United States Congress from interfering with the States' provisions regarding religion, including the establishment of a State-supported church. Massachusetts, for example, did not repeal its establishment until 1833.[1]

I. The Twentieth-Century Longing for Separation of Church and State

The notion of separation of church and state was not mentioned in the United States Constitution. Nevertheless, during the first half of the 20th century, separation became quite popular, most especially with secularists but also with members of some Christian denominations. In some instances, separationists did not like the stance of other Christian denominations.[2] The dislike of other denominations in some instances also extended to political perceptions about the other denominations and their adherents. This resulted in prejudice, particularly against Jews and Roman Catholics.[3] Masons had shown the way by "adopting eclectic rituals drawn from religions across the globe and throughout human history . . . [so that they] denied the distinctiveness of any particular religion."[4] Various Baptists, Jews, atheists and Masons were eventually joined by the Ku Klux Klan which was the most successful organization to popularize the notion of separation of church and state as a fundamental constitutional right. The Revised Klan during the years, between 1921 and 1926, "exerted profound political power in states across the country and, probably more than any other national group in the first half of the century, drew Americans to the principle of separation."[5]

The Klan made it seem that the founding fathers of the American Republic had provided for the separation of church and state, which, in fact, would have been impossible while there were still State-established churches.[6] Klan members believed that

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1. Michael S. Ariens & Robert A. Destro, *Religious Liberty in a Pluralistic Society* 48-53 (2d ed. 2002) (citing Jacob C. Meyer, *Church and State in Massachusetts from 1740 to 1833* (1930) to the effect that the 11th amendment of the Massachusetts State constitution abolished the right to tax for public worship).

2. Philip Hamburger, *Separation of Church and State* 400 (2002) (quoting from a Puritan descendant and advocate of separation of church and state, William M. Grosvenor, "[b]efore it is too late and the hordes of Europe and Asia have engulfed us, let us arise and fight, not with dreadnoughts, but for Puritan Ideals and Puritan morals, for Anglo-Saxon freedom and Anglo-Saxon discipline, for Almighty God. ...").

3. Id. at 401-402 (listing some articles in one anti-Catholic newspaper, the *Menace*, including "The Mother of Harlots and Her Children," "The Rape of Civic Honor – Americanism Betrayed," "Rome the Rum Dealer," and "Alice –The Cincinnati Convent Slave!" and stating its support for separation of church and state in political campaigns). Jews often advocated separation of church and state. Gregg Ivers, *To Build a Wall: American Jews and the Separation of Church and State* (1995).

4. Hamburger, supra n. 2, at 397.

5. Id. at 407.

6. Id. at 409 (quoting from the Klan member's oath of allegiance to protect "the sacred constitutional rights – and privileges of – . . . separation of church and state – liberty – white supremacy – just laws – and the pursuit of

attendance at public schools should be compulsory, sharing the assumptions of liberal intellectuals about parochial schools.[7] Therefore, it is not surprising that *Everson* – the first case construing the Establishment Clause of the First Amendment – concerned at least indirectly parochial-school education and opined that the "wall [of separation] between church and state . . . must be kept high and impregnable. We [the Supreme Court] could not approve the slightest breach."[8] The author of the opinion in *Everson* was Associate Justice of the United States Supreme Court Hugo L. Black (1886-1971), a Baptist politician from Birmingham, Alabama and a Klansman who was suspicious of Catholics, but progressive and concerned for the poor.[9] In the America of the 1930s and 1940s, "the separation of church and state flourished as a constitutional ideal, bringing together disparate groups by appealing to their aspirations for America and their loathing for Rome."[10]

Everson dealt with a New Jersey Township's reimbursement of bus transportation money to parents of children enrolled in parochial schools. This was done because children in public schools would be provided with school bus services while children in parochial schools would not. In *Everson*, a New Jersey taxpayer's challenge to this reimbursement was denied on the grounds that bus transportation is a *neutral*[11] government service. Despite the result the Court reached, Justice Black led with the notion of *separation* between church and state.[12] In the next Establishment Clause case after *Everson*, Justice Black applied the logic of *separation* to reach the conclusion that indirect *accommodation* of religion was precluded by the wall of *separation*.[13] Not only were parochial schools isolated from society by the wall but public schools themselves were also secularized.

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happiness – against any encroachment...").

7. Id. at 414 ("According to the Klan, in public schools, unlike in Catholic institutions, the young would 'be taught *how to think, not* what to think.' On such assumptions, which sometimes came remarkably close to those of liberal intellectuals, the Klan and allied organizations, including many Masonic lodges, joined movements for obligatory public schooling in various states . . .")(italics original, internal citation omitted).

8. Everson v. Bd. of Educ. of the Twp. of Ewing, 330 U.S. 1, 18 (1947). See also Reynolds v. United States, 98 U.S. 145, 164 (1878) (referring to a "wall of separation between church and State" in criminalizing polygamy when a Mormon sought an exemption on the ground of free exercise); Ronald F. Thiemann, *Religion in American Public Life: A Dilemma for Democracy* (1996) (arguing that "the introduction of the notion of separation into the Court's" jurisprudence led to confusion because the "only sense in which religious communities and the modern welfare state are to remain `separate' is that neither should exercise final authority over the values, beliefs and practices of the other").

9. Hamburger, supra n. 2, at 425-34 (citing Howard Ball, *Hugo L. Black: Cold Steel Warrior (*1996) and Roger K. Newman, *Hugo Black: A Biography* (1994)). Black's first public client, in 1921, was a Klansman who had murdered a Roman Catholic priest. Black had been engaged by the Grand Dragon (head) of the Alabama Klan and won an acquittal. With Klan support and the Grand Dragon as his campaign manager, Black had become a United States Senator. He was nominated as Associate Justice of the United States Supreme Court in 1937 by PresIdent Franklin Roosevelt. Black's earlier Klan membership dId not become known until after his confirmation by the Senate. Black saId that "intolerant" opposition to him would only provoke retaliation against Catholics. Some of Black's Klan supporters lit crosses from Mountain Lakes, New Jersey, to Bancroft Tower near Worcester, Massachusetts, while others in Virginia sang "The Old Rugged Cross." Republican criticism was meant to embarrass the PresIdent and brought Democrats to his defence.

10. Id. at 434.

11. Note that certain words are italicized in both the text and the footnotes as a shorthand guIde to the jurisprudence of the religion clauses: separation, neutral(ity), accommodation and exemption. They are keynotes to the four major approaches to the religion clauses. Due to space limitations, there is no major elaboration of these positions along the spectrum of disfavor to acceptance of the role of religion in American society.

Plaintiffs were taxpayers like the plaintiffs in *Frothingham* and *Flast,* referenced infra notes 57-58 and accompanying text.

12. Another justice and numerous people throughout the country thought that the reimbursement for bus transportation was a subsidy to parochial school education. Associate Justice Wiley Rutledge, a Unitarian, wrote in a long dissent from the result in *Everson* that bus reimbursement lessens the true cost of sending children to parochial school. If parents could not afford the transportation costs, they would have to turn to public schools. Parochial schools would eventually go out of business, as many people wished to see come about. Eliminating the bus subsIdy would not constitute legal discrimination against parochial school parents. Even if the parents cannot afford to take advantage of it, they retain the theoretical right to send their children to parochial school. That reasoning, of course, does not take into account the fact that the parochial school parents have paId the same taxes other parents have paId and would thus be paying double.

13. Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. 71, 333 U.S. 203 (1948).

The wall of *separation* between church and state grew high in the two decades after *Everson* as on-site religious instruction,[14] the recitation of prayers[15] and Bible reading[16] were excluded from the public schools. By the beginning of the 1970s, however, the tone in some Supreme Court cases was very different, reflected in the shift to case-by-case determination, even when establishment violations were deemed to have occurred.[17] It was not, however, until the middle of the 1990s, that the change had begun to take hold.[18] At the time of *Everson* and for decades after, the *separation* interpretation of the Establishment Clause was being used to wage a war on various religious groups and on religion in general. That misuse of the Establishment Clause lasted with full vigor for 20 years. For a while thereafter, this application of the Establishment Clause retained its strength. As reflected in *Agostini*, it then took another 30 years for this interpretation of the Establishment Clause to decline. *Mitchell v. Helms* tells the story.[19] These cases signal departure from *separation* in funding involving parochial schools.

II. SHIFTING ATTITUDES ON ESTABLISHMENT AND FREE EXERCISE

Van Orden v. Perry presented a recent Establishment Clause objection to the presence of a monument displaying the Ten Commandments. Relief was denied on the grounds that the Commandments themselves carry "an undeniable historical meaning," in effect subordinating their "religious significance" to their secular function.[20] A pluralistic approach to American society would recognize that the Ten Commandments are valued by many as having religious significance, but this approach would not demean them as a mere historical remnant in order not to disrespect the non-belief of that growing minority without religious adherence.[21] The divisions among the members of the Court – which

14. Id. at 203 (weekly religious instructions on the premises of the public school with the use of taxpayers' money struck down on establishment grounds as unconstitutional state action). Justice Jackson admitted that the Supreme Court was relying on "its own prepossessions." Id. at 238 (Jackson, J., concurring). Justice Stanley Reed's dissent in *McCollum* gave a different history from Justices Black and Rutledge in *Everson*, reflecting discord as early as the year after *Everson* concerning the Establishment Clause but without the ability to stop the wall of separation from growing higher. *But see* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding released time from public schools for religious instruction off the premises of the public school). Like Justice Black, Justice Douglas adopted *separation* of church and state and *neutrality* but also called for *accommodation* of religion within the standard of *separation*.

15. Engle v. Vitale, 370 U.S. 421 (1962) (striking down as unconstitutional non-sectarian theistic prayer).

16. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (holding that the purpose of the legislation or practice must be secular and its primary effect must neither advance nor inhibit religion (*neutrality*)).

17. Lemon v. Kurtzman, 403 U.S. 602 (1971) (Rhode Island salary supplements and Pennsylvania state aId for books in parochial schools struck down as unconstitutional). Like *Everson*, the tone and direction of this case is at odds with its outcome for the schools affected. No longer is there such a high wall of separation as there had been in *Everson*, *McCollum*, *Engle* and *Abington*. Chief Justice Burger, even in striking down both States' provisions, was careful to recognize the contribution of the parochial schools. The "three-prong" test in *Lemon* consisted of reasoning used separately in earlier cases.

18. Agostini v. Felton, 521 U.S. 203 (1997) (federally funded program under Title I of the Americans with Disabilities Act for remedial instruction to the disadvantaged upheld despite attendance at a parochial school). It is commonly saId that the religious question has receded in favor of concentration on the provision of a secular service so that "public welfare supersedes establishment." This decision does not permit "public funds or programs *to come under the control of religious authorities* . . . . Had the Court in *Agostini* interpreted the Constitution as maximizing religious freedom, the teachers administering Title I could have been hired or directed by the religious schools themselves." Amy Gutmann, *Religion and State in the United States: A Defense of Two-Way Protection*, in *Obligations of Citizenship and Demands of Faith* 127, 136 (Nancy L. Rosenblum, ed. 2000) (italics in original). The Court's direction became much clearer in an opinion authored by Justice Thomas. Mitchell v. Helms, 530 U.S. 793 (2000) (upholding the use of taxpayer's money to purchase equipment in a general program for schools, not excluding parochial schools).

19. *Mitchell*, 530 U.S. at 829 (stating it was time to bury the disparaging phrase "pervasively sectarian" and the discrimination associated with it).

20. Van Orden v. Perry, 545 U.S. 677, 690 (2005). The 8th Circuit, sitting *en banc*, opined that *Van Orden* "is a passive acknowledgement of the roles of God and religion in our Nation's history." ACLU Neb. Found. v. Plattsmouth, 419 F.3d 772, 778 (8th Cir. 2005). One commentator remarking on *Plattsmouth* wondered how far the United States can "afford, in its public life, to treat the religious traditions of the country as mere quaint survivals." Roger Trigg, *Religion in Public Life: Must Faith be Privatized?*, 225 (2007).

21. Michael W. McConnell, "Believers as Equal Citizens," in *Obligations of Citizenship and Demands of Faith* 90 (Nancy L. Rosenblum, ed. 2000). It is as "tyrannical" in Madison's terms to permit the minority to

seem to be at least somewhat resolved for the purposes of aid to education, disabled and disadvantaged children and parental choice – were still strongly present in this aspect of establishment considerations. At virtually the same time that the Court decided *Van Orden*, the Court also decided *McCreary Co. v. ACLU of Kentucky* in the opposite manner. *McCreary* seemingly requires the same analysis as *Van Orden*.[22] The Court very narrowly distinguished the facts as presenting either a religiously-intended or a passive presentation of a monument that includes the Ten Commandments,

That dispute is reflected by the different authorship of each opinion. Chief Justice Rehnquist wrote the opinion in *Van Orden*, rejecting *Everson's separationism*. Justice Souter wrote the opinion in *McCreary* on the basis that *Everson* is still operative. The Court's seemingly arbitrary jurisprudence led one commentator to summarize this line of cases as "a most convoluted and fractured line of Establishment Clause decisions."[23] Now five years later, neither Justice Souter nor Chief Justice Rehnquist remains on the Court. There is some hope that new justices might perceive a measure of compromise in the country and reflect that balance in future opinions.

Salazar v. Buono was argued before the United States Supreme Court in early October 2009.[24] The opinions in the Ninth Circuit are more centrally concerned with the treatment of religion in a secular age than the Supreme Court opinions in *Salazar v. Buono*. Judge McKeown wrote the opinion expressing the 9th Circuit's decision not to rehear *Buono en banc* and Judge O'Scannlain wrote the dissent. Some decades ago, Justice Kennedy had posed what appeared to be a noncontroversial hypothetical. He suggested that the Establishment Clause would forbid the government to permit the permanent erection of a large Latin cross on the roof of city hall. "[S]uch an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."[25] According to Judge McKeown, author of the Circuit Court opinion, Justice Kennedy's hypothetical is realized in *Buono*. "A Latin cross sits atop a prominent rock outcropping known as 'Sunrise Rock' in the Mojave National Preserve."[26] Both Judge McKeown and Judge O'Scannlain admirably set the stage for the Supreme Court's treatment.

In 1934, the Veterans of Foreign Wars erected a World War I memorial, consisting of a cross and a wooden sign to notify the visitor that the cross was erected in memory of the "Dead of All Wars." In terms of prior precedents, this sign suggests a secular purpose of remembering the soldiers who died for the United States in foreign wars. The fact that no controversy existed about the memorial for more than sixty years shows that its presence was not divisive. That long, peaceful use might appeal to Justice Breyer, for example. In his concurrence in *Van Orden*, Justice Breyer found the fact that the display of the Ten

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prevent acknowledgement of the majority's beliefs as it is to permit the majority to prevent those with minority (in numbers) beliefs from enjoying public expression, recognition and protection. For Madison's *Memorial and Remonstrance*, *see* the Appendix to *Everson*, 330 U.S. at 64. That does not mean that nonbelievers must be tasked with setting a manifesto in stone denying that their sense of morality comes from God or that they do charitable works for the sake of humanity and not for love of a God who created the needy and the rich. They must choose their own expression. For example, the NYC Metropolitan Transit Authority has recently accepted ad copy proclaiming that "[o]ne million New Yorkers are OK without God." (In the largest American city, by that estimate, the athiest population is just over 10%.) More commonly, nonbelievers' expression of choice presently appears to include popular book signing parties for best sellers explaining non-theistic views in large bookstore chains and appearances on television talk shows publicizing nontheistic views and books which provIdes a large audience so that they may reach people to explain their views.

22. McCreary Co. v. ACLU of Ky., 545 U.S. 844 (2005).

23. Angela C. Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good*, 2 ALB. GOV'T L. REV. 485, 506 (2009).

24. Salazar v. Buono, No. 08-472 (argued 7 October 2009). Salazar v. Buono, 559 U.S (2010), No. 08-472, was decided on 28 April 2010 in an opinion by Justice Anthony Kennedy. See http://www.supremecourt.gov/opinion/09pdf/ 08472.pdf. The establishment clause issue was not before the Supreme Court which was mainly concerned with the implementation of the congressional land transfer statute. In a 5-4 vote, the case was remanded for further proceedings on the constitutionality of the land transfer statute.

25. County of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

26. Buono v. Kempthorne, 527 F.3d 758, 768 (9th Cir. 2008)(*Buono IV*).

Commandments had occasioned no dispute for nearly two generations so that it is arguably not divisive, unlike the "short (and stormy) history of the courthouse Commandments' display" at issue in *McCreary*.

In 2002, Frank Buono, who had retired from the National Park Service which administers the Mojave National Preserve, sued to remove the cross from federal land as a violation of the Establishment Clause. Similar issues had arisen elsewhere. In the 7th Circuit, conveyance of the government land to private parties had made any further judicial consideration moot because there was no longer any possibility of government action.[27] Here, perhaps following the logic of the 7th Circuit, an exchange of land occurred during one of the *Buono* phases of litigation. The exchange of land was arguably facilitated when the 9th Circuit expressly refused to consider the issue.[28]

Despite the condescending emphasis on the secular purpose of the war memorial over the religious significance of the cross, the land transfer is likely to be persuasive to some Justices when the Court decides *Buono v. Salazar*. Indeed, the precedent of *Van Orden*, even with the contrasting result in *McCreary*, presages a similar outcome in *Buono*. With the perspective of more than 20 years, the Latin cross sitting "atop a prominent rock outcropping known as 'Sunrise Rock' in the Mojave National Preserve" now private looks nothing like the "large Latin cross on the roof of city hall." In his 9th Circuit dissent in *Buono IV*, Judge O'Scannlain invoked the principle from *Amos* that "[t]here is ample room under the Establishment Clause for benevolent *neutrality* which will permit religious exercise to exist without sponsorship and without interference."[29] That is perhaps the most interesting point of speculation about *Buono*. Will the Supreme Court state that the Establishment Clause does not require disavowal of religion in upholding the constitutionality of the war memorial with the Latin cross on now--private land? As Justice White put it in *Amos*, "[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. . . . government itself [must advance] religion through its own influence and activities."[30]

The tone of Supreme Court free-exercise cases during the early 1970s was pluralistic and entertained the notion of a free-exercise *exemption*.[31] Nevertheless, the effect of more than twenty years of deliberate secularization was substantively felt in the free exercise area, even as the availability of an *exemption* from laws of general applicability for religious free exercise became more clearly articulated with accountability standards and limitations.[32] Much of the legacy of, or depending on one's outlook, the fallout from, interpretation of the Establishment Clause as requiring *separation* of church and state eventually spilled over into the area of free exercise as well.

Thus, *Smith*, one of the most significant Supreme Court pronouncements in the last decade of the 20th century, focused on the general applicability of the law in question rather than on the burden for the individual seeking free exercise of his religion when the legislature inadvertently failed to provide an *exemption* for religious purposes.[33] "[L]eaving *accommodation* to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence

27. Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000) (upholding the sale of a portion of a municipal park with a statue of Jesus); Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 702-03 (7th Cir. 2005) (upholding the sale of a portion of a municipal park with a monumental presentation of the Ten Commandments).

28. Buono v. Norton, 371 F.3d 543, 550 (9th Cir. 2004) (*Buono II*).

29. Corp. of the PresIding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987) (emphasis added and internal quotations omitted).

30. *Amos*, 483 U.S. at 337.

31. Wisconsin v. Yoder, 406 U.S. 205 (1972) (granting Amish children an exemption from two years of compulsory high-school education required by Wisconsin public school law). "A regulation *neutral* on its face may, in its application, nonetheless offend the constitutional requirement for government *neutrality* if it unduly burdens the free exercise of religion." Id. at 220 (emphasis added).

32. *See* Angela C. Carmella, "Responsible Freedom under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good," 110 *W. Va. L. Rev* 403 (2007).

33. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990), reh'g denied, 496 U.S. 913 (1990) (requiring a burdened indivIdual to go to the legislature for an exemption from establishment clause strictures).

of democratic government must be preferred to a system in which each conscience is a law unto itself," wrote Justice Scalia, echoing *Reynolds* which he says controls. *Smith* signifies that the reach of the Free Exercise Clause of the First Amendment is limited.

Reaction to this decision was dramatic. Congress, the States and commentators acted vigorously in the face of this apparent disrespect for free exercise of religion and the constitutional clause protecting it.[34] Congress responded to constituents who wished to protect free exercise when facially *neutral* laws failed to *accommodate* religious needs. The legislature quickly passed the Religious Freedom Restoration Act (RFRA).[35] This act sought to prevent the government from burdening free exercise of religion without a compelling governmental interest by providing *exemptions* from generally applicable, facially *neutral* laws. The Supreme Court, however, held RFRA unconstitutional when applied to the States. According to Justice Kennedy's analysis for the Court, Congressional power under § 5 of the Fourteenth Amendment, which provided the basis for RFRA, is limited to enforcing the provisions of the Fourteenth Amendment. That means § 5 is only remedial. Accordingly, Congress cannot legislate the substance of the Fourteenth Amendment's restrictions on the States. RFRA is not enforcing legislation. Congress therefore needs to respect the doctrine of separation of powers. RFRA, however, remains in force in so far as it affects only the federal government.

Congress went back to the drafting board and avoided the separation of powers problem. In its second free exercise statute, The Religious Land Use and Institutionalized Person Act (RLUIPA), Congress continued with its purpose of protecting religious expression that comes into conflict with government provisions.[36] Congress retained the notion from RFRA of requiring government to show a "compelling interest" for interfering with religious free exercise. It also retained the standard that the State or local government use the least restrictive manner to impose on religious practices. That is the "no less restrictive alternative means" requirement found in cases before *Smith*. RLUIPA covers only land use regulations (such as zoning and historic preservation) and people in government housing, medical facilities or jails. RLUIPA also has a more limited scope than RFRA in that RLUIPA addresses the issue of the burden placed on the free exercise of religion. In this way, Congress ties the burden to a program or activity receiving federal financial aid, interstate commerce or a regulation that permits individual assessments of a proposed property use. Thus, President Clinton signed RLUIPA based on the congressional spending power and regulation of commerce among the States rather than on the enforcement power of the Fourteenth Amendment.

When *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*[37] was decided not long

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34. "Religious liberty is popular in the abstract, but unpopular in its concrete applications. A secular society is far too quick to decIde that its interests in uniform application of the law overrIde the needs of religious minorities, or even of the religious mainstream . . . . One function of judicial review is to protect religious exercise against such hostile or indifferent consequences of the political process. The Court has abandoned that function, at least in substantial part and perhaps entirely." Douglas Laycock, "The Remnants of Free Exercise," 1990 *Sup. Ct. Rev.* 1, 68. *Contra* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 *U. Chi. L. Rev*. 308 (1991). For the immediate reactions at the State level, *see* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post*-Smith *Jurisprudence*, 1993 BYU L. REV. 275 and Tracey Levy, "Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of Employment Division v. Smith," 67 *Temp. L. Rev*. 1017 (1994) (noting that ten States adopted laws based on RFRA).

35. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997). *See also* Angela C. Carmella, *New Roles for Congress, the President, and the Supreme Court in Protecting Religion*, 3 Religion & Values in Public Life 1- 4 (1995); Jed Rubenfeld, "Antidisestablishmentarianianism: Why RFRA Really Was Unconstitutional," 95 *Mich. L. Rev*. 2347-84 (1997); Eugene Gressman & Angela C. Carmella, "The RFRA Revision of the Free Exercise Clause," 57 *Ohio St. L. J*. 65 (1996).

36. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified as 42 U.S.C. § 2000cc). This statute returns to the free exercise standard of burden on religious exercise balanced against a "compelling state interest" used in *Yoder*, 406 U.S. 205 and Sherbert v. Verner, 374 U.S. 398 (1963) (granting unemployment compensation to people such as Seventh-day Adventists, unable to work on Saturday because it is their Sabbath when the statute had no free exercise exemption).

37. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (declaring the city of Hialeah ordinance protecting chickens unconstitutional for discrimination against the Santerians).

after *Smith*, it became apparent that the small area left for the free exercise clause was almost restricted to ordinances or laws not of general applicability but directly discriminating against a targeted group. Facial *neutrality* is required in a city ordinance or State legislation. In the early 1990s, some 50,000 people (particularly in the Cuban community in southern Florida) practiced Santeria, a religion requiring animal (here, chicken) sacrifice. In its ordinance, the city could have dealt with cruelty toward animals for any reason but it protected animals sacrificed only for religious purposes. Justices Blackmun and O'Connor, concurring in the judgment, said that *Smith* was wrongly decided because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an anti-discrimination principle. It began to become clearer that federal statutory provisions, and not the Free Exercise Clause, would now be the main vehicle for addressing free exercise claims. In effect, after *Smith*, plaintiffs with any other free-exercise burdens would have to qualify under RLUIPA or their State constitutions.

III. EARLY TWENTY-FIRST-CENTURY DEVELOPMENTS: TWILIGHT OF CONSTITUTIONAL FREE EXERCISE BUT LOWERING OF SOME ESTABLISHMENT BARRIERS

Cutter v. Wilkinson relied on RLUIPA when prisoners in Ohio complained that prison officials failed to *accommodate* their free exercise of various minority religions.[38] The prison officials argued that RLUIPA violates the Establishment Clause because it advances religion by giving greater protection to religion than to other constitutionally protected rights.[39] More specifically, the 6th Circuit in *Cutter* had been worried that a prisoner who was a member of the Aryan Nation would be less likely to be able to keep his materials after suing without benefit of RFRA than a member of a minority religion. If the 6th Circuit's fears were realized, political rights would be disadvantaged compared with the treatment of religious exercise. This fear led the 6th Circuit to see an establishment violation. Addressing that concern, the Supreme Court noted that even if prison officials had to prove a compelling governmental interest in the case of an Aryan Nation member, they would be able to meet the test. Their officials' action in confiscating such materials would be taken to prevent prison violence, more likely when another prisoner discovers inflammatory racist literature than if (s)he discovers material from a minority religious group.

The Court was very careful to make sure that the reader knows this is a statutory case. The same result would probably have been reached more straight forwardly under the former desire of the Court to protect minority religions, as Justice Brennan did in *Sherbert*, because anyone so disadvantaged could invoke the protection of the Free Exercise Clause and not just those under the supervision of the United States government.[40] This brave new statutory world has been issued into prominence, since as Justice Scalia put it in *Smith*, judges no longer wish to "weigh the social importance of all

38. Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that § 3 of RLUIPA falls between the Establishment and Free Exercise Clauses and permissibly accommodates religion, thereby statutorily protecting the prisoners' free exercise rights and alleviating exceptional government-created burdens on free exercise). RLUIPA § 3 provIdes, among other things, that "[n]o government shall impose a substantial burden on the religious exercise of a person resIding in or confined to an institution," subject to a compelling government interest implemented by the least restrictive means. RLUIPA § 3.

39. Because people who qualify under § 3 are in prisons, mental hospitals and other state institutions receiving federal aId, they do not control their own circumstances and "are unable freely to attend to their religious needs," being dependent on government *accommodation*. Adherents of mainstream religions in the Ohio prisons regularly have access to chaplains, worship services, religious books and other items. Without incorporation by RFRA and RLUIPA, both *Sherbert* and *Yoder* would have been consigned to the history books.

40. Of course the plaintiffs had to bring their case citing the statute, but this is the direct result of the judicial repudiation in *Smith* of protecting free exercise under the First Amendment. "In *Sherbert v. Verner*, Justice Brennan's majority opinion characterized a religious exemption as `reflecting nothing more than the governmental obligation of neutrality in the face of religious differences.'" Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 *U. Chi. L. Rev.* 1109, 1133 (1990).

laws against the centrality of all religious beliefs." The abdication of judicial review under the free-exercise clause was the subject of lengthy and deep analysis beyond the recollection of the Court's "traditional role as protector of minority rights against majoritarian oppression. The 'disadvantaging' of minority religions is not 'unavoidable' if the courts are doing their job . . . [which is] the very purpose of a Bill of Rights."[41] The pattern of deconstitutionalizing free exercise and committing it to Congress is underlined in *Cutter*. Justice Ginsburg, in *Goldman v. Weinberg*, approvingly noted in this regard the parrthe parallel action with regard to members of the military in "the Federal Government's accommodation of religious practice by the military in

> [W]e held that the Free Exercise Clause did not require the air force to exempt an Orthodox Jewish officer from uniform dress regulations so that he could wear a yarmulke indoors. Congress responded to *Goldman* by prescribing that 'a member of the armed forces may wear an item of religious apparel while wearing the uniform' unless 'the wearing of the item would interfere with the performance [of] military duties [or] the item of apparel is not neat and conservative.'[42]

In 1791, the United States was comfortable with the prohibition that "Congress shall make no law" prohibiting the free exercise of religion. Indeed, it did not say 'Congress shall make no law . . . promoting or advantaging religion.' After *Smith*, the Supreme Court approvingly left free exercise to Congress and the State constitutions. Is this an abdication of its historic role of judicial review under the aegis of the First Amendment or is it simply streamlining judicial resources for docket control when Congress can tailor legislation to pinpoint rights for different classes of plaintiffs who come under the thumb of federal supervision? While State and lower federal courts dealt frequently with free exercise claims, the United States Supreme Court had before *Smith* "rejected every claim requesting exemption from burdensome laws or policies to come before it" since 1972.[43] The free exercise clause was pronounced dead in *Smith*, although it did not carry a "Do Not Resuscitate" sign over its bed. The concept of free exercise itself was given new life in a different, nonconstitutional, form through such statutory law as RLUIPA and the federal application of RFRA. As the product of the political sphere, this free exercise does not have constitutional status. Does it matter that freedom of conscience is not, at the present time, honored with the constitutionalizing which characterizes the American legal approach when it wants to recognize the importance of a particular right to the life of the country?[44]

The term after *Cutter* was decided, the Court was presented with a reprise of the facts in *Smith* but had to decide the case under RFRA because in accordance with the holding in *Smith*, the Free Exercise Clause was foreclosed. Brazilian-American members of UDV, a spiritist sect with 130 members, use a hallucinogenic tea called hoasca in their communion service. When the Customs inspectors seized a shipment of hoasca, UDV sued several federal officials, including the Attorney General, under RFRA.[45] With a statutory substantial burden test, the Court would not have to inquire about the centrality

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41. Id at 1129 (exploring the effect of *Smith* on the judicial role, constitutional anomalies, denominational *neutrality* and other consequences of the opinion). In *Cutter*, Justice Ginsburg notes that RLUIPA responded to Justice Scalia's disavowal of inquiring into "whether a particular belief or practice is `central' to a prisoner's religion'" by restricting inquiry to the sincerity of the believer's professed belief. *Cutter*, 544 U.S. at 725, n. 13.

42. *Cutter*, 544 U.S. at 722 (internal citations omitted).

43. McConnell, supra n. 40, at 1110, n. 2 (noting that unemployment compensation claims routinely continued to come before the Supreme Court).

44. More than 65 years ago, it was recognized that public opinion about what is right in school funding cases has a lot to do with constitutional status and judicial enforcement. "Should present constitutional provisions barring public funds to Catholic schools be generally repealed, the courts would still be in a position to invalIdate appropriations for them on this ground. A judicial disinclination to do so, however, is likely to be present when public opinion has been sufficiently strong to remove express restrictions." Note,"Catholic Schools and Public Money," *50 Yale L.J.* 917, 925 (1941).

45. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (applying RFRA to a substantial burden on the group's religious practices to grant an *exemption* to the Controlled Substances Act).

of the practice in question to the plaintiff's religion, an inquiry which was too burdensome for the Court in *Smith*. Nevertheless, Chief Justice Roberts did not shy away from noting that receiving communion through hoasca was "[c]entral to the UDV's faith." Though the Controlled Substance Act allows the Attorney General to grant an *exemption*, as had been done for the Native American Church which uses peyote, the government argued that the Court could not grant such an *exemption* under the Act.

The government's argument provided the occasion for the Chief Justice to educate the government and opinion-readers alike about the vitality and capacity of the judiciary, despite the abdication in *Smith*. "[T]hat is how the law works," and the courts are "up to the task" of judging, even though "the task assigned by Congress to the courts under RFRA" is not easy. "Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue." Without the prod of RFRA, Justice Brennan in *Sherbert* and Chief Justice Burger in *Yoder* had proved to be "up to the task" constitutionally speaking when the free exercise clause of the First Amendment provided sufficient judicial guidance to grant specific *exemptions* to particular religious claimants.[46]

Now RFRA requires that analysis during the post-*Smith* abeyance in which the generally applicable law or government mandate has occupied the judicial vacancy. While it is not edifying to see the judiciary called by Congress in RFRA (*UDV*) and RLUIPA (*Cutter*) to do its job, it must be said that the Chief Justice's opinion in *UDV* and Justice Ginsburg's in *Cutter* clearly demonstrate that the judiciary is eminently "up to the task." Perhaps in the coming decades, some plaintiffs left out by the scope of these statutes will find that space beyond anti-discrimination, which in theory is still left to the Free Exercise Clause after *Smith*.

Shortly before *Cutter*, in a small area of the Cleveland City School District with its 75,000 children, the Pilot Project Scholarship Program deemed all children, including those attending any religious schools, eligible to receive vouchers for school tuition.[47] The effect of the United States Supreme Court's holding in *Zelman v. Simmons-Harris*, the voucher case, as Justice David Souter described it in his dissent is that:

> Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.[48]

The picture Justice Souter paints of all religious schools eligible to receive money certainly avoids the original harm in establishment, the favoring of one religion to the exclusion of all other viewpoints in the attempt to provide social order through uniformity. Programs today do not focus on the religion of the recipient but on the purposes and particulars of the program itself, whether science equipment and materials for schools or grants or scholarships for students. So long as the program in question is open to all otherwise qualified to participate, no one can now be kept out because of his

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46. For an appreciation of the different approaches of Chief Justice Burger and Justice Brennan, *see* C.M.A. Mc Cauliff, *Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?*, 24 *Cal. W. L. Rev*. 287, 321-25 (1988).

47. In the Cleveland Pilot Project Scholarship Program (voucher program), for example, neither Christian nor Moslem schools themselves were aIded. Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (holding that the establishment clause dId not prevent parents from receiving vouchers and using them at the schools of their choice). *See* C.M.A. Mc Cauliff, *Distant Mirror or Preview of our Future: Does* Locke v. Davey *Prevent American Use of Creative English Financing for Religious Schools?*, 29 *Vt. L. Rev.* 365 (2005). The holding in favor of parental choice in Cleveland means that parents who otherwise could not afford the tuition could enroll their children in a private school under the Project.

48. *Zelman*, 536 U.S. at 687.

religion or lack of it. The Establishment Clause is no longer being used to manage the government's discrimination against particular religious groups. *Zelman* has returned these cases to a political solution. Beliefs, values and sentiments – secular and no longer Protestant -- are transmitted in the public schools. The absence of God in public education conveys that God's role in education is only private while reading, writing, mathematics, science and languages may all be found in school in the course of the educational day.

Despite the demise of a *separation* interpretation of the First Amendment, a Washington State scholarship program successfully excluded study for the ministry, even though the recipient chose to pursue that study, thereby interposing himself between the State and the religious institution. Joshua Davey, the student whose application the State denied, decided to sue on free exercise grounds under the United States Constitution.[49] Davey argued that the Free Exercise Clause required the State (which finances secular education) also to finance religious education.[50] The Supreme Court, however, could not say that the Free Exercise Clause controlled the issue in this case because the Washington State Constitution, which has an 1889 amendment dealing with the establishment of religion,[51] was more rigid than the wording of the First Amendment in 1791. This case illustrates that "some state actions [are] permitted by the Establishment Clause but [are] not required by the Free Exercise Clause."[52] The free exercise clause and the equal protection clause of the 14th Amendment were not strong enough to overcome State considerations of establishment. Most American school legislation and funding comes from State and local government.[53] Ultimately, school funding for American religious schools will be worked out with state and local government, as *Locke v. Davey* recognizes.[54]

IV. POURING SEPARATION INTO DIFFERENT OLD-WINE CASKS? STANDING REDUX

The perennial question of standing[55] has recently assumed greater importance in

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49. Locke v. Davey, 540 U.S. 712 (2004).

50. The Free Exercise Clause has been narrowly construed. See Mary Ann Glendon & Raul F. Yanes, "Structural Free Exercise," 90 *Mich. L. Rev*. 477, 489 (1991).

51. The state constitutional amendments (known as "baby Blaine amendments") dealing with establishment of religion have been recognized as bigoted. (The Blaine Amendment in Washington State's constitution is reflected in Articles I, section 11 and IX, section 4.) See Robert F. Utter and Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L. Q. 451 (1988) (treating the Washington State Constitution and its relationship to earlier similar provisions against establishment).

52. 540 U. S. at 716.

53. See, e.g., John Dayton, *Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 ED. L. REP. 447 (2001).

54. It will be up to State court plaintiffs to challenge the separationist ethos of various States by seeking recognition of their free exercise rights in the State courts. The teachers' unions had always opposed vouchers because many religiously affiliated schools had no unions, thereby decreasing the power of the unions, the benefits, salaries and equipment and materials available to teachers and arguably the standards of the teachers themselves, who may or may not have had to meet the same requirements as public school teachers, depending on local laws. "At the behest of the teachers' unions, the Democrats had just shut down a successful District of Columbia voucher program." David Brooks, "The Quiet Revolution," *N.Y. Times*, 23 October 2009, at A35 (explaining that for the most part, so far the $4.3 billion Race to the Top fund administered by a reforming Education Secretary, Arne Duncan, has been able to leverage change and not pork, thereby receiving support across the political spectrum).

55. For standing in an Establishment Clause case in a different guise, see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S.1 (2004). There Chief Justice Rehnquist, concurring in the judgment, dissented from the Court's use of the standing doctrine to avoId decIding the establishment question on the merits. He thought that the Court would probably have decIded that the School District's policy does not violate the Establishment Clause of the First Amendment. The School District's policy was that willing teachers and students recite the Pledge of Allegiance (including the words "under God" since 1954).

The problem of deeming references to God as "more properly understood as employing the Idiom for essentially secular purposes" is that "one nation under God" reflects the centuries-old invocation of God to protect, for example, all the English people or in the pledge of allegiance to the flag, all the American people. In her concurrence in *Newdow*, Justice O'Connor deems such language "ceremonial deism." One commentator attempts to explain this dismissive categorization in the following way: "O'Connor seems so to concentrate on

taking the country's temperature on church-state relations. This has in part occurred because the Establishment Clause is providing a less reliable way for secularists and those believers who support *separation*, rather than *neutrality* or *accommodation*, to prevail. Despite the recent growth in the number of Moslem Americans (by one estimate from about 800,000 to over 3 million in a quarter of a century), the country is growing more secular in the sense that fewer Americas have ties to traditional Christian and Jewish denominations.

In *Hein v. Freedom From Religion Foundation, Inc.*, the Foundation sought standing as taxpayers under Article III of the Constitution to claim that conferences of the Faith-Based and Community Initiatives program violated the Establishment Clause of the First Amendment.[56] The claimed violations consisted of giving speeches using "religious imagery" and praise of the faith-based programs. The Foundation based its claim on *Flast v. Cohen*.[57]

Justice Alito characterized *Flast* as a narrow exception to the prescription against giving taxpayers standing set forth in *Frothingham v. Mellon*.[58] He also noted that the conferences the Foundation questioned were not paid for from statutory funds but from general executive branch appropriations, thus placing an additional layer between the taxpayers and standing because *Flast* itself limited standing to challenges to exercises of "congressional power." Discretionary executive branch expenditures were not contemplated in *Flast*.

Various other possible barriers to standing, such as concerns about separation of powers, make standing less possible than before. The taxpayers suggested that standing should be extended to discretionary Executive Branch expenditures because an agency could use its discretionary funds to buy Stars of David, stars-and-crescents, or crosses in bulk for distribution. Justice Alito suggested that such improbable abuses could be challenged through other than taxpayer standing. Finally, Justice Alito addressed Justice Scalia's position that *Flast* is unstable and must be expanded or overruled by emphasizing that the exception in *Flast* had always been very narrow. *Hein* effectively forecloses Article III taxpayer standing from being used as a new vehicle to claim that an Establishment Clause violation had been caused by a governmental actor. Thus, taxpayer standing is as unsuccessful a way to challenge public *accommodation* of religion as it was some eighty years ago in *Frothingham*.

V. JUSTICE SCALIA, AT LEAST, WANTS TO AVOID APPLYING THE ESTABLISHMENT CLAUSE TOO

From the briefed arguments, *Pleasant Grove* is ostensibly a public forum case under the Free Speech Clause of the First Amendment, but Justice Alito says it is in fact predominantly about First-Amendment "government speech."[59] The doctrine of

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the private sIde of religious commitment, that she fails to see the importance of an admission that nations too are guIded by God." *Trigg*, supra n. 20, at 219. Perhaps Jacques Maritain saId it best:

> There is real and genuine tolerance only when a man is firmly and absolutely convinced of a truth, or of what he holds to be a truth, and when he at the same time recognizes the right of those who deny this truth to exist, and to contradict him, and to speak their own mind, not because they are free from truth but because they seek truth in their own way, and because he respects in them human nature and human dignity and those very resources and living springs of the intellect and conscience which make them potentially capable of attaining the truth he loves, if someday they happen to see it.

Jacques Maritain,"Truth and Human Fellowship," in *On the Uses of Philosophy:Three Essays* 24 (1961), quoted in *Martha C. Nussbaum, Liberty of Conscience* 23 (2008).

56. Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587 (2007) (denying taxpayer's standing to challenge faith-based community groups' eligibility to compete for federal financial support as a violation of the establishment clause).

57. Flast v. Cohen, 392 U.S. 83 (1968) (granting federal taxpayers standing to challenge programs including parochial schools on establishment grounds).

58. Frothingham v. Mellon, 262 U.S. 447 (1923).

59. Pleasant Grove City v. Summum, 129 S.Ct. 1125 (2009) (holding that the city's decision to accept or reject a donated monument for a place on the grounds of Pioneer Park is a matter of First-Amendment government speech).

government speech is perhaps a new category or, in the words of Justice Breyer, a much more flexible "rule of thumb."[60] In *Pleasant Grove*, a religious group wanted a permanent copy of its commandments to accompany the Ten Commandments donated by the Fraternal Order of Eagles and other donated statues and objects from the public finding a permanent home on the grounds of Pioneer Park. The careful analysis of time, place, and manner is rehearsed only to be deemed irrelevant to government speech which is not subject to First-Amendment challenge.

In his concurrence in *Pleasant Grove*, Justice Scalia, reprising the insight from *Smith* that the Court does not have to apply the Free Exercise Clause, writes as if he is blowing Justice Alito's cover. According to Justice Scalia, in *Pleasant Grove*, "government speech" serves as an end-run around the Establishment Clause. If this proves true over the next cases, we will be without effective constitutional protections against establishment as well as having narrow, if any, constitutional protection for free exercise. Is speech a broad enough category to protect religion and individual conscience constitutionally? There is always freedom of association, as we know from the First Amendment holiday and ethnic parade cases. In 1215, clause one of Magna Carta protected the liberties and freedom of the church, in effect acting as a clause for the protection of freedom of assembly and association as well as institutional protection. Arguably, that clause of Magna Carta died in 1532, with the establishment of parliamentary supremacy when the Canterbury Convocation of the English Church assented to a new notion of sovereignty on 15-16 May 1532. *Gobitis*, *Smith* and possibly *Pleasant Grove*, if it proves to be a circumvention of the Establishment Clause, are the intellectual heirs to that parliamentary supremacy, which harkened to generally applicable statutes deemed to encourage social unity and uniformity.[61]

60. Justice Breyer joined the Court's opinion, but concurred to warn that the Free Speech Clause could turn into "a jurisprudence of labels." Justice Stevens finds the decisions relying on government speech "of doubtful merit," including Garcetti v. Ceballos, 547 U.S. 410 (2006); Johanns v. Livestock Marketing Assn, 544 U.S. 550 (2005); Rust v. Sullivan, 500 U.S. 173 (1991) (Stevens, J. concurring).

61. C.M.A. Mc Cauliff, "Parliament and the Supreme Headship: Church-State Relations according to Thomas More," 48 *Cath. U. L. Rev.* 653 (1999) (reviewing Peter Ackroyd, *The Life of Thomas More* (1998)). In the current situation, legislative occupancy of the judicial voId has so far proved benign. The democratic reaffirmation of principles once committed to constitutional adjudication has been successful in provIding pinpointed statutory causes of action for many claimants. The judicial decision voluntarily to withdraw from a vital constitutional domain remains inexplicable and controversial.

GENE SHREVE

Religion, Science and the Secular State: Creationismin American Public Schools[†]

Law may be seen as a series of expedients to influence, punish, reward, and authoritatively explain human behavior. Law tells us how to behave and places the assorted coercive powers of government behind that directive. Our governments compel us to follow the rule of law.[1] They sweeten their commands by assuring us that their laws will be uniformly applied[2] and that they will in their application pro-mote the public good.[3] Their laws will, that is to say, create a good society. This assumes that it is possible to find a moral compass to tell good from bad in society – to know what good and bad people do.

Religion appears capable of supplying law's moral compass.[4] Or moral guidance as firm and definitive may derive from a secular source. This essay will examine American law's commitment to the secular approach with particular reference to the current debate over creationism in the public school curriculum.

I. THE LEGAL LANDSCAPE

Ratified in 1791, the First Amendment to the U. S. Constitution begins: "Congress shall make no law respecting an establishment of religion …."[5] This is termed the Establishment Clause.[6] The U.S. Supreme Court has extended Establishment Clause constraints on state governments and their subdivisions.[7] The Clause is thought to prevent government favoritism of religious over secular concerns or favoritism of one religion over another.[8] Among the numerous settings for Establishment Clause litigation[9], have

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This article first appeared in 58 (Supp.) Am. J. Comp. L. 31 (2010). The General Reporters for this volume are grateful for permission to reprint it here. Professor Shreve expresses gratitude for the "prolonged and patient assistance of two faculty colleagues who are luminaries in their fields My deepest thanks go to Dan Conkle for his guidance on the Establishment Clause and to Kevin Brown for his guidance on public education and the Constitution Any errors are mine alone."

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1. See Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004).

2. "For any well functioning governance, it is as important that decisions seem appropriate as well as that they are appropriate This is especially true for the courts, which are supposed to dispense even-handed justice." Kent Greenawalt, "The Enduring Significance of Neutral Principles," 78 *Colum. L. Rev.* 982, 999 (1978). In addition, see Lloyd L Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (2005).

3. However open to dispute, these assurances are made by every government to its citizens. In totalitarian regimes, they may be associated with notions of propaganda and ideology. Dennis H Wrong, *Power: Its Forms, Bases, and Uses* 96 (1995).

4. Thus, "principled constitutionalism" can be "constructed on the foundation of institutionalized religion." Larry Cata Backer, "Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering," 16 *Ind J. Global L. Studies* 85, 170 (2009).

5. Continuing, the amendment states "or prohibiting the free exercise thereof. " This notion of religious freedom, that one can practice his or her religion of choice without government interference, has enjoyed a robust constitutional history comparable to that of the Establish Clause See Peter K Rofes, *The Religion Guarantees: A Reference Guide to the United States Constitution* 123-177 (2005).

6. A related provision in Article VI of the Constitution states: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States " However, the subsequent ratification of the First Amendment probably eclipsed this restriction See Torcaso v. Watkins, 367 U.S. 488 (1961)

7. Everson v. Board of Education, 330 U.S. 1 (1947).

8. Daniel O. Conkle, *Establishment Clause,* Encyclopedia of the American Constitution 924 (2nd ed. 2000).

9. Important questions have arisen concerning the effect of the Clause on prayer in public schools, public

been the religion-based attempts by state and local governments either to block teaching of the biological theory of evolution[10] in public schools or to diminish the effects of such teaching. Evolutionary theory provoked religious opposition from many Christians because it conflicted with the biblical account of living things created by God in unchanging form,[11] and because it suggested the age of the earth was far greater than theologians estimated by using the Bible.[12] This religious movement in opposition to evolution is often called creationism.[13]

Establishment Clause cases in this area represent three historical stages.

The earliest form of government opposition, and the most direct expression of creationism, was simply to ban teaching the scientific theory of evolution in American public schools. In the 1968 case, *Epperson v. Arkansas*,[14] the U.S. Supreme Court ruled that this violated the Establishment Clause. An Arkansas statute that forbade teaching biological evolution in public schools was found unconstitutional by the Court because its purpose was to advance a particular religion's view.[15]

Creationists responded to the *Epperson* decision with a new approach. "The second generation of creationism statutes conceded that evolution could be taught, but required that creationist theory be given equal time."[16] These initiatives, termed "balanced treatment" by their proponents, were brought to a halt by the Supreme Court in 1987. *Edwards v. Aguillard*[17] extended the Court's *Epperson* ruling, striking down a Louisiana statute entitled "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction." Once more the Court found a religious purpose in the legislation. *Edwards* currently provides the Supreme Court's last word on religion in the public school curriculum.

> To some religious believers, [*Edwards*] embodies the hostility to all things religious to which the contemporary Court has led the Constitution, the regrettable triumph of secularism over faith. To others, such a result represents nothing more than the reality that the Constitution insists that religiously driven messages be disseminated in venues other than the American public school. These differing cul-tural perspectives likely will not reconcile anytime soon.

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financial assistance to religious institutions, public religious displays, religious content in public oaths of allegiance, and in many other settings For comprehensive surveys, see Ronald D. Rotunda & John E Nowak, *Treatise on Constitutional Law* Sec 21 3-21 5(e) (4th ed 2008); Rofes, supra n. 5 at 29-112.

10. "The theory of evolution is the central idea in modern biology." Dylan Evans & Howard Selina, *Introducing Evolution* 3 (2001). Charles Darwin (1809-1882) sought to answer two questions: Did species change – evolve – and, if so, how and why did change occur? There were numerous scientific observations prior to Darwin's work on the possibility of evolution. His most important contributions came in his answer to the second question, which he termed "natural selection." Id. at p 25.

11. "And out of the g round the LORD God formed every beast of the field, and every fowl of the air; and brought them unto Adam to see what he would call them: and whatsoever Adam called every living creature, that was the name thereof " Genesis 2:19 (King James Version).

12. Christian theologians computing all of the time mentioned in the bible determined the age of the earth to be about 6000 years "If the Bible was literally true [t]his was nowhere near enough time for evolution to take place " Evans & Selina, supra n. 10 at 12.

13. "Creationism is the belief that plants and animals were originally created by a supernatural being substantially as they now exist Proponents of creationism today are primarily evangelical Christians who adopt a literal reading of the book of Genesis of the Bible." John G. West, "Creationism," *Encyclopedia of the American Constitution* 706 (2nd ed 2000) By this view, "Scripture" is taken "to be a special revelation from God himself, demanding our absolute trust and allegiance " Alvin Plantinga, "When Faith and Reason Clash: Evolution and the Bible," *Intelligent Design Creationism ant its Critics* 113 (Robert T Pennock, ed. 2001).

14. 393 U.S. 97.

15. For discussions of *Epperson*, see Daniel O. Conkle, *Constitutional Law: The Religion Clauses* 170 (2nd ed. 2009); West, supra n. 13, at 706; ROTUNDA & NOWAK, supra n. 9, at 21 5(d).

16. Steven G. Gey, *Religion and the State* 183 (2nd ed 2006).

17. 482 U.S. 578 (1987) For discussions of the *Edwards* case, see Conkle, *The Religion Clauses*, Id. at 170-171; West, supra n. 13, at 707-708; Rotunda & Nowak, supra n. 9, at 21 5(d) In *Edwards*, as in *Epperson*,

> "[t]he Court found that the challenged laws were intended to protect and further a religious understanding of human origins As such they had the purpose of advancing and endorsing religion over irreligion, thereby confer-ring benefits on religion that were deliberately discriminatory and constitutionally impermissible. " Conkle, id.. at 169-170.

> For now, however, [Establishment Clause] principles cast shadows of constitutional doubt over efforts to use the institutions of public education to inculcate students with a view of mankind's origins that comports with the view espoused by religious teachings.[18]

The creationist response to *Edwards* has been to regroup once more. This latest initiative has been to offer in the public school curriculum a theory in opposition to evolution called Intelligent Design. Intelligent Design is like earlier creationist positions in rejecting bio-logical concepts of evolution and natural selection. It is careful, however, to avoid reference to biblical sources or to the existence of a divine supernatural being. Proponents advance Intelligent Design as a rival scientific theory.[19] It rests on "the argument that certain features of the natural world are so complex and intricately put together that they must have been deliberately fashioned."[20] The legitimacy of intelligent design is debated within the scientific community,[21] while its constitutional viability is debated among legal scholars.[22] The Supreme Court has not yet considered a challenge to insertion of Intelligent Design into the public school curriculum. But lower courts have struck down such initiatives on Establishment Clause grounds, relying upon *Edwards*.[23]

II. THE VIEW FROM THE OUTSIDE

Little of the U.S. Constitution is explicit or self-applying. The Supreme Court derives much of its considerable power from its professed need to expound on the meaning of a few words of constitutional text in order to resolve particular controversies before it.[24] The Supreme Court thereby makes most of our constitutional law though judicial doctrine and in increments – determining the rational effect of prior cases on new case facts. This means that the constitutional law making process of the Court moves in starts and stops as the court grapples with the facts – including the quirks and idiosyncrasies – of each new controversy. The Court's Establishment Clause jurisprudence bears this out. The only meaning clear from the text alone is that it bars creation of an official government religion. "Beyond the consensus on this indisputable proposition, however, much remains up for grabs among the justices regarding the precise contours of the anti-establishment principle."[25]

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18. Rofes, supra n. 5 at 56.

19. Intelligent Design proposals come in various forms, including efforts by school boards to directly advance the theory in science classes beside traditional scientific renditions of evolution theory, incorporation of Intelligent Design precepts in state science standards, and the placement of disclaimers in science textbooks. Gey, supra n. 16 at 184.

20. Margaret Talbot, "Darwin in the Dock," *The New Yorker* 66 (5 December 2005).

21. E.g., compare Phillip E. Johnson, *Evolution as Dogma: The Establishment of Naturalism*, 59-76 (Robert T. Pennock, ed. 2001) (defending Intelligent Design as a legitimate scientific theory) *with* Robert T. Pennock, *Naturalism, Evidence, and Creationism: The Case of Phillip Johnson, Intelligent Design Creationism and its Critics* 77-97 (Robert T . Pennock, ed. 20001) (questioning the same).

22. E.g., compare David K. DeWolf, Stephen C. Meyer & Mark Edward DeForrest, *Teaching the Origins Controversy: Science, Or Religion, Or Speech*, 2000 *Utah L. Rev.* 39 (2000) (arguing that Intelligent Design can be taught in public schools without offending the Establishment Clause) *with* Matthew J. Brauer, Barbara Forrest & Steven G. Gey, "Is It Science Yet? Intelligent Design Creationism and the Constitution," 83 *Wash. U. L. Q.* 1 (2005); Jay D. Wexler, "Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools," 56 *Vand. L. Rev.* 751 (2003) (arguing the same to be unconstitutional).

23. Freiler v. Tangipahoa Parish Bd. of Educ., 185 F. 3d 337 (5th Cir 1999), *cert denied*, 530 U.S. 1251 (2000); Kirtzmiller v. Dover Area School District, 400 F. Supp. 2d 707 (M. D. Pa. 2005); Selman v. Cobb County Sch. Dist , 390 F. Supp. 2d 1286 (N. D. Ga.) These cases are examined in Gey, supra n. 16, at 185-186 *Kirtzmiller*, involving an attempt by a local Pennsylvania school board to introduce Intelligent Design into the science curriculum, has received the most attention For a fascinating account of the trial there, see Talbot, supra n. 20.

It should be noted that the result shared by Epperson, Edwards, and the cases above – that religious purpose in public school teaching violates the Establishment Clause – might suggest far more clarity and continuity in judicial doctrine than actually exists See notes 25-27 and accompanying text, infra.

24. In the landmark case, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Supreme Court claimed the power to invalidate an act of Congress on this basis.

25. Rofes, supra n. 5 at 30.

Doctrine applicable to the creationism question suffers from uncertainties of constitutional history[26] and from the failure to adequately define "religion."[27] It is impossible to grapple with these interior concerns of the structure and fabric of Establishement Clause doctrine[28] within the space permitted here. But I can take a different perspective that my international readers may find at least as interesting: a view from the outside. I will devote the balance of the paper to some thoughts on the larger social, political, and legal significance of the Supreme Court's creationism cases.

While religious antagonism toward scientific theory has long existed,[29] science has never been antagonistic toward religion. Rather it is indifferent to it, as it is to all moral concerns. Natural science is preoccupied with the physical world. It is usually enough for scientific theory to state and support a causal rule, *viz*, to explain why a particular phenomenon occurs and will repeat itself.[30] Lofty moral questions – religious or secular – have no place in science.[31] They are uninteresting to scientists because they "cannot be tested and proved in the same way that an hypothesis in physics or chemistry can be falsified or verified."[32]

Consider the Copernican Revolution. The discovery that the earth was merely one of several planets revolving around the sun assaulted the belief in "the earth as the unique and focal center of God's creation."[33] While they were denounced as satanic figures, neither Copernicus nor Galileo set out to affect religion. Copernicus only wanted to simplify astronomical theory and make it more accurate. He found he could do this "by transferring to the sun many astronomical functions previously attributed to the earth."[34] Galileo intended to advance no religious point of view in developing the telescope. But he "popularized astronomy, and the astronomy that [he] popularized was Copernican."[35]

Perhaps the indifference of scientists to the damaging effects their discoveries can have on religious belief is as infuriating to some religious persons as if scientists set out to do them harm. This appears true for the biological theory of evolution, which remains highly controversial today. A recent news report disclosed that a "British film about Charles Dawrin has failed to find a U.S. distributor because his theory of evolution is too controversial for American au percetnences."[36] The story went on to note that, according to a February Gallup poll, "only 39 percent of Americans believe in evolution."[37] This seems to bear out the observation of a distinguished First Amendment scholar that "there has been tremendous controversy concerning the topic of human origins and how it

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26. One commentator has lamented, the selective and self-contradictory use of historical evidence by advocates on both sides. In no area of American constitutional law have judges and scholars more consistently resorted to historical materials as the foundation of their analytical structures than in the church-state area. Yet, to date, they generally have used these materials in a way that has obscured the meaning of the First Amendment's provisions on religion.

John Sexton, "Of Walls, Gardens, Wildernesses, and Original Intent: Religion and the First Amendment," *America in Theory* 85 (Leslie Berlowitz, et al. eds. 1988).

27. Ronald J Krotoszynski, Jr , Steven G. Gey, Lyrissa C. Barnett Lidsky & Christina E. Wells, *The First Amendment: Cases and Theory* 758 (2008) ("The Supreme Court has never provided a definitive definition of the term 'religion' in its Establishment Clause decisions"); Wexler, supra n. 22, at 815 ("Courts and commentators have spilled much ink over the question of how to define 'religion' for First Amendment purposes, but the Supreme Court has never spoken authoritatively on the issue").

28. Examples of such scholarship appear in n. 22, supra.

29. In "about 450 B. C., Anaxagoras shocked conservative opinion in Athens by declaring that the sun and the moon were red-hot stones, which meant they could not be divinities " S. G. F. Brandon, *Origins of Religion, Dictionary of the History of Ideas,* vol. IV, 93 (1973).

30. Numerous examples appear in Thomas Kuhn, *The Structure of Scientific Revolutions*, 3rd ed. (1996).

31. Scientists only choose problems that "can be assumed to have solutions * * * One of the reasons why normal science seems to progress so rapidly is that its practitioners concentrate on problems that only their own lack of ingenuity should keep them from solving ." Id. at 37.

32. Thomas Fleming, *The Politics of Human Nature* 9 (1988).

33. Thomas S. Kuhn, *The Copernican Revolution* 2 (1957).

34. Id. at 1.

35. Id. at 225.

36. Anita Singh, "Charles Darwin film 'too controversial' for religious America," *Telegraph Co UK*. (11 September 2009).

37. Id.

should be taught in the public schools."[38] We might ask then a couple of questions. Is it appropriate for the U.S. Supreme Court to consider the effect of its decisions on the public? And, if so, has the Court done so here?

Like all judges serving under Article Three of the U. S. Constitution, justices of the Supreme Court are appointed rather than elected and have their appointments for life. One can say that the strength of the Supreme Court lies precisely in the fact that it is protected from the wrath of public opinion and from the corresponding political pres-sure felt by the legislative and executive branches of the federal government. This does not mean however that the Court should be unconcerned about public reaction to its decisions. In the words of Alexander Bickel, "[b]road and sustained application of the Court's law, when challenged, is a function of its rightness, not merely of its pronouncement."[39]

The public is entitled to ask – and constantly does ask – whether the Supreme Court's decisions improve society. The Court cannot flee from controversy. But we should be able to find in its controversial decisions vindication of clear principles that, to many at least, make the price of public outcry worth paying. The principles of racial equality in *Brown v. Board of Education of Topeka*[40] and of women's right to choose whether to have children in *Roe v. Wade*[41] are illustrations.

In contrast, the creationism cases have established little in the nature of principle. The First Amendment restricts only government action. It poses no ban on the teaching of creationism in private schools or to home-schooled children. Creationism can be included in even the public school curriculum. It is clear from the Supreme Court's opinion in *Edwards v. Aguillard* that the Louisiana legislature would have been free to include a component on creationism is part of a required course on comparative religious thought or on con-temporary social issues.[42]

Attempts to introduce creationism into the public school curriculum failed in *Edwards* and elsewhere only because creationism was to be taught as scientific fact. To be sure, it is commendable to protect public school students from scientific misinformation. This has been seen as an important contribution of the Court's creationism cases.[43] It is no more, however, than a fortunate side effect. We value public education in this country.[44] But, unlike freedom of expression, it does not enjoy the status of a constitutional right.[45] Even the most back-ward secular misrepresentations in the public school curriculum – for example about the dangerous effects of fluoridation, the nonexistence of the Holocaust, or the historic absence of racial injustice[46] – would be unaffected by the Establishment Clause. They may not even be unconstitutional.[47]

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38. Conkle, *The Religion Clauses*, supra n. 15 at 169.

39. A. M Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* 258 (1962).

40. 347 U.S. 483 (1954).

41. 410 U.S. 113 (1973).

42. 482 U.S. at 593-594.

43. See, e.g. , Steven Goldberg, *The Constitutional Status of American Science*, 1979 U. Ill. L. F. 1; Steven Jay Gould, *Justice Scalia's Misunderstanding*, 5 Const Comment 1 (1988).

44. "Education expresses what is, perhaps, our deepest wish: to continue, to go on, to persist in the face of time It is a program for social survival " Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 197 (1983).

45. The right to an education may be expressly secured elsewhere, e.g., Constitution of the Republic of Liberia, Article 5(c) (1986) (guaranteeing "educational opportunities"); Universal Declaration of Human Rights, Article 26 (1948) ("Everyone has the right to education ")

46. "I recall from my own childhood being taught in a public school of the District of Columbia, as though there were no room for debate on the matter, that the slaves in the antebellum South were essentially happy and had no desire to be free " Stephen L Carter, *Evolutionism, Creationism, and Treating Religion as A Hobby*, 1987 *Duke L J* 977, 990 Professor Carter's conclusions on Supreme Court doctrine in creationist cases are generally in line with those advanced in this paper I regret that I am unable to give more attention to his excellent article.

47. Thus, Grimes v. Sobol, 832 F Supp 704 (S D N Y 19930, *aff'd* 37 F 3d 857 (2d Cir 1994), involved a challenge to the New York City public schools that the curriculum presented an inaccurate and biased picture of African-Americans The courts ruled that, while inaccurate and biased, the curriculum withstood challenge under the Equal Protection Clause of the Fourteenth Amendment, because plaintiffs failed to prove that defendants deliberately made the distortions to harm them and other blacks For an illuminating discussion of the *Grimes* case, see Kevin Brown, *Race, Law and Education in the Post-Desegregation Era* 265-266 (2005).

CARMEN ASIAÍN PEREIRA

Religion and the Secular State: Uruguayan Report

I. INTRODUCTION

Uruguay has been categorized as a prototype secular State, together with Mexico, following the trend of France, which is also shared by Turkey. Nevertheless, some peculiarities of its statutory setting – which, in terms of secularism, go beyond the words and spirit of the Constitution and contradict the principles of International Human Rights norms – detaches it from the rest of its colleague secular states. While the rest of its former parallel states have positively evolved in terms of State/Church relationships, Uruguay has not. Mexico, for instance, has developed a more open-minded attitude towards religion by (1) reforming its preceding restrictive Constitution in terms of freedom of religion or belief, (2) creating a public office for religious affairs and (3) approving the Religious Freedom Frame Act.

Although still maintaining overt violations of the right to exhibit one's own religious identity in public spaces, France pays some attention to religious concerns as it cooperates with the preservation of churches and other edifices of worship of cultural or historical significance, and carries out charity actions in coordination with religious entities, amongst other areas of encounter. Uruguay's uniqueness lies on the fact that it seems still attached to a model of a liberal State with rigid separation, which goes back to the nineteenth century in terms of religious freedom.

And yet, Uruguay is still complex to categorize. In terms of its position with respect to secularity, because while neutral and even cooperationist in its Constitutional and international binding norms, its legal framework, its administrative regulations and resolutions, and overall, the customary interpretation (or misinterpretation) of law and of the entire legal system, tend to meet a high commitment to secularism as a result of hostile separation between State and Church,[1] very proximate to secular fundamentalism.[2]

The very definition of "secular" or "lay" needs to be reviewed in our legal forum. In fact, the concept is under debate and will be submitted to thorough analysis and revision in the near future.[3] Since secularity is frequently identified as an imposed *prescindence*[4] of religious issues by the State – or even misunderstood under the belief that the State must be abstentionist[5] for the reason that the Constitution (Article 5[6]) establishes an abstentionist form of secularism since the separation of State from Church in 1917[7] - these misinterpretations of law and of human rights call for urgent eradication in order to approach the minimum standards of religious liberty.

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1. Asiaín Pereira, C., *Algunas Reflexiones acerca de la Libertad Religiosa en el Uruguay*, Anuario Argentino de Derecho Canónico T. X, 2003.

2. Martínez- Torrón, J. and Navarro-Valls, R., "The Protection of Religious Freedom in the System of the Council of Europe,"in *Facilitating Freedom of Religion or Belief: A Deskbook*, Lindholm, T., Durham, Jr., W.C., Tahzib-Lie, B.G., editors, Koninklijke Brill NV, Leiden, Martinus Nijhoff Publishers, 2004, 235.

3. Brito, Mariano, conference on Education which will deal with the revision of the concept of "lay" or "secularism" in Uruguayan Law, Congress on "Contemporary Transformations in Administrative Law," Administrative Law Institute Academic Week, 6-9 October 2009.

4. Cassinelli Muñoz, H. *Derecho Público*. Montevideo: Fundación de Cultura Universitaria, 2002, 63.

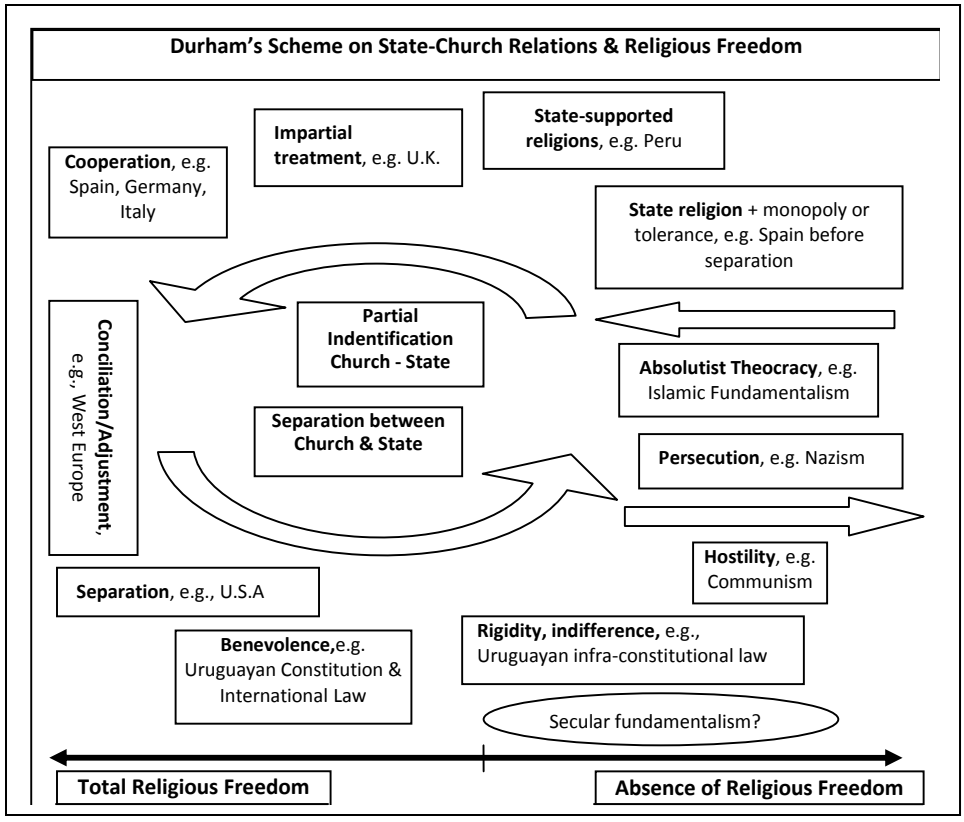
5. Semino, M. A., *Estado y Religión, Semanario Búsqueda*, 17/4/08, Montevideo, p. 47, and *La enseñanza y la laicidad, Semanario Búsqueda*, 20/11/08, pp. 83 & 84 and in *¿Y la laicidad?*, http://www.forobatllista.com/showaNews.asp?tf_newsId=4245#.

6. Article 5 of the Constitution: "All religious cults are free in Uruguay. The State doesn't endorse any religion. It recognizes the Catholic Church's ownership of all temples that have been partially or completely built with funds from the National Treasury, with the exception of chapels that have been designated to serve as shelters, hospitals, jails, or other public settlements. In like manner, the State declares all churches consecrated to the worship of the various religions exempt of any form of taxes."

7. Semino, supra n. 6.

At the same time, another current of opinion underlines a positive assessment that our Constitution shows towards religion, specifically, where it grants tax exemptions to churches, recognizes the pre-existing Roman Catholic Church as a legal entity and owner of property, and incorporates the principles of Natural Law in Article 72.[8] The incorporation itself leads to the conclusion that the regime as a whole, being based on the recognition of human dignity and the respect of human rights as well as on the principles of democracy and republic, is mandatorily respectful of freedom of Religion or Belief in its constitutional and international law context. Infra-constitutional law and regulations must therefore be adapted to suit the elevated norms, and interpretation of the whole legal system ought to be enlightened by and redirected to harmonize the mandates of International Human Rights norms and the Constitution.

This being the state of the question in our forum, we will attempt to apply W. Cole Durham's methodology and model in his essay "Basis for a Comparative Analysis of Religious Freedom"[9] to approach a categorization of Uruguay's posture on religion and the type of secularism it embraces. By denouncing the position that Uruguay deserves in Durham's scheme of Religious Freedom according to State-Church relationships, we intend to (1) shake the theoretical foundations of scholars who still neglect the presence of religion in the public sphere and consider freedom of religion thoroughly complied with through abstentionism, perhaps awaking decision-makers to become conscious about the weakness of the system, and (2) finally influence in State spheres to hopefully provoke a reformation process in order to attain full respect of religious freedom deserving a position closer to "Total Religious Freedom" in Durham's scheme.



8. Art. 72: The enumeration of rights, duties and guarantees made by the Constitution doesn't exclude others that are inherent to human personality or are derived from a republican form of government."

9. Durham, W. C. Jr., "Basis for a comparative analysis of religious freedom,"in Anuario de Derecho Eclesiástico del Estado, Vol X (1194), 471-478, transcribed by Navarro-Vals, Rafael & Palomino, Rafael, Estado Y Religión. Textos para una reflexión crítica, Ariel, 2003, España, 213- 222. Examples are mine.

This analysis will try to explain this categorization, as well as the dichotomy between the Magna Carta and the International Human Rights norms on one hand, and legal and administrative regulations as well as the secularist interpretation of law on the other.[10]

II. SOCIAL CONTEXT IN URUGUAY

As in the rest of the New World, various native peoples inhabited our lands prior to Spanish colonization, mainly nomadic and either polytheistic or pantheist. As Spaniards disembarked, they brought the Christian cross with them as a sign of appurtenance, evangelization, discovery and conquest in the name and under the protection of religion.[11]

Unlike the rest of the American countries, the multiplicity of pre-existing indigenous populations living in this country resisted integration of European culture in general terms, either through struggle against the invader or through compulsory and self-imposed isolation from the conqueror. As a result, those who were not submitted to slavery, condemned to confusing misery or assimilated to European blood through crossbreeding, were gradually decimated in battles against the enemy. Finally, the remains of the last rebel native groups were exterminated in 1831,[12] immediately after our birth as an independent country.

So the shameful fact of our history is the present absence of hardly any religions of native origin, at least in the form of organized and identified native groups. Our national identity was hence forged on the basis of a homogeneous European population. This initial uniformity of the population in general terms of culture, language, ethnicity and religion had a strong influence on its attitude towards the "different," undermining the development of an open-minded tradition. Sharing the "only child syndrome,"Uruguayans found themselves in no need to resolve the challenge of coexistence with the "alter." This peculiar historical fact conditioned our nation since its birth, making it prone to holding a monolithic ideology and a single truth.

Foreign native peoples – Guaranis from the Jesuitical missions – immigrated in thousands from Paraguay and Argentina to Uruguay in an 1828 exodus,[13] presumably after the expulsion of the Company of Jesus (1768-1803). These peoples settled in Uruguayan territory in an unprecedented International Law action, bringing their authorities and representatives with them, but refused assimilation to our population, desegregated and absorbed by us, after being sunk in misery. Because of integration to our population, and due to the fact that these peoples had already been evangelized by Jesuits and had converted to Catholicism, they didn't represent a threat to our religious uniformity. And therefore, their integration to Uruguayan society didn't challenge its homogeneity, in terms of religion.

The Roman Catholic Church preceded our independent State and, being the majority religion, it was crucial in determining the denominational structure adopted by our 1830 Constitution, which followed the Patronage model. Soon the religious hegemonic scenario was gradually nourished by other Christian protestant groups migrating from Europe. These groups shared religions with some minimal expressions of native cults which had survived annihilation or assimilation by the white conqueror. Also present was a small sample of African natives submitted to slavery, who brought their cults with them, which became a determining fact for the birth of syncretism later on in history. So despite catholic hegemony and the privileged status of the Roman Catholic Church, tolerance of other non-historically rooted cults was due in the name of the principles of freedom of expression,[14] association, and equality.

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10. Examples belong to the author of this article.

11. Asiaín Pereira, C., *La presencia de lo religioso en el ámbito público en el Uruguay,* Anales Derecho, IV Colloquium, Latin American Consortium for Freedom of Religion or Belief, Pontificia Universidad Católica de Chile, 2005.

12. Battle of Salsipuedes, Puntas del Queguay, 11 April 1831.

13. Padrón Favre, Oscar, *Ocaso de un pueblo Indio, Historia del Éxodo guaraní-misionero al Uruguay,"*Ed. Tierradentro, Durazno, Uruguay, 2009.

14. Gros Espiell, H., "Evolución Constitucional del Uruguay,"Fundación de Cultura Universitaria, Montevideo, 2003, 35.

Masonry was very strong in these latitudes, especially in Uruguay. This presence, together with the nineteenth century ideas of liberalism and Jacobinism dating back to the French Revolution, determined the development of a secularization process in Uruguay – beginning in law and validated half a century later by the 1917 Constitution which established the separation of State and Church. Uruguay was a pioneer in secularization.

As for religious composition of society, Roman Catholics are still the majority group, but the number of its adepts is slowly decreasing presently, on behalf of new religious movements, comprised mainly of neo-Pentecostals of Brazilian origin and neo-Christians.

Sociologists outline[15] the fact that historical protestant churches (Anglican, Lutheran, Calvinist, Mennonites) coexist with modern evangelical churches from different origins grouped in confederations: Baptists, Salvation Army, Seventh Day Adventists, Pentecostals, neo-Pentecostals (the Worldwide Church of God (from Brazil)), and neo-Christians or post-protestants (Jehovah's Witnesses and the Church of Jesus Christ of Latter-day Saints ((Mormons)), from U.S.A., and Scientology beliefs). Nowadays the number of non-Catholic Christians are the second largest religious group. Armenian, Greek and Russian Orthodox churches are also present, though minimally.

Jewish communities of diverse movements have established in Uruguay. Orthodox Jews stand side by side Conservatives and Reformists.

Islam has arrived relatively recently and established small but growing communities, especially in the frontiers.

Buddhist and Hinduistic groups are also present, as well as Spiritualists of different schools, Theosophical schools and Rosae Crucis.

The Moon Sect (Unification Church) used to have a strong economic power, somehow diminished nowadays.

The Bahá'i faith collects some sympathizers and volunteers as well.

Afro-Brazilian religions such as Candomblé, Quimbanda and Umbanda have a strong presence, greater than that of movements stemming from African groups clustered together in different communities.

A particular Latin American phenomenon very typical of Uruguay occurred by means of mingling of African cults with Brazilian faiths and Catholic ingredients, giving place to the emergence of syncretism. One belief – borrowing its typical elements of faith, such as Christ, the Virgin Mary, or saints, and renaming them or assimilating them to its own deities, or performing Catholic rites together with native cults, or embraces Catholic faith without rendering alien beliefs – tends to encourage the practice of other religious beliefs or to incorporate some elements of other faiths, or tries to disguise itself as Catholic. A new religious creed is born, known as religious "Syncretism, a symbiosis of religions.[16]

Masonry may be considered a form of belief, in the sense that its members practice cults and have temples.[17] Like the Roman Catholic Church, it is historically-rooted and exercises a very powerful influence in politics, government, and culture. Masonry also has undermining effects on freedom of religion or belief, particularly on the public dimension of religion, i.e., on its "forum externum."Very often it finds support from militant forms of agnosticism and atheism, formerly linked or not, with historical anti-clericalism.

According to some statistical data,[18] the population breakdown is as follows: Roman Catholics: 66 percent; Protestants: 2 percent; Jews: 1 percent; and others, including those who don't profess a religion: 31 percent. Other statistics throw different results: "Research studies from social sciences have reported the recent religious pluralisation and diversification in our country. All studies agree in establishing that slightly more than 80

15. Geymonat, Roger (compiler), "Las religiones en el Uruguay," eds. La Gotera, Montevideo, 2004.

16. Asiaín Pereira, C., "Law and Religion in Latin America. General Aspects of Law and Current Concerns,"march, 2009, (pending publishing) Law and Justice the Christian Law Review, Worcester WR2 4PB UK, United Kingdom, http://www.lawandjustice.org.uk/LAWJUSTICE.

17. Korseniak, J., "Primer Curso de Derecho Constitucional," Fundación de Cultura Universitaria, Montevideo, 2006, 347.

18. Available at http://go.hrw.com/atlas/span_htm/uruguay.htm.

percent of Uruguayans assert to believe in God."[19] This fact was provided by the National Statistics Institute (INE),[20] which for the first time in our history inquired about religious beliefs published.[21]

So our societies have passed from diversity to uniformity, and back to diversity in the religious arena. This has occurred after immigration and after the resurrection of native cults and culture, giving place to the presence of many religious denominations.

III. THEORETICAL AND SCHOLARLY CONTEXT

As was outlined, two major trends govern the theoretical and scholarly context in Uruguay.

The laicist approach may be considered "prescinding" (abstentionist) in terms of religion, and highly committed to secularity. This leading school of thought prevailed till the dawn of the twentieth century and has deeply influenced scholars and academics, lawyers and students, and in general, the entire Uruguayan culture. The label of "secular" – in the sense of strict separation between the two spheres of religion and the political community – rises as the spontaneous answer to the question about Uruguay's State–Church relations. The non-denominational nature of our State, consecrated by Article 5 of the Constitution, is interpreted as implying that besides being non-denominational, the government should abstain from supporting any religion, even on an equitable basis, and is even prohibited to involve itself with religion entirely. The State must disregard ("rescind from")[22] religious expressions as alien to State affairs.

Therefore, religion must be absolutely absent from public schools, public premises and outcast from public spheres in general. Religion is confined to the forum internum and to private practice,[23] receiving hardly any attention or consideration by authorities. Religious communities are regarded as civil institutions, entitled to rights and duties once they are recognized as legal entities. The trend is closely linked to positivism and receives support from the Masonry and forms of agnostic or atheist proselytism, and within it, two vectors are distinguishable.

Some radical interpretations of secularity actually qualify as forms of "secular fundamentalism."[24] An advocate has said "the only governmental attitude compatible to religious pluralism is that of prescindence, indifference, the State's abstention from the religious phenomenon;. . . not only in the sense that it tolerates that diversity, but also in that it shouldn't tip the balance of the juridical and political organization of the community in favour or against one or other religious or non-religious posture."[25]

Sometimes religion is presented as restricting freedom, creating slavery which is an obstacle to progress and even to democracy.[26] Religiously-based arguments are disqualified, "acting as if illiberal policing of religion were mandatory for a religiously neutral state."[27] This "strident laicism" has held its own truth as absolute, but under the appearance of impartiality. As the State cannot support any religion, and moreover, as the State is impeded from even considering religion, this stance is the only guarantee of neutrality. In fact, in Lindholm's words, the former hegemony of the Roman Catholic Church has been replaced by another hegemony, that of an antireligious rationalism, "*rather than achieving genuine neutrality*." This rigid version of secularism has, however, been very successful in imposing this vision as general to past and present generations,

19. Da Costa, N. (compiler) "Guía de la Diversidad Religiosa de Montevideo,"CLAEH (Centro Latinoamericano de Economía Humana), 2008, Ed. Santillana S.A., Montevideo, 16 (translation by the author).

20. Amplified National Homes Poll, published December 2006.

21. Da Costa, supra n. 19 at 35.

22. Cassinelli Muñoz, H., *Derecho Público*, Montevideo, Fundación de Cultura Universitaria, 2002, 63

23. Korseniak.

24. Martínez-Torrón..

25. Cajarville Peluffo, J. P., Pluralismo religioso y acción estatal. Cuadernos No. 7, 161, quoted by Rotondo, La Religión en la Educación Pública Uruguaya: Régimen Legal.

26. Sanguinetti, J. M, Semino.

27. Lindholm, T., "Philosophical and Religious Justifications of Freedom of Religion of Belief," in "*Deskbook*," supra n. 2 at 45.

thus undermining the very foundations of freedom of religion or belief in the minds and souls of Uruguayans.

The other laicist vector poses an attitude of cold indifference, underestimating religions in general, leading to freedom of indifference more than freedom of religion or belief.

Both constitute true forms of intolerance in the end, led by an erratic understanding of neutrality, revealing a denial of the religious fact in society as natural to the human being and uncaring of his dignity.

The pluralistic approach regards religion as part of reality and natural to the human being, entitled to due respect from the State as well as from all layers of society on behalf of human dignity. It clearly distinguishes between the two philosophical concepts of secularism ("laicidad," stemming from lay) as a synonym of genuine neutrality, and ("laicismo," as opposed to laicism), as committed secularism deriving in denial of the religious dimension of the human being manifested in society, and as anti-religious.

This approach praises separation between State and religion because the State is ontologically secular or non-religious, while the churches are religious by nature.[28] As a consequence, the State doesn't sustain, support, nor bear any religion in particular, since the State is incompetent in spiritual affairs. As the main agent of the well being of the population,

Only a totalitarian model of society can justify the domain of a one and absolute truth ideology. What is particular of the Rule of Law is not to hold uniform theoretical foundations, but a common method, which is Democracy. And democratic method implies considering the prevalent pluralism living in our societies.

Religion is essential to human culture. Therefore the State, as the main agent of the general interest of its population, is compelled to create the suitable conditions to allow individuals to choose their ways to relate themselves with the Creator.[29] It isn't enough for the government to simply abstain from involvement in religious issues, but rather it should intervene in order to insure the effective and legitimate enforcement of fundamental rights.[30]

There are certain principles containing values common to mankind, which prevail over national regulations, amongst which Freedom of Religion or Belief stands as a "first freedom"[31] and as "the origin of all freedoms."[32] Embodied in the proclaimed human rights, these core values are fundamental, non-derogable, and considered part of customary law and part of *ius cogens* or imperative mandatory law. The principles, rights, and liberties established or recognized by Humanitarian International Law form a nucleus, or Human Rights block,[33] which represents a minimum standard in terms of Human Rights. This binds every State, and is even superior to Constitutions, otherwise it compromises the State's international and public responsibility.

IV. CONSTITUTIONAL CONTEXT

A. Outline of the political history with regard to relations between State and Religion.

During the colonial period Uruguay was part of the Diocese of Buenos Aires. The Roman Catholic Church was significantly influential in leading the social and spiritual life

28. Cagnoni, Aníbal, "Laicidad y Constitución," in IX Coloquio del Centro de Estudios de Derecho Público, Sept., 2006, Ministry of Foreign Affairs, Uruguay

29. Durán Martínez, A., "Enseñanza Estatal y Laicidad,"Vivir es Combatir, eds. De la Plaza, Montevideo, 2004, 227-228

30. Risso Ferrand, M., "Derecho Constitucional" Vol. I, Fundación de Cultura Universitaria, Montevideo, 2005, 360 and 424.

31. See http://www.firstfreedom.gov/, United States Department of Justice, First Freedom Project. "Religious liberty is often referred to as the "First Freedom" because the Framers placed it first in the Bill of Rights. Yet it is not merely first in order: it is a fundamental freedom on which so many of our other freedoms rest."

32. Congreso Internacional del Consejo Argentino para la Libertad Religiosa (CALIR), "*La Libertad Religiosa, Origen de Todas las Libertades*," Buenos Aires, abril, 2008.

33. Risso Ferrand, Martín, Derecho Constitucional I, F.C.U., Montevideo, 2006

of the people, and a main character in the revolutionary movement,[34] which concluded with the declaration of independence in1825. It was not before 1878 that the Diocese of Montevideo was erected.

The fact that the Roman Catholic Church preceded the existence of our independent State was crucial in determining the denominational structure adopted in the 1830 Constitution.[35] Notwithstanding the absence of a Concordat between the Holy See and the State, most scholars consider that the State followed a Patronage model, at least *"de facto,"* due to the powers arrogated to the State over the Church – like the right of bestowing offices or *church benefices*, and the right to appeal to the Supreme Court against ecclesial court decisions. Freedom of religion in regard to other faiths was acknowledged as part of freedom of expression,[36] and it followed a main principle of our foundations: "We shall promote civil and religious liberty to its maximum imaginable extension."[37]

Now, Masonry counted on adepts since the times of the independent movement and has kept its presence and strong influence in power, even today. So our secularization process began very early, in the second half of the nineteenth century, as a consequence of the alliances between a fortified masonry that had gained important positions in government, positivism, rationalism and enlightenment,[38] following the "French laicité" model in their plans of strict secularization. After the first State-Church conflict over a jurisdiction contest in 1861,[39] secularization was inaugurated with the secularization of cemeteries.[40]

The secularization process (1861-1918) is apparent through reforms carried out in diverse terrains: religious instruction is substituted by "Lay, Free of expense, and Compulsory School" as a motto, deprivation of civil effects to religious marriage, prohibition of religious symbols in the public sphere, restrictions on immigration and social activities of nuns, divorce, secularization of religious holidays, State Civil Registry, and suppression of religious oaths amongst other measures which lead a school of thought to the assertion that "Free-thinking tendencies soundly start to open their, definitely driving our country to be the least religious of the world."[41]

The process – unconstitutional under the 1830 denominational Constitution – is legitimized after the separation of Church and State in the 1918 Constitution. With insignificant changes, the same text has been ratified through each of the constitutional reforms until our current 1967 Constitution, with its amendments. In 2004 it read:

Article 5: "All religious cults are free in Uruguay. The State does not endorse any religion. It recognizes the Catholic Church's ownership of all temples that have been partially or completely built with funds from the National Treasury, with the exception of chapels that have been designated to serve as shelters, hospitals, jails, or other public settlements. In like manner, the State declares all churches consecrated to the worship of the various religions exempt of any form of taxes."

It is accurate to affirm – as most analyzers assert – that our Constitution establishes a secular State in terms of its posture towards religion. But this statement is true only after

34. Acevedo, E., "Anales históricos del Uruguay," Barreiro y Ramos, Mvdeo, 1933; Zum Felde, A."Proceso histórico del Uruguay". Arca, Mvdeo, 1967; Cayota, M., "Historia de la Evangelización en la Banda Oriental (1516-1830) Ucudal-Cefradohis, Mvdeo, 1994.

35. Asiain Pereira, C., *Law and Religion in Latin America. General Aspects of Law and Current Concerns,* Law and Justice, The Christian Review, Nº 162, 2009, The Edmund Plowden Trust, 63.

36. Gros Espiell, H., *Evolución Constitucional del Uruguay,* Fundación de Cultura Universitaria, Montevideo, 2003, 35.

37. Instructions of the year XIII to the representatives of our province to the 1813 Constitutional Convention in Buenos Aires, by José Artigas, 3rd Instruction.

38. Lisiero, Darío, "Iglesia y Estado del Uruguay en el lustro definitorio. 1859-1863,"Revista Histórica LXV –Segunda época -tomo XLII (1971) 12.

39. Asiaín, C., "Algunas Reflexiones acerca de la Libertad Religiosa en el Uruguay,"Anuario Argentino de Derecho Canónico T. X, 2003, 17-36

40. 18 April 1861, Alonso y Criado, "Colección legislativa de la República Oriental del Uruguay,"T. 1-30, Mvdeo., 1876-1908, Ed. Palacio Legislativo

41. Eirin Fava, S., "Libertad Religiosa y Neutralidad: Normativa Jurídica,""Jornadas: Estado de Derecho, Educación y Laicidad,"Cuadernos de la Facultad de Derecho y Ciencias Sociales, Montevideo., 1988, 177.

acknowledging that our Constitution proclaims Freedom of Religion or Belief as a fundamental principle, and subsequently establishing its non-denominational stance with regard to religion. Therefore, when describing Uruguay's stance on religion, we should identify the State as a "Religious Liberty State," and only after, as a non-denominational State. The Constitution itself has chosen this prevalence.

B. Constitutional Provisions and Governing Principles

A Human Rights Respectful State: The Constitution acknowledges – does not create – the basic Human Rights, and grants their protection. Amongst these rights are the guaranteed protection of the enjoyment of the right to life, honour, liberty, security, labour and property (Article 7). The *forum internum* is exempt from the arm of the authority, as are private actions, provided they do not interfere with public order or impede others (Article 10) in enjoying the *Principle of Legality*).

Uruguay is part of International Humanitarian Law, having ratified the key international instruments affirming freedom of religion or belief, and thus is obliged to respect and take action in order to guarantee and facilitate the universally applicable human rights codified in its instruments.[42]

As part of *ius cogens,* or imperative mandatory law, the principles, rights and liberties form a nucleus, or Human Rights block.[43] This represents a minimum standard in terms of Human Rights, which is considered non-derogable under Customary International Law as an application of the Vienna Convention on the Law of Treaties (1969), and binds every State, being superior even to Constitutions, otherwise compromising the State's international and public responsibility. So, these rights and liberties may be directly invoked by individuals and communities.

Article 72 of the Constitution "The enumeration of rights, duties and guarantees made by the Constitution, does not exclude others that are inherent to the human person or derived from the republican model of the government" constitutes an innominate or general guarantee for human rights compliance, as well as a tool to demand the authorities to accomplish the duties and secure the guarantees due to human dignity and proper to a republican government, notwithstanding their explicitation in the text. Therefore, all recognized human rights and guarantees are included as part of the guiding principles and are executable under the enforcement of Article 332 of the Constitution, which consecrates the *direct applicability of the articles that acknowledge rights to individuals and those that assign powers and impose duties to public authorities.* These precepts are *directly applicable*, which constitute the "generic constitutionalization of the founding principles of justice of classical Natural Law,"[44] may be invoked even in the absence of regulation, and will be replaced by looking at analogous laws, the general principles of law, and the overall accepted theoretical foundations of law."

Non-derogability of Rights: Limitation of rights – true and perfect subjective rights – would be ineffective even if it were attempted by law,[45] as they are regarded as independent from the will of the sovereign.[46]

A Pluralistic State: The phrasing "All religious cults are free in Uruguay" (Article 5) embodies the recognition of different religious denominations coexisting in our nation, receiving the same or similar treatment from the State. "The Republic of Uruguay is the political association of all the inhabitants of its territory (Article 1) comprises all individuals living in the country, in an association of equals.

The Rule of Law: "The Nation adopts the democratic republican form of government.

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42. Lindholm, T., Durham, Jr., W.C., Tahzib-Lie, B.G. with Ghanea, Nazila, "Introduction," *Deskbook*, supra n. 2 at xxxvii and xli.

43. Risso Ferrand, M., Derecho Constitucional I, F.C.U., Montevideo, 2006.

44. Real, A. R., "Responsabilidad del Estado,"infra n. 45.

45. Cassinelli Muñoz, H, "Responsabilidad del Estado por Lesión del Interés Legítimo" 4º Coloq. Contencioso de Derecho Público, Responsabilidad del Estado y Jurisdicción y "El Interés Legítimo como situación jurídica garantida en la Constitución Uruguaya,"Perspectiva del Derecho Público en la 2ª mitad del S. XX, Estudios de Homenaje al Prof. Enrique Sayagués Laso, T.III.

46. Id. at 93 y sigs.

Its sovereignty will be directly exercised by the Electoral Body in the cases of election, popular initiative and referendum, and indirectly through the representative powers established by this Constitution; all according to the rules expressed in it" (Article 82), embeds a State, governed under the Rule of Law, whose juridical manifestation is Democracy.

The Principle of Equality outlined by Article 8, "All persons are equal before the law, with no distinction among them other than their talents or virtues" provides the premise for the Principle of Non-Discrimination and for Pacific Coexistence and Tolerance – the latter only after due respect fails to be attained.

A Religious Freedom State: Not only does the Constitution proclaim freedom of religion or belief with outdated terms of "*religious cults*" – which should be interpreted as modern Freedom of Religion or Belief under the historical-evolutive and teleological method of interpretation – but it moreover esteems religion highly, which is partially revealed by tax exemption "to churches consecrated to worship of the different religions."[47]

The Constitution automatically acknowledges the Roman Catholic Church as a legal entity, incurring a slight detriment in the principle of equality with regard to the rest of the faiths. However, religious freedom in its full extent is acknowledged, with its manifestations stemming from a republican form of government. Freedom and independence of the conscience are specifically shielded (Article 54), which provides the foundation for conscientious objection. Allusions to morals abound throughout the Magna Carta, as well as the reference to virtues, revealing that the Constitution recognizes spirituality in the individual.

A Secular State in terms of its separation from religion and non-denominational nature, yet pluralistic at the same time.

The Principle of Cooperation between the State and religious communities is in force by means of the several coordinated actions taken to assist the unprivileged, regardless of the absence of provisions in legal documents. In sharing the common aims of peace, solidarity, equality, and respect of others, the focus of both the State and religions is set on the human being, which creates cooperation in some charitable actions. Regrettably, some areas – like spiritual assistance to confined people, education and direct promotion of religion in order to facilitate freedom of religion of belief – are still ignored.

We are in debt to the *Principle of Autonomy* of religious congregations and academic autonomy in teaching and studying this discipline of Law and Religion. With regard to religions, the State still vindicates its supposed power to mettle in religious affairs or disqualifies opinions or intervention of Church authorities in the public sphere. As for Law and Religion, it is still subsumed by Constitutional and Civil Law, and is thus hindered from developing proper theoretics and foundations of its own. Moreover, issues directly concerning freedom of religion or belief are frequently addressed as issues alien to its principles, and therefore, not solved but neglected or denied.

The Rule of Law proclaimed by our Constitution and the comprehensive respect of human dignity demands the harmonization of human rights and constitutional principles in order to comply with the essentials of Freedom of Religion or Belief. The State must face religious issues with the legal frameworks necessary to address, in a systematic and human-focused attitude, the upcoming concerns that religions are posing to modern pluralistic societies. Because "it isn´t enough nor easy to simply proclaim the existence of specific liberties in the Constitution if they are not completed with the adequate guarantees."[48] Scholars and academic production must declare its independence from other branches of Law, in order to deal with religious issues in an appropriatly autonomous way.

The Principle of Liberty generally guards Freedom of Religion or Belief, but it is undeniable that some specificities are irreparably lost without a deep reflection and

47. Durán Martínez, A., *Enseñanza Religiosa en la Educación Pública. Marco Constitucional Uruguayo,* IX Colloquium of the Latin American Consortium for Freedom of Religion or Belief, Montevideo, August 2009.

48. Cassinelli Muñoz, H., *Derecho Público,* surpa n. 45 at 109.

development of the discipline. Following Descartes, we will only be able to assert that Law and Religion exists in Uruguay, after having demonstrated that it thinks.[49]

V. LEGAL CONTEXT

There is *no specific legislation* dealing with religion or religious freedom in an integral manner. While our legislation provides regulation for very specific religious features, it lacks a framework, like in a General Law on Freedom of Religion or Belief, as other countries possess. The same happens with case law and court decisions; scarcely does the judiciary deal with religious issues, from a freedom of religion perspective.

This legal desert of ours may be partially mitigated by means of the direct applicability of International Humanitarian Law. As we have outlined, Uruguay has ratified most, if not all, of the International Covenants and documents on Human Rights which, together with the Constitution, form the "constitutionality block"[50] or "Human Rights Block"[51] and may be invoked as national binding law.

This posture on International Humanitarian Law hierarchy is not shared by all scholars; some grant international treaties the same hierarchy as statutory law,[52] which may be abolished by subsequent law or be declared unconstitutional by the Supreme Court and made inapplicable to the case in question.

There are no specific bodies – like councils, agencies, or directorates – in the State structure that deal with religious affairs and religious communities. This is a huge deficiency in our legal system, which is repeatedly denounced as a means of neglecting Freedom of Religion, against both individuals and communities.

A shallow attempt towards establishing a public link with religions involved the creation of the Honorary Commission against Racism, Xenophobia, and any kind of Discrimination, as a portion of the Human Rights Office of the Ministry of Education and Culture.[53] The norm specifies as possible forms of discrimination "any distinction, exclusion, restriction, preference, or the use of physical or moral violence, motivated by race, skin color, religion, national or ethnic origin," amongst other reasons, resulting in impairment of human rights in any possible sphere. This Commission, however, doesn't qualify as the demanded institutional type of relation between the State and religious communities as legal entities. It is limited to give response to and arbitrate specific conflict situations, lacking mandatory effects.

A National Human Rights Institute was recently created[54] as an autonomic Parliamentary office, to deal with the defense, promotion, and protection of Human Rights proclaimed by the Constitution and International Law. Despite the fact that the term religion is absent from the extensive text of the norm, it appears as a useful tool to protect religious freedom as comprised by the "Human Rights Block."

The State's posture with regard to religion is not clear yet and is undergoing revision, frequently incurring in contradiction. For example, notwithstanding the fact that religious issues are amongst the purposed of the outlined Human Rights Commission in the Executive – when the Ministry of Education and Culture lists the Human Rights in its report about the "Expenditure on Human Rights in Uruguay 2004-2008" – Freedom of

49. Asiaín Pereira, C., "El gran desafío del Derecho Eclesiástico del Estado en el Uruguay: Su Existencia misma como Rama del Derecho,"Secretaría de Gobernación de México, actas del V Coloquio Internacional del Consorcio Latinoamericano de Libertad Religiosa, México, D.F., 2006 y Anuario D. Administrativo T. XIII, F.C.U., Montevideo, 2006.

50. Durán Martínez, A., *Enseñanza Religiosa en la Educación Pública. Marco Constitucional Uruguayo,* IX Coloquio del Consorcio Latinoamericano de Libertad Religiosa Montevideo, agosto, 2009.

51. Risso Ferrand, M., *Derecho Constitucional*, T.I, Montevideo, Fundación de Cultura Universitaria, 2006

52. Korseniak, J., *Derecho Público. Derecho Constitucional*, Montevideo, Fundación de Cultura Universitaria, 2006, p. 465 and Jiménez De Aréchaga, Justino. "La Constitución Nacional" T VIII, 182; y "El Poder Legislativo,"T. II, Escuela Nacional de Artes y Oficios, Mvdeo., 1906, 314 y sigs.; Esteva, E. y Nicoliello, N. "Declaración de Inconstitucionalidad de Actos Legislativos,"R. Uru. D.Const. y Pol. 1,1989, 97; Informe de la Comisión de Constitución y Legislación, Cámara de Senadores, 1962, Doc.X, 61.

53. Created by Law Nº 17.817 from 6 September 2004.

54. Law Nº 18.846, from 27 January 2009.

Religion is left aside.[55] As a counterpart, the same Ministry has recently organized a seminar on "Religious Pluralism and Secularity ("laicidad") in the Uruguayan society,"[56] showing a very open minded attitude towards the religious phenomenon, even considering its presence in public spheres.

Needless to say that this setting accounts for the absence of bilateral formal relations between the State and religious communities. As a consequence, religious communities and churches are not recognized as interlocutors at the same level as the State. On the contrary, as we have previously noticed, opinions and locution from religious organizations are often disqualified.

VI. The State and Religious Autonomy

Following the "two separate spheres" model, public authorities do not intervene in the life or organization of religious communities, partly because they lack jurisdiction over religious groups and affairs and partly because it just pays little or no attention to religion at all. Secular law has no provisions on the subject and religious communities govern themselves and act freely in the secular sphere, provided public or common interest is not challenged. Although the State has no specific legal provisions to facilitate peaceful coexistence and respect between religious communities, this philosophy underlies most of State actions and is currently developing. An example was the recent seminar on Religious Pluralism, which gathered representatives from the diverse religions in Uruguay, side by side with scholars from different disciplines.

There are some specificities, however, that may be considered as recognizing religious autonomy. One is the issue declaring that religious property – objects, goods or real estate – destined to worship are unattachable, according to several laws regarding the question, redounding in its universal scope.[57]

Another special consideration of religious autonomy is that related to religious secrecy. Proceedings Law allows ministers of religion – amongst others holders of professional secret – to abstain from testifying in court.[58] Although clergymen are not directly addressed by the provision, they are undoubtedly secret-holders, and may therefore invoke the exemption. The same is established for pleas (reports requested on paper), in which case the request may be denied if the matter is classified or under secrecy (Article 190.2).

A negative example in the fields of the State interfering in religious autonomy did take place, though, when the Executive ordered the Catholic Church authorities to replace a Jesus Cross to its original location in a temple, based on the fact that it entailed a historical and cultural value for the Nation.[59]

The issue regarding secularization of religious holidays may be considered another case of State interference in religious autonomy, or more exactly, a case of State invasion of religious holidays specifically of the Roman Catholic Church. What are the foundations of this bold statement? We are aware that secularization of religious holidays did take place in many other countries and yet, they could hardly be considered as interfering with religious autonomy. This non-interference is due to the manner in which it was implemented or the features that were designed to encompass the measure. For example, other countries have adopted religious holidays from other major religions as holidays or non-working days, together with Catholic festivities.

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55. Beretta, N., *Expenditure of Human Rights in Uruguay 2004-2008*, Ministry of Education and Culture, CINVE, U.N. System in Uruguay United in Action, 2009, 18-45.

56. Seminar "Pluralismo religioso y laicidad en la sociedad uruguaya,"National Library, 30 September 2009, organised by the Human Rights Office, Ministry of Education and Culture.

57. Civil Code, Art. 2363 "Sacred and religious objects and goods destined to worship of any religion"; Proceedings Law Art. 381"The following goods are unattachable: 9)Goods destined to worship of any religion".

58. Proceedings Law Art. 156 "Exemptions to the duty to testify: … (2) the holders of professional secret, or those who must keep secrets by virtue of law."

59. See Asiaín Pereira, C., "Declaración de Patrimonio Histórico o Cultural versus Libertad Religiosa,"May, 2006, www.libertadreligiosa.net, for an extensive description of this case. The decision was subsequently abolished.

The Romans built their edifice to their gods on the Jewish Temple Mount and later the Dome of the Rock and Al-Aksa were built by Arab Muslims on the ruins of the Roman structures.[60] Muslim mosques were erected in the holiest site in Judaism, the Temple Mount, where the Temple of Jerusalem once stood. Thus, Jews consider their main holy place profaned, and therefore cannot legitimately render a proper worship, a reason why they express their sorrow in the Wailing Wall. When a new antagonist religious community or a conquering political authority has intended to overthrow the native or traditional religious groups existing in the conquered or dominated territories, it either substitutes the original religious elements with elements of its own, or erects other buildings or monuments in or on top of sacred places, thus, profaning the place and intending to change its nature. History abounds examples of this sort.

More than interfering in religious autonomy, our argument is that the State has invaded the religious holidays of the Christian faith (Catholic, more specifically) rather than having "borrowed" and secularized them. This is part of a strategy to relegate and nullify religious manifestation, with a very deliberate purpose which was made explicit by the lawmaker: to "empty churches."[61] In order to accomplish that goal, Catholic religious holidays which were traditionally kept as non-working days, and were confiscated by the State with their names being substituted by pagan nomenclature. As a result, Uruguay's eccentricity stands out from the rest of the world, being the only country which has made the Easter Week – whose name was changed to "Tourism Week" – entirely non-working days (seven days). The measure turned out to be very effective: many Christians choose to take all the non-working week off, leaving their parishes to engage in tourism, leisure or travelling. As a result, churches have in fact been considerably emptied, or at least their congregation during the most important celebration of their Christian calendar.

A proof of our statement is the fact that, being the Holy Week a mobile holiday, State authorities depend on or must wait for the religious authority (Holy See, mainly) to determine when the Holy Week will be every year, and then to set the "Tourism Week" in that particular period of the year by themselves. The same happens with Carnival and is eloquent of the intention to invade, more than to secularize, a religious holiday.

Table 1. National Holidays as Proscribed by the 1979 Law

RELIGIOUS HOLIDAY	**Date**	**HOLIDAY** (non-working)	**Change of Denomination by Law**
Epiphany	January 6th	YES	Children's day
Carnival	Set by RC Church	2 days	Amplified: Carnival week
Easter week	Set by RC Church	7 days	Tourism week
All Saints	November 1st	NO	
Faithful deceased	November 2nd	YES	Deceased Memorial Day
Immaculate Conception	December 8th	NO	Beaches Day
Christmas	December 25th	YES	Family Day

A 1920 law establishes a weekly rest after every six working days, setting it on Sundays, allowing the exceptions necessary to cover the requirements of the give service.[62] The later 1979 law of "National Holidays" separates "traditional holidays" from "patriotic" commemoration and exaltations days. Included as "traditional" holidays are

60.Winston, E. A., "The Imminent Collapse of the Jewish Temple Mount," http://74.125.93.132/search?q=cache:CeNo719yJIoJ:www.freeman.org/m_online/apr02/winston.htm+al-aksa+profanation+of+jerusalem+templew&cd=5&hl=es&ct=clnk&gl=ar.

61. Asiaín, C., "Algunas Reflexiones acerca de la Libertad Religiosa en el Uruguay,"Anuario Argentino de Derecho Canónico T. X, 2003 and Asiaín Pereira, C., "Law and Religion in Latin America. General Aspects of Law and Current Concerns,"Hilary/Easter, 2009, "Law and Justice The Christian Law Review,"Worcester WR2 4PB UK, Reino Unido, http://www.lawandjustice.org.uk/LAWJUSTICE, 62-78.

62. Law Nº 7.318, 10 December 1920, arts. 1 and 2 Art. l "… notwithstanding the nature of the establishment, public or private, secular or religious, and even if it has a professional teaching or charitable character …"

these Christian religious holidays, but without mentioning their religious origin[63]: 1 and 6 January, Monday and Tuesday of the Carnival Week, "the sixth week after the Carnival Week, which will be denominated "Tourism Week," 2 November and 25 December. N.b.: Monday and Tuesday of the "Carnival Week" are the two days before the beginning of Lent, that is, before Ash Wednesday, which is also set by the Roman Catholic Church authorities (see Table 1).

VII. Religion and the Autonomy of the State

No religious community is entitled to a specific role in the secular governance of the country, nor given some power to control other religious communities under the State law. However, some religious authorities or representatives (members of the clergy, priests, and religious personnel) have occupied places in the Executive,[64] or have been appointed honorary members of public commissions.There is no restriction on members of the clergy to exercise political rights or to access public office.

VIII. Legal Regulation of Religion as a Social Phenomenon

With the exception of tax exemption, the State deals with religious communities in the same way it does with other associations in terms of granting legal personality, registration of religious entities for this purpose, cemeteries, regulation of places of worship, distribution of literature, data protection, and slaughtering of animals.

Until May 2009, the only administrative regulation on slaughtering of animals[65] mandated the use of humanitarian methods in slaughterhouses authorized by the Ministry of Agriculture, *with the exception of ritual sacrifice methods.* Ritual slaughtering may be permitted on demand – kosher or Islamic cases. Provided they comply with sanitary regulations, the activity is control-free.

The recent Law on "Responsible Tenancy of Animals"[66] is destined to protect animal life and well-being. Therefore, ill-treatment of animals is banned, and animal sacrifice is strictly regulated, except those for "productive activities or religious rites" (Article 3).

As Afro-Brazilian religions sacrifice birds or goats as ritual offerings to their gods, some animal-protection associations have raised their voices against this practice, and some bills on animal protection have been under consideration.[67] The paradox is that, while animals are banned from entering public beaches[68] for sanitary and other reasons, dead animals are left alongside the coast, with impunity. The Law authorizes sacrifice, but omits regulating about the destiny of the dead bodies.

As for data protection, privacy is generically guaranteed by the Constitution and International Humanitarian Law. The "Habeas Data" Law[69] regulates the treatment of personal data contained in registries, and is intended to provide reliable commercial reports. It explicitly leaves religious affiliation information out of the scope of the law, treating these as "sensitive information to people's privacy."Similar treatment is provided by later "Personal data protection and habeas data action" Law,[70] proclaiming personal data protection as a human right. It includes information related to racial and ethnic

63. Law N° 14.977, 14 December 1979 of National Holidays, Art. 1.

64. As recent examples, during this administration, Father Mateo Méndez was head of the Juvenile Rehabilitation Institute, and Father Uberfil Monzón was head of the Food National Institute; previously, during the Batlle Administration, Archbishop of Montevideo, Mons. Nicolás Cotugno was appointed President of the Peace Commission created 9 August 2000, to investigate the whereabouts of the disappeared during the military dictatorship, which was also composed by other members of the clergy.

65. Decree Nº 369/983, art. 181.

66. Law Nº 18.471, 21 April 2009.

67.See http://www.vet-uy.com/publicidad/animalessinhogar.htm.

68. Local Law N° 27.379, Municipality of Montevideo, 12 December 1996 and its administrative regulations

69. Law Nº 17.838, 1 October 2004. Art. 2º establishes that the law excepts "sensitive information about people's privacy, understanding by these, those referring to people's racial or ethnic origin, their political preference, religious, philosophical or moral belief, trade union affiliation or information regarding their health or sexuality or any other area reserved to individual freedom."

70. Law Nº 18.331, 18 August 2008, arts. 1, 4 and 18.

origin, political preference, religious or moral beliefs, trade union affiliation, and information related to health or social life as "sensitive information" which is specially protected. While data bases collecting "sensitive information" are banned, those possessed by churches and religious communities, associations and other non-profit entities with "political, religious, philosophical, trade union purposes."

Distribution of literature is absolutely free. Previous censorship doesn't exist, and freedom of expression is often privileged both by law and court-rulings – even over eventual offence of racial or religious feelings – provided it doesn't incur in crime, which we will discuss.

Regulation of places of worship follows the general criteria, with no specificities.

In regard to cemeteries, they were the first religious sites to be secularized – more accurately, expropriated – in 1863, unilaterally by the State.[71] As a result, the Roman Catholic Church owns no cemetery. However, Jewish cemeteries exist at least since 1917,[72] and the British cemetery is even older. Other private cemeteries have been authorized fairly recently.

As for the issue of legal entity, there are no specific structures for religious congregations or organizations with religious objectives. Therefore, all religious organizations must try to "fit" into existing civil or commercial structures, or as non-profit civil societies, given the absence of a particular legal religious association type.

The Constitution recognizes the Roman Catholic Church as an entity distinct from its members (Article 5), and as the owner of patrimonial rights. The Roman Catholic Church legal status is therefore implicit. Its rights are acknowledged, not granted. This status may be explained as the result of an agreement that goes back to the separation of Church and State where separation was achieved and the State granted legal recognition to institutions existing prior to the State, thus recognizing certain rights that the Church already had.

Likewise, the Civil Code (Article 21[73]), treats the Roman Catholic Church the same as governmental institutions. Legal personality of the Roman Catholic Church is automatic. For example, there is no required approval of its statutes, as its status is recognized as a package deal that includes all the guidelines, authorities, and regulations set forth by the institution, without the government requiring them to be presented for approval.[74] No other institution that wishes to obtain legal status has this luxury. A decree from the Holy See may create a new Diocese in Uruguay, and hence, a new legal entity is born in the country, without governmental approval.[75] The rest of the religious corporations, institutions, and associations should be recognized by civil authority. Recognition means they should go through the process of receiving legal status – a

71. Secularization of Cemeteries Decree, 4 April 1861.

72.http://74.125.47.132/search?q=cache:TCsgPSRXaogJ:jai.com.uy/histocementerios.htm+cementerio+israelita+uy&cd=1&hl=es&ct=clnk&gl=ar.

73. Civil Code, art. 21 "All individuals of the human race are recognized as persons. The following are considered legal entities, and therefore are entitled to civil rights and obligations: the State, the Treasury, the Municipality, the Church, and those corporations, institutions and associations acknowledged by public authority."

74. Asiaín Pereira, C., "El gran desafío del Derecho Eclesiástico del Estado en el Uruguay: Su Existencia misma como Rama del Derecho,"Secretaría de Gobernación de México, actas del V Coloquio Internacional del Consorcio Latinoamericano de Libertad Religiosa, México, D.F., 2006 y Anuario D. Administrativo T. XIII, F.C.U., Montevideo, 2006

75. Interpretative Law Nº 12.802, art. 134: "The following are recognized as cultural institutions in Article 69 of the Constitution, and therefore are tax exempt: seminaries or instructional buildings of the congregations or institutions of any religion, libraries, buildings for public events, edifices designed for classes on commerce, music, employment, and domestic economy, all sports fields, centers, and entertainment for youth established and sustained by a non-profit church or institution. In addition, all cultural institutions, and those instructive in nature, sports federations or associations, as well as any institution incorporated therein is declared exempt from all national or local taxes, as well as all tributes, national security taxes, and/or contributions, inasmuch as said entity has been legally recognized. Equally exempt from any national or local tax, as well as any tribute, and/or contribution of goods of any kind, are all current and/or future Dioceses of the Roman Catholic Church, as well as any other religion that has, receives or acquires, for the purpose of worship, welfare and educational assistance. In the case previously mentioned, the reason for the exemption would be justified by the Minister of Finance. The legal bodies of the Dioceses of the Roman Catholic Church, created or that will be created in the future, as they formulate their respective legal declarations, will indicate which assets are not tax exempt."

process that requires that their statutes be presented and approved – and that a series of administrative controls be put in place for the duration of their existence.[76]

The Ministry of Education and Culture is authorized to apply sanctions that range from a fine, to termination of all legal status of the institution. Administrative intervention is seen as a precautionary means when (1) violation of law, regulations, or statutes may be challenged, (2) necessary to protect the state interest, (3) necessary to safeguard the integrity of its members, and (4) when necessary to protect moral or material goods that are the property of the organization. (Outline of legal implications, Table 2, below.)

Discrimination against the rest of the religious communities is undeniable, notwithstanding the historical explanations that may be given to justify it.[77] The Principle of equality is overruled as well as is Article 5 of the Constitution, which doesn't distinguish between "all churches consecrated to the worship of the various religions" when granting tax exemption.

One might ask, where lays the so called "abstentionist" secularism when the State is favouring one religion over the others? The truth is that neutrality is a myth. We will look into tax exemption later.

Table 2. Legal Implications of Authorized Discretionary Treatment of Religions Organizations

	ROMAN CATHOLIC CHURCH	**OTHER RELIGIOUS GROUPS**
Legal personality	Automatically granted	Must follow procedures to attain it (Law Nº 15.089)
Creation of new associated entities with legal status	A decree from the Holy See automatically creates a new legal entity in Uruguay	Must follow administrative procedures and registration before the government
Statutes	Canon Law (C.I.C),[78] constitutions and conciliatory documents rule as the R.C.C.'s statutory law	Need approval
Controls	Exempt of controls →consequences in civil life	Ministry of Education controls, with powers to punish and intervene
Change of statutes	Without notifying the State	Submitted to administrative control
Tax exemption	Per se (Const. Article 5)	Depends on: legal status, tax authority approval, be non-profit, plus historical rooting for tax exemption for employer
Need to prove worship objective ?	Exempt	Must prove
Type of association/ legal structure	Original legal entity (recognition together with the State)	Acquisition of a generic type of legal association, thus "forced to fit" into existing associative typology
Private or public?	Private legal entity for legal business and civil life (dioceses, parishes, congregations, schools); recognition of the Holy See as an international public entity or subject.[79]	Always private.

76. Law of civil organizations Nº 15.089, 23 December 1980, art. 1: "The Department of Education and Culture has administrative power over all civil bodies, and as a consequence, will control their creation, function, dissolution, and sale."

77. Asiaín Pereira, C., "Personalidad Jurídica de las Congregaciones Religiosas en el Uruguay. Desigualdades Jurídicas,"in "Religion, Identity and Stability: Legal Challenges of Religious Difference," 14th Annual International Law and Religion Symposium, 7-9 October 2007, Brigham Young University, Utah, U.S.A.

78. Codex Iuris Canonici, Canon Law of the Roman Catholic Church.

79. Executive Power Res. (1990-1995), Brito, M., Yearly Report on Administrative Law Group, June 2006, http://www.mrree.gub.uy/protocolo/PrecedenciaEmbajadores.htm and http://www.mrree.gub.uy/protocolo/pais2.asp.

religious activities follows the trend of any other social phenomena. In this sense, one might attempt to believe that freedom of religion is actually undermined, since religious issues and concerns are neglected or overlooked. Contrary to what a neophyte may guess, the absence of norms doesn't secure freedom at all. As it leaves rights and goods unattended, due protection is denied.

The State has no official record of the religious affiliation of individuals, at least not a complete and universal record. The National Statistics Institute, however, did carry out a poll in 2006,[80] and inquired about religious affiliation. According to the poll, 80 percent of the population declared to believe in God, or belonged to a religion or belief.[81] While it was the first time that the State asked about religious membership or sympathy – which is a huge step if compared to prior inquiries – it isn't conclusive since the poll was not universal and cannot be considered complete, like a census. In fact, some initiatives to include the question in the next census were rejected, so the issue will continue to be absent from official records.

As the State ignores the religious affiliation of its inhabitants, it eludes designing and enforcing suitable policies to assure freedom of religion or belief. Again, the issue is neglected. This legal desert has undermined important concerns such as freedom of conscience, amongst others. In this atmosphere, conscientious objection was hardly recognized as a right till very recently, even though our Constitution recognizes the independence of the moral and civic conscience,[82] and commits authorities and individuals to further physical, moral, and social health and perfection.[83]

As compulsory military service is not operative in our country, there were no complaints in this area, so the issue of conscientious objection wasn't raised as early as it was in other countries in which academic reflection was enabled.

The question was opened by Jehovah's Witnesses objecting to medical treatment, challenging scholars and decision-makers to take a stance on the point. Few cases reached the courts – the claims being generally ruled in favour of the objector – on the grounds of freedom of conscience and of belief, or enhancing self-determination.[84]

In spite of the fact that the right is not yet granted full recognition – at least by some conservative scholars or secular fundamentalist postures – conscientious objection to blood transfusion is generally accepted both by private and public hospital authorities, as a reason to avoid the prescribed treatment, provided the person is capable of deciding and has been thoroughly informed of the risks he is facing.

Based on the patient's right to self-determination, the Clinics Hospital – a university hospital part of the public university – has approved a medical Protocol to deal with these cases, founded on the two governing principles of valid and informed consent by a capable adult. In the case of minors or mentally disabled whose guardians refuse the treatment, as in the case of pregnancy, a Family Judge will make the determination.[85]

Several "progressive" bills have been under consideration in Parliament during the

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80. National Statistics Institute (INE), Homes National Poll (Amplified), 2006, http://www.ine.gub.uy/biblioteca/metodologias/ech/metodologia percent20enha percent202006.pdf.

81. Da Costa, Néstor (compilador), *Guía de la Diversidad Religiosa de Montevideo,* CLAEH, Montevideo, 2008, Ed. Santillana SA, 16.

82. Art. 54 "Law must recognize independence of the moral and civic conscience of those involved in labour or service relation, as well as a fair salary, limitation of the working day, weekly rest and physical and moral hygiene."

83. Art. 44: "The State will legislate in all matters related to public health and hygiene, seeking physical, moral and social perfectioning of all inhabitants. All inhabitants are due to care for their health and submit to treatment in case of illness. The State will provide free means of prevention and assistance only to the poor or those lacking the necessary resources."

84. A court ruled that the judge lacked jurisdiction to substitute the free will of a capable person exercising his right to self-determination inherent to human nature (Juzgado Letrado de Primer Instancia en lo Penal de 5º turno, 21.X.1998, La Justicia Uruguaya, T. 120). In another case, the judge quoted the "Dignitatis humanae" Declaration of Vatican Council II as "a religious text of universal scope" (Juz. Let. Pen. 13º T, Nº "omissus", 30 January 1997 (Cecilia Schroeder), La Justicia Uruguaya, T 115, caso 115006.

85. Cendoya, N. y otros, *"Relevancia del consentimiento del paciente y situaciones en que éste no acepta el procedimiento terapéutico propuesto en centros asistenciales públicos,"*Yearly Report on Administrative Law, Vol. XIV, Fundación de Cultura Universitaria, Montevideo, 2007, 659.

last administration, and several laws have been passed, which have introduced innovations in the area of bioethics which challenge religions, beliefs, and consciences.[86] Some of them have foreseen the legitimacy of posing conscientious objection. Others have limited the right to the extreme of denying it.

The "Human Assisted Reproduction Bill"[87] deals with manipulation of embryo and other techniques. As the "Defence of the Right to Sexual and Reproductive Health Bill" – which intended to legalize abortion and recognize conscientious objection,[88] – was vetoed, Law Nº 18.426 (the few articles of the vetoed bill which prevailed) commited the State to enforce national programs to implement sterilization techniques and to provide birth-control methods universally. The Law on the Rights and Duties of Patients and Health Services Users[89] and the "Law on Anticipated Statement of Will"[90] (which enables termination of life under certain conditions) both regulate the right to conscientious objection, with limits.

The Bill on the "Right to Genre Identity and Change of Name and Sex in Identification Documents,"[91] recently approved by both chambers of Parliament, has no provision on conscientious objection. In spite of this law, some public servants, physicians, suregeons and other medical personnel assigned to a sex operation will refuse to comply when facing the change of name and sex in documents.

IX. STATE FINANCIAL SUPPORT FOR RELIGION

A. State Financial Support for Religion Is Indirectly Specified through Tax Exemption

Article 5 of the Constitution exempts *all temples consecrated to the worship of the various religions from any form of taxes.*

Several problems have risen when interpreting the meaning of the term "temple" or church, as well as of the concept of "taxes." Tax specialists have interpreted the concept of "taxes" as referring to any kind of tribute and consequently including property taxes and payroll taxes in the scope of the tax exemption, defining it as "immunity" or objective exemption.[92] It has also been defined this way by interpretative laws, as well as by the jurisprudence of the Supreme Court. Constitutionalists have argued, instead, that by the time of the last reform of the Constitution, which maintained the term "taxes" in Article 5, three types of tributes were clearly differentiated in Tax Law,[93] and thus the term "taxes" is not comprehensive of the rest of the tributes.[94]

Another problem was raised when interpreting the term "temple" or "church" alluded to by Article 5. In general, scholars – tax specialists and constitutionalists[95] – have

86. For a further analysis, see Asiaín Pereira, C., "Derecho Sanitario y Libertad de Conciencia en Uruguay," May, 2009 (publishing), chapter on Uruguay, "Estudio comparado de libertad de conciencia y Derecho Sanitario en Iberoamérica,"Universidad Autónoma de Madrid, Spain.

87. Bill www.parlamento.gub.uy, *Cám. Representantes*, Carpeta Nº 3181, 2003, Repartido Nº 334. Jule, 2005

88. The bill also contained legalization of abortion, which was vetoed by President Tabaré Vázquez, Dec., 2008. For a detailed analysis, see Asiaín Pereira, C., "El Aborto de la Ley de Aborto," IUSTEL, Revista General de Derecho Canónico y Derecho Eclesiástico del Estado, España, Nº 19, enero de 2009, (RI §407323), http://www.iustel.com/v2/revistas/detalle_revista.asp?id=2&id_noticia=407323& id_categoria=8481&texto.

89. Law Nº 18.335, August 2008.

90. Law Nº 18.473, 21 April 2009.

91. At http://www.parlamento.gub.uy/texrobados/AccesoTextoAprobado.asp?Url=/textos aprobados/ camara/d20090915-34607-1167.htm was approved by the Chamber of Deputies and subsequently by the Senate on 10 October 2009, still pending pronunciation by the Executive, as for 15 October 2009, to become a Law.

92. Valdes Costa, R. y Shaw, J. L., Tax Law Code.

93. Tax Law Code, Arts 10 to 13 distinguishes three kinds of tributes: *Tax* (impuesto) as the tribute paid regardless of the State's counter parting activity in favor of the taxpayer, e.g., consumer taxes; *Rate* (tasa) as the tribute paid in relation to a specific governmental activity for the taxpayer, e.g. registration costs and administrative charges; *and Special Contributions*, such as those paid as a counterpart to an economic benefit provided to the taxpayer, derived from public works or activities, e.g., special contributions due to improvements in property, and payroll taxes.

94. Risso Ferrand, M., *Derecho Constitucional*, T.I, Montevideo, Fundación de Cultura Universitaria, 2006,

95. Shaw and others, Tax Code) and Korseniak, José, *Derecho Público. Derecho Constitucional*, Montevideo, Fundación de Cultura Universitaria, 2006.

understood that the temple should be permanently dedicated to worship to be considered for exemption. Others, on the contrary, have outlined that as Article 5 doesn't require it, the interpreter shouldn't go beyond the text of the Constitution, exacting stricter requirements.[96]

But the meaning of the term "temple" has been debated in courts and the legal forum. Some judicial decisions have considered that the idea that religion entails an integral development of all aspects of life and culture,[97] acknowledging the global aspect of religion.[98] These decisions proceeded to rule that not only is the area of the temple exempt, but also its annex buildings – such as pastoral classrooms, clergymen's premises, etc. This ruling favors the subjective nature of the exemption, that is, that religions were the subjects of exemption, not only the temple's building.

Others have leaned towards interpreting the exemption as objectively directed to temples and not to religious congregations or communities as a whole.[99]

Some scholars have even held that Masonic temples may be included in the exemption, given the fact that Masons call their meeting premises "temples." Such an inclusion calls upon a definition of the concept of religion.[100]

Annex buildings used for educational purposes may sometimes be exempted by Article 69,[101] which exempts private schools and cultural institutions from taxes, as a subsidy for their services. Schools owned or operated by religious communities – the majority of which are Roman Catholic – are reached by tax exemption of Article 69 on behalf of the cultural nature. The last reform in Tax Law raised some doubts about payroll taxes due from religious communities for the schools, charitable institutions, congregations, and associated institutions with religious or religiously-related purposes, as the reform appeared to abolish the tax exemption. The question was temporarily solved by an administrative regulation,[102] declaring tax exemption for these groups complied with the three requisites: be non-profit, have legal personality, and have historical rooting. The exemption is explicitly granted on behalf of their "cultural nature" (Article 69 of the Constitution, not Article 5). Religious nature is hence ignored.

There are no other State subsidies of religious organizations or activities, at least not based on their religious nature. The maintenance of religious structures of historical or cultural value is not subsidized, but as the Constitution orders the State to lawfully implement all suitable means to protect "all artistic or historical riches of the country, no matter who its owner is" (Article 34). Therefore, once a building, part of a building, monument, or piece of art is declared part of the cultural or historical heritage of the nation,[103] a burden is put on its owners. This burden implies that the cultural object may not be disposed of or modified, amongst others, and are exempt of some taxes.

There was a particular incident which compromised the Roman Catholic Church's autonomy. A parish priest had removed a sculpture of Christ in a Cross which had stood as the main image of the church for more than 30 years. A Resolution of the Executive

96. Torres, G., Derecho Tributario y Confesiones Religiosas, Paper for the IX Colloquium of the Latin American Consortium for Freedom of Religion or Belief, Aug, 5-8, 2009, University of Montevideo, Uruguay

97. Case ruled by the Court of Administrative Litigation, Sentence Nº 827, 23 October 1996.

98. Case ruled by the Court of Administrative Litigation, Sentence Nº 4, 5 February 1997.

99. Case ruled by the Court of Administrative Litigation, Sentence Nº 157, 4 April 2005.

100. Korseniak, J., *Derecho Público. Derecho Constitucional*, Montevideo, Fundación de Cultura Universitaria, 2006, 347.

101. Constitution, article 69 : "Private education institutions and cultural institutions of the same nature are exempted of national and provincial taxes, as subsidy for the services they provide.

102. Administrative Regulation Nº 183/008, regulating payroll tax exemption, when schools belong to a religious community, under certain circumstances: "Article 3 Bis. The activities of religious institutions, in regard to worship and in regard to diffusion of their doctrine, are considered of cultural nature and therefore included in the benefits regulated by this decree. The cultural nature also includes social and human promotion activities carried out by religious institutions. Religious institutions must accomplish the following requisites: a) be a legitimate legal entity; b) be non-profit; c) possess historical rooting in the country. The Administrative authority must control the effective fulfillment of these requisites when enforcing this regulation."

103. Law Nº 14.040, Oct., 20th, 1971, art. 5, 15 and 21, establish that real estate will be affected by certain burdens which ban modification, destination to incompatible uses, the obligation to maintain them and allow inspections, and prohibits their departure from the country, while establishing some tax exemptions.

Power of 2006, recalling a prior Resolution that had declared the Church a historical monument, declared the sculpture itself a historical monument too, as it formed a unit with the church, and in the same Resolution, established that the piece should remain in the church, for artistic reasons,[104] when it had been already removed.

X. Civil Legal Effects of Religious Acts

There is no legal recognition of legal effects to acts performed according to religion or within the realm of the internal autonomy of religious communities.

Religious marriage, for instance, is deprived of civil effects or invalid, since 1885.[105] Previous civil marriage and its registration in the State Civil register is compulsory, in order to be granted official effect. As an exception, "in extremis" marriage is allowed, though deprived of civil effect.[106] Punitive sanctions in the form of criminal offenses are established against members of the clergy who celebrate religious weddings without previously verifying the celebration of the civil marriage. As for dissolution of marriage and divorce, they are of the exclusive jurisdiction of State authorities, "with complete disregard of ecclesiastical authorities."[107] At the same time, equal legal treatment has been approved by law for non-married couples (heterosexual as well as homosexual),[108] with the same or similar effects and rights as those of married couples, and adoption by either is legitimate. As the Parliament is legislating in accordance to "progressive" streams, forwarding impairment of genre rights and sexual diversity, it hasn't shown to be so concerned about religious pluralism. As a result, we must face the paradox that the only element proscribed from matrimonial law, is religion, per se.[109]

Likewise, secular courts do not intervene nor enforce decisions adopted by religious courts or hierarchical bodies, following the "two separate spheres" model. Canon Law rules as the Roman Catholic Church's statutory law, as do the statutes of any other association.[110] Therefore, transmission of property from this church must follow the procedures and requirements of Canon Law, a fact which is often disregarded by notaries and public property registries with serious consequences in real estate.

XI. Religious Education of the Youth

The Constitution guarantees academic freedom (Article 68), establishing that "State intervention will be limited to assuring the maintenance of hygiene, morality, security and public order." It recognizes "the right of every parent or guardian to choose the suitable teachers or institutions for their sons or children under their care."

So religious communities are free to create private schools, but in order to acquire official recognition, they must either adapt their curricula to the State's curricula and submit to public controls, or make their students sit for an examination before public authorities which will evaluate the student's capacity in accordance to official standards.

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104. Res. of the Executive Power Nº 13/006, 16 January 2006, recalled Res. Nº 141/997, 29 July 1997 which had declared the Church of San Pedro de Durazno by Architect Eladio Dieste a historical monument, and alluded that as sculpture by national artist Claudio Silveira Silva forms a unit with the building, and therefore it should be declared a historical monument for itself, in order to reaffirm the interaction between artistic elements, as the work of art was conceived as part of the architecture of the temple. Thus, its permanence in the Temple is ordained (when the cross had been already removed). This resolution was later abolished.

105. Civil Code Art. 83. "Civil marriage is the only valid marriage all throughout the territory of the State, and no other type are recognized as for 21 July 1885…."

106. Civil Code Art. 84. "Once the civil marriage is prosecuted . . . spouses may freely request religious ceremony to the church they belong to, but no priest of the Catholic Church or pastor of the different dissident religions in the country, may proceed to bridal blessing without previously verifying the celebration of civil marriage . . . either incurring in a six months imprisonment penalty and one year in case of second offense. As an exception, "in extremis" marriage is unpunished, though deprived of civil effects."

107. Civil Code, arts. art. 145 y 146.

108. Law Nº 18.246, "Concubinary free-union" Law.

109. Asiaín Pereira, C., "Efectos Civiles del Matrimonio Religioso en el Uruguay," in publication by Consorcio Latinoamericano de Libertad Religiosa, VII Coloquio, 2007 and in www.libertadreligiosa.net.

110. Conclusion of Dr. Gabriel Gonzalez Merlano, Latin American Consortium for Freedom of Religion or Belief.

This occurs both in primary schools as well as in college or high school levels. Private universities were authorized fairly recently, and their diplomas and career degrees were subsequently recognized – in general – by secular law, in spite of the arguments that were raised – and still interfere – to oppose it.

Our legal system doesn't prohibit the inclusion of religion as a subject in public schools. Moreover, it has the duty to impart religion as the manager of public interest,[111] or at least instruct about the existence of *the diverse religions* existing in the country in compliance with binding International documents.[112] Religion is in fact absolutely absent from public schools curricula, as a result of the misinterpretation that the State must have a prescinding attitude towards the religious phenomenon, thus incurring in "strident laicism."

Not only does the Constitution value and favour religion – as we have outlined – but so does Law. The recent Law on Education[113] recognizes education as a basic human right, and proclaims that it will follow the guidance of International Humanitarian Law, as well as the Constitution in its implementation. On proclaiming the governing principles of public education (Article 17), it defines the principle of secularism ("laicidad") as that *assuring the integral and egalitarian treatment of all topics in the ambit of public education, by means of implementing free access to all sources of information and knowledge, enabling pupils to adopt a conscious posture.* ***Plurality of opinions and rational and democratic confrontation of knowledge and beliefs is guaranteed***. Notwithstanding this mandate, religion is still absent from schools.

Despite these flaws, religion has received some special consideration by Education authorities,[114] recognizing the teacher's freedom of conscience and opinion whether it be *religious, philosophical, political or any other sort, within the strictest secular context, preserving the pupil's foredoom against any form of coercion.*

Some measures are given as examples of "positive" secularism.[115] Absences for religious reasons may be justified[116] for Jews and Seventh Day Adventists. Refusal to take compulsory oath or reverence to the flag and national symbols may be excused, or not taken into account as essential for continuing scholarship,[117] on the grounds of Freedom of Religion or Belief and the right to education. An administrative resolution provided the correct interpretation of secularism ("laicidad"): "the fact that religion is not taught in public education and that religious practice is not promoted doesn't mean disrespect of all of them in equal terms, as well as the right not to have any religion at all." The resolution provides that no absences for religious reasons should be counted, as long as they don't exceed 4 days per year; that teachers should be instructed not to set exams or tests "in those days in which one or more pupils have requested and have been exempted to attend school for religious reasons," among similar criteria.[118]

The opposite criterion was held by the Public University when dealing with the same issue; students and professors were denied the possibility of being waived from university activities for religious reasons,[119] arguing that "freedom also implies that people should impose upon the University a certain religion."

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111. Durán Martínez, A., Enseñanza Religiosa en la Educación Pública. Marco Constitucional Uruguayo, IX Colloquium of the Latin American Consortium for Freedom or Religion or Belief, Montevideo, Aug., 2009

112. Asiaín Pereira, C., "Religión en la Educación Pública: Deberes del Estado Uruguayo a la luz del Derecho Humanitario Internacional,"IX Colloquium of the Latin American Consortium for Freedom or Religion or Belief, Montevideo, Aug., 2009.

113. Law Nº 18.437, 12 December 2008, arts. 1, 4 and 17.

114. National Administration for Public Education (ANEP), Public Teachers Statute.

115. Rotondo Tornaría, F., "La Religión en la Educación Pública Uruguaya: Régimen Legal,"IX Colloquium of the Latin American Consortium for Freedom or Religion or Belief, Montevideo, August, 2009

116. Ordinance Nº 31, ANEP, from 1986. Parents must notify the headmaster beforehand about planned absences. Resolution Nº 7 from 1994 justified absences from Friday afternoon till Saturday afternoon, for religious reasons.

117. Res. of the High School Council, 20 July 2005, session Nº 37, circular Nº 2666/005.

118. ANEP, Res. Nº 20, Act. Nº 14, 25 March 2009.

119. Res. Nº 15, Oct., 28th, 2008, Central Governing Board, University of the Republic

XII. RELIGIOUS SYMBOLS IN PUBLIC PLACES

Citizens are free to wear religious symbols in public places, in general. Resistance to this public manifestation of faith comes not from the legal setting, but from the rest of society and by those enforcing or interpreting law in different areas of life.

There was a case which revealed the lack of tolerance of fellow students at the Public University. A Catholic Nun attended class wearing her religious dress, to which the students association opposed on the grounds of the sacred "laicité" of the State, and demanded a resolution to be adopted by the authorities banning such garment, with no success.

Schools, hospitals,[120] courtrooms, and public offices are in fact devoid of religious symbols. However, common places (like streets, squares, and open spaces) have been gradually inhabited by statues representing religious symbols or images of more than one religion.

After the visit of Pope John Paul II in 1987, a white cross was erected in his honor, and the controversy about the presence of religious symbols in public spaces was reanimated and strongly debated in Parliament.[121] Ultimately, the statue was allowed to stay by law,[122] as a commemorative monument. "From iconoclasm to tolerance," the battle fought by the cross opened the way to the presence of religious symbols in the public space for other faiths.[123]

The "Yemanjá" Goddess, of the afro-Brazilian cult, has her monument in riverside of Montevideo since 1994; Confucius has a statue very near; there is a homage to the holocaust and one to a Great Rabine; the Rotaries and Lions welcome visitors in routes, crosses and images of the Virgin in her different advocations are erected in the countryside. When Pope John Paul II died, a monument was erected next to his commemorative cross, an event which awakened protests by evangelicals and other Christian churches.

XIII. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

The Penal Code[124] specially protects religion in the public arena against offensive expressions, punishing several criminal offenses committed against religious elements.

In the chapter destined to protect Freedom, it sanctions four types of "offenses against religious practice and religious sentiment," punishing outrage against religious worship by impeding or disturbing a *religious ceremony or rite*, against *places or elements of worship and against individuals professing it or ministers of religion.*[125] It deals with the deceased separately.[126] As the norms refer to "all cults [religions] tolerated in the country" this protection is equally applied to all religions and beliefs.

In 1989, and as an answer to the demands of the Jewish community, the Parliament passed a law to punish "incitement of hatred, scorn or violence against certain individuals because of the color of their skin, their race, religion, or national or ethnical origin" as well as the *commission* of such acts.[127] On demand of the genre-equality lobby, a 2003

120. Religious symbols in public hospitals were prohibited in 1906, a "Jacobin" measure for some critics (José Enrique Rodó), which ignited a harsh and long debate nationwide.

121. Asiaín, C., "Algunas Reflexiones acerca de la Libertad Religiosa en el Uruguay,"Anuario Argentino de Derecho Canónico T. X, 2003.

122. Law Nº 15.870 "Pope John Paul II," 9 July 1987.

123. Asiaín, C., "La presencia de lo religioso en el ámbito público en el Uruguay,""Anales Derecho, IV Col. Latinoam. de Libertad Religiosa,"Pont. Univ.Católica Chile, 2005.

124. Penal Code of 1889, with its 1934 reform, updated. Title XI, Chapter V, protecting Freedom.

125. Penal Code, Art. 304 "Offence against religion by impeding or disturbing the ceremony . . . the practice of a rite or any ceremonial act of some of the religions tolerated in the country, either in temples, in spaces open to the public, or in private, if assisted by a minister of religion in this last case …. " Art. 305 "Offense . . . by outrage against places or elements of worship … either by word or by action, or even by spoilage or destruction … provided that the offence is perpetrated in public or being notorious, is made public …. " Art. 306 **"**Offense against religion by outrage against individuals professing it or ministers of religion …. "

126. Penal Code Art. 308 **"**Vilification of tombs, urns and objects destined to reverence of the deceased …. "

127. Law Nº 16.048, of 16 June 1989, incorporated as articles 149 BIS and TER to the Penal Code.

law included the motives of sex discrimination among the criminalized conducts.[128] These provisions may account for the criminalization of blasphemy, defamation of religion, or religious hate speech, whenever an individual or group of a certain religion feels offended or attacked in his or their religious feelings and integrity, and therefore decides to denounce the situation. Their scope widely covers all religions, provided the criminalized conduct is proved to have occurred and the offensive consequences of that conduct was foreseeable. In the area of Freedom of Expression[129] we also count on some legal provisions.

Our Constitution specifically and explicitly recognizes freedom of expression in Article 29,[130] and our Penal Code criminalizes Defamation and Insult as a means of shielding individual honor.[131] Defamation is committed when someone, "in a manner that could be made public, attributes to another person a certain event, which if it were true, might give place to penal or disciplinary proceedings against her, or that might expose her to public hatred or scorn." By Insult ("injurias"), criminal law understands "that person who, apart from the cases foreseen in the precedent article, offends in any way, by means of words, writing or acts, another person's honour, rectitude or propriety." Perpetration of these acts by means of "writings, drawings or paintings, publicly disclosed or exposed to the public" are penalty aggravating circumstances. The perpetrator may, however, be exempted of responsibility in certain circumstances related with public interest, thus privileging this value over the value of honor, even when the disclosure is made by means of funny or artistic manifestations. If "actual malice" is found in the offender, then his responsibility re-emerges. If disclosed facts or qualities attributed to the person are proved to be true or verisimilar, then the perpetrator of the offence may be exempted, except when his "actual malice" is demonstrated. Very rarely do cases based on religious offence reach the courts, mainly because they are solved by pacific means, or either disregarded.

Law defines as a media offense, or crime committed through media, the perpetration of acts qualified as criminal offences, if committed through the media. They usually entail media-abuse by the perpetrator.[132] The right to rectification and answer is assured, and may even exempt the media representative of responsibility, privileging the right to inform and to acquire information over other values involved.

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128. Law Nº 17.677, 29 Jully 2003. Arts. 1 and 2 substitute art. 149 BIS and TER of the Penal Code, incorporated to it by Law 16.048, and include "sexual orientation or identity" as a motive for criminalization of "incitement to hatred, scorn or any kind of moral or physical violence, by any means suitable for public diffusion, against one or more individuals because of the color of their skin, their race, religion, national or ethnic origin, sexual orientation or sexual identity . . ." as well as the "commission of acts of hatred, scorn or violence" against such individuals, for the given reasons.

129. For an extensive analysis, Asiaín Pereira, C., "Libertad de Expresión y Derecho de Expresión de las Confesiones Religiosas en el Uruguay,"2006, in publishing, Consorcio Latinoamericano de Libertad Religiosa, actas del VI Coloquio, and in www.libertadreligiosa.net.

130. Constitution Art. 29: "Communication of thought either by means of words, writing - private or published by the press - or by any other form of disclosure is entirely free, without previous censorship; the author, or in its case, the printer or transmitter, being lawfully responsible for the abuse they might commit."

131. Penal Code Arts. 333 to 336. art. 336 were substituted by Law N º 18.515 (15 July 2009), arts. 4: "Responsibility will be exempted to those who: a) made or disclosed a public statement about public interest matters, either referred to public servants or to individuals who, because of the profession or office, have relevant social exposure, or to any person who has voluntarily got involved in matters of public interest; b) reproduced any sort of statement in regards to matters of public interest, provided its author has been identified; c) made or disclosed any kind of public humoristic or artistic manifestation, provided it refers to the precedent hypothesis. Responsibility exemption will not proceed when the author's actual malice (or intention) to offend other people or harm their lives. Those accused of having committed the offences of articles 333 and even 334, when prosecuted, have the right to prove the truth of the facts and the verisimilitude of the qualities attributed to the person, except when the case refers to the person's private life or when disclosure of facts is of no public interest. If truth or verisimilitude is proved, the perpetrator of the accusation will be exempt of punishment, except in the case he had acted with actual malice."

132. Law Nº 18.515, Art. 7: "The perpetration of an act qualified as a criminal offence by the Penal Code or special laws, through the media, constitutes a media offense." Art. 8: "He who, disclosed fake news, knowing that they are false, in order to commit one of the criminal offences …. " Art. 9: "The legal proceeding will be immediately closed, no matter its stage, in case the person responsible for the media shows he has published or made public the requested reply to the offence, with an outlining similar to the information provoking it …."

XIV. FINAL REMARKS

As the present report contains a considerable amount of regulations on Religion, one might be tempted to promptly conclude that Uruguay has paid a relevant attention to the phenomenon. If we look closer, though, we can appreciate that most regulations are intended to intervene in cases where coercion is required, that is, the State unfolds its repressive arm to stop and punish law trespassers (the negative phase of Freedom of Religion, to prevent coercion and abuse). Regrettably, evidence shows that our State is not so concerned with the positive aspect of Religious Freedom, which is customarily enforced through measures aimed at promoting Freedom of religion or Belief. The focus is put into shielding attacks from abusive interference, not so much in providing the wheels and wings for human promotion.

The religious phenomenon demands a special regard from the Legislative and positive action from the State, not the State's indolence or indifference towards it, which results in despair and lack of protection. Borrowing Juan Navarro Floria's idea, and concretizing it to the case of Uruguay, we may say that if we are here today and in this part of the world talking about religious freedom, it would be because of the influence of what is taking place at a planetary level. Close and homogeneous societies – like ours in its origin – are not concerned by these issues, because they ignore the complexity and depth of the conflicts posed by plurality, and among them, those related to Freedom of Religion or Belief.[133]

Uruguay was born as a fairly homogenous European-rooted society, which didn't find itself in the need to develop terms of coexistence with the "diverse," due to the regrettable historical fact that indigenous peoples were almost exterminated, if not absorbed and nullified by the European invader. This peculiar and uniform social composition may explain our society's narrow-mindedness in its youth and forthcoming years. But despite that probable determination, self-awareness of the plural quality of its society, as well as of their legitimate demands, is crucial. We cannot keep on applying old structures and perished ideas to an evolving, mutable and diversified society in terms of religious pluralism.

As we have outlined, our social composition has dramatically changed, becoming diversely pluralistic. At the same time, the international community has made substantial progress in recognizing Human Rights and implementing effective means to enforce them. Now Uruguay must make an introspective and acknowledge the "alter" or "otherness" coexisting in the realm of our society, as well as glance outdoors to encompass the progress of International Humanitarian Law, in order to meet the demands of Freedom of Religion or Belief of its plural inhabitants.

133. Navarro Floria, J., *"El Derecho Eclesiástico en la República Argentina: asignaturas pendientes,"* Anuario de Derecho Eclesiástico del Estado, Spain, Vol. XXV (2009), 513-532.

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