

The ‘Religious Issue’ in Spanish Constitutional Law – Some Lessons in How to, and How Not to, Deal with the Freedom of Religion

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Honoured Sir,

Since you’re are pleased to inquire what are my thoughts about the mutual toleration of Christians in their different professions of religion, I must needs answer you freely, that I esteem that toleration to be the chief characteristic mark of the true Church (...).

‘A Letter Concerning Toleration’ John Locke.

A. Introduction

The lack of religious freedom has been a constant problem throughout the history of Spain. The so-called ‘religious issue’ has been a source of intolerance and confrontation all the way back to those who, in the Spanish Civil War (1936–1939), were called ‘the Two Spains’.

The term ‘religious issue’ can be defined as the existing conflict, both political and emotional, between those who wished to maintain the pre-eminence of the Catholic Church in Spain and those who, fighting for the freedom of religious and a lay state, identified the Catholic Church with conservatism, absolutism and lack of liberties. The former position considered that the state was obliged to guarantee its privileged situation because Catholicism was a main component of the Spanish history and social reality: their components were sometimes tolerant, sometimes intolerant towards the existence and practise of other religions, but they were never claimed in favour of the freedom of religion. The latter attacked the power of the Catholic Church which was seen as an obstacle preventing the modernization of Spain: this position was sometimes anti-clerical and aggressive against the Catholic Church.

It is true that in certain historical periods there was an exemplary respect and

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tolerance between the Catholic, Jewish and Muslim religions, which coexisted for centuries in the Peninsula: Toledo is a good example of this. However, religious intolerance has literally been a constant feature in Spanish history.

Until the 1978 Constitution, and since Bayona's Constitution of 1808, Spain has had seven constitutions:¹ one (that of 1856) which was not promulgated, the Project of Constitution of 1873, and two equivalents; the 'Estatuto Real' of 1834, and 'Las Leyes Fundamentales' of General Franco's regime.

Nevertheless during those 170 years of constitutionalism, it was only at the time of the two 'Republicas' that Spain enjoyed a period of religious freedom: which means less than 20 years.

The Spanish Catholic unity was achieved in 589 with the conversion of the Arian Visigoths at the III Council of Toledo. Therefore Spain has been confessionally Catholic throughout most of its history. Thus the Catholic religion has been considered the state's official religion (except in the Republican Constitution of 1931) to the point of prohibiting, in some cases, the practise of any other religious, such as in Article 1 of Bayona's Constitution or in Article 12 of Cádiz's Constitution.²

This situation changes completely with the Constitution of 1978. This Constitution is generally understood as the 'Consensus Constitution', and also the 'Integrating' Constitution of the different existing sensibilities in Spain. This is a Constitution in whose elaboration the 'historical memory' played an important role.

The concept of freedom of religion employed in this article is in its strictly juridical sense. Thus, Ruffini said that:

... we do not have to confound the concept of freedom of religion neither with a philosophical principle, nor with a theological concept. We have to place it in the field of law. Thus, it consists in the creation of that juridical conditions which allow everyone to realize his/her religious ends, without that the state or anyone else, individually or collectively, may interfere with it, nor obstruct it.³

B. Religious Freedom in the Spanish Historical Constitutionalism

Constitutions in Spain have always reflected the ideology of the political party in power and, in general terms, they were written with no popular basis. This made

¹ Constitution of Bayona of 1808; Constitution of Cádiz of 1812; Constitution of 1837; Constitution of 1845; Constitution of 1869; Constitution of 1876; Constitution of 1931.

² J. Mantecon Sancho, *El Derecho Fundamental de Libertad Religiosa* (Pamplona 1996) at p. 116.

³ F. Ruffini, *La Liberta Religiosa; Storia dell'idea* (Milan 1967) at p. 7. See also J. Mantecon Sancho, *supra* note 2, at p. 30.

their period of validity rather short. Moreover, as far as religious freedom is concerned, the existence of several religions for a long period of time did not occur as in other countries, a stream toward religious tolerance. Instead Spain became a confessionally Catholic country since the Reformation and Counter-Reformation the end of which was marked by the Council of Trento.

Thus, this official Catholicism of the state was extended almost entirely throughout the period of the constitutional codifications, and it largely went along with intolerance towards other religions. This situation provoked the principle of religious freedom that was exclusively defended by the liberals. They were anti-clerical in the sense that they were opposed to both the established power and to the conservative influence of the Catholic Church in a mainly rural Spain, which had a late industrialization. This late modernization prevented the wide development of the middle class which occurred in other European countries.

The simple legal study of this article may fail to reflect the emotional element that the 'religious issue' had in Spain. This would be better understood by reading the newspapers of that time, the discussions at the clubs and, even with an analysis of the parliamentary discussions in the preparation of the different constitutional texts of that time.

It is hard to understand the burning of covens, the slaughter of friars, the suppression of Jesuits and the sale of Church lands of XIX, as well as the aggressive anti-clericalism which developed during the II Republic and led to the Civil War of 1936–1939, without an understanding of that emotional element.

I. The Constitution of 1808

On 6 July 1808, the 'Estatuto de Bayona' was proclaimed. It dealt with the religious issue in Article 1, Section I, which said:

... the Catholic, Apostolic and Roman Church, in Spain and all its possessions, will be the religion of the King and of the Nation and no other will be allowed.⁴

The occupation regime of Jose Bonaparte, brother of Napoleon, tried to appease the rebellious state of Madrid's people in 1808 with the inclusion of this severe and exclusive confessionalist in Article 1 of the 'Estatuto de Bayona'.

This strict confessionalist was supposed to be in agreement with the Spanish tradition. In fact, the conservative legislation was opposed to the progressive spirit that Napoleon himself promoted in the French law.

Despite the intolerance showed by the Constitution, it was subsequently decreed in diverse legislation that the Inquisition, and several unfavourable measures for the

⁴ E. Tierno Galvan, *Leyes Políticas Españolas Fundamentales (1808–1936)* (Madrid 1968) at p. 3.

Church such as the suppression of covens and many military orders and the confiscation of Church possessions, should be abolished.

This 'Estatuto' never obtained real validity because of the state of war and unacceptance on the part of the Spanish people of the Bonapartist regime.

II. The Constitution of Cádiz of 1812

This Constitution was liberal and progressive in character and it had an important influence in America, being accepted altogether in Portugal and in the Sicily and Sardinia.⁵ Its Article 12 affirmed that 'the Spanish nation religion is and will perpetually be Catholic, Apostolic and Roman which is the only true one. The nation protects it with just and wise laws and prohibits the practise of any other'.⁶ Likewise, the text began with an invocation to 'God, Father, Son and Holy Spirit, Author and Supreme Legislator of Society'.⁷

Thus, the contradiction between a deep liberal character in its global inspiration and a religious intolerance of absolute nature was to be found within the Constitution. Nevertheless, once the Constitution was passed, the liberal members of the 'Courts of Cádiz' ('Cortes de Cádiz') approved the decree of 22 February 1813 whose second article declared the incompatibility of the 'Inquisition' with the Constitution, and meant the abolition of the former. However, the price to be paid by its abolition was the Catholic denominationalism of the state and, in a way, the secularization and the nationalization of the inquisitorial spirit of intolerance of the Catholic religion which was represented by the Inquisition. This denominationalism went along with a series of protective measures contained in the Catholic religion, such as the repressive measures against heresy offences or other protective measures against circulation of books or manuscripts against the Catholic religion in Spain.⁸

III. The Constitution of 1837

The Queen Isabel II and her followers, who were supported, among others by the liberals, were confronted in a civil war with the Archduke Carlos, brother of Fernando VII and pretender to the throne. Archduke Carlos represented the defence of absolutism and was supported by the Catholic Church.

In the middle of this conflict, the Constitution of 1837 was promulgated, which in its Article 11 declared that 'the Nation obliges itself to maintain the cult and the ministers of the Catholic religion professed by the Spanish people'.⁹ Despite this

⁵ J. Ferrando Badia, 'Vicisitudes e Influencias de la Constitución de 1812' in (1992) 126 *Revista de Estudios Políticos*, at pp. 195–216.

⁶ E. Tierno Galvan, *supra* note 4, at pp. 22–24.

⁷ *Ibid.*

⁸ F. Tomas y Valiente, *Manual de Historia del Derecho Español* (Madrid 1983, 4th ed.) at p. 613.

⁹ F. Marti Gilabert, *Iglesia y Estado en el Reinado de Isabel II* (Pamplona 1996) at p. 93.

statement, the tolerance or intolerance towards other religions was not mentioned in the constitutional text, and therefore, not being forbidden, the practice of other cults was in fact tolerated.¹⁰

It is remarkable that this constitutional precept was an issue after the continuous sale of Church lands, which were carried out by Godoy in 1797, by Jose I, and most of all, by Mendizabal in 1835 and 1836.¹¹ Indeed, this precept was drafted 'as a compensation to the Church for the loss of its incomes proceeding from rents (title and first fruits) established by the Law of July 1837'.¹²

IV. The Constitution of 1845

Its Article 11, just as in the Constitution of Cadiz of 1812, the Catholic denominationalism is reaffirmed when it states 'the religion of the Spanish Nation is the Catholic, Apostolic and Roman one. The state binds itself to maintain the cult and its ministers'.¹³

Thus, according to political events, 'if the Constitution of 1937 was claimed to be the constitution of the progressist party, that of 1845 would be the one of the moderate party'.¹⁴

V. The Non-Promulgated Constitution of 1856

Article 14 stated:

... the Nation binds itself to maintain and protect the cult and the ministers of the Catholic religion which the Spanish people profess. But no Spaniard or foreigner will be prosecuted for his/her religious opinions or beliefs, as long as he/she does not manifest them through public actions contrary to the religion.¹⁵

VI. The Constitution of 1869

After the dethroning of Isabel II, caused by the revolutionary outbreak on September 1868, the Constitution stated in Article 21 that:

... the Spanish Nation binds itself to maintain the cult and the ministers of the Catholic religion. The public or private exercise of any other cult is guaranteed

¹⁰ M.E. Olmos Ortega and M. Vento Torres, 'La Libertad Religiosa tras un Decenio de Constitución' in *Diez Años de Régimen Constitucional* (Departamento de Derecho Constitucional de la Universidad de Valencia (eds)) (Madrid 1989) at p. 176.

¹¹ F. Martí Gilabert, *supra* note 9, at pp. 69–84.

¹² F. Tomas y Valiente, *supra* note 8, at p. 616.

¹³ M.E. Olmos Ortega and M. Vento Torres, *supra* note 10, at p. 176.

¹⁴ F. Martí Gilabert, *supra* note 9, at p. 106.

¹⁵ D. Basterra Montserrat, 'El Derecho a la Libertad Religiosa y su Tutela Jurídica' in *Servicio de Publicaciones de la Facultad de Derecho* (Madrid 1989) at p. 209.

to all foreigners residing in Spain with no limitation but those universal rules of morality and law. If any Spaniards were to profess a religion other than the Catholic one, what has been primarily explained applies to them.

This Constitution, even if timid in its redaction, was inspired by the laical and anti-clerical principles of the Revolution of 1868 and, for the first time, religious tolerance was constitutionally legislated for within it.¹⁶

It is noteworthy that, during the outbreak, the anti-clerical violence and the burning of covens accounted for the emotional importance of the 'religious issue', and foreshadowed the events to come in the second Spanish Republic.

VII. The Project of Constitution of 1873

After the abdication of Amadeo of Saboya and the proclamation of the First Republic, the Project of Federal Constitution of the Spanish Republic mentioned the following paragraphs.

The preliminary section of the Project stated that 'everybody is guaranteed all natural rights within the Republic, with any power having the prerogative to restrain them and no law authority to reduce them'. Similarly, Article 1 recognizes 'the right to the free exercise of thought, and to the free manifestation of its conscience'. Article 34 stated 'that the exercise of all cults is free in Spain'. In Article 35 'the church is separated from the State' and in Article 36 'it is forbidden for the Nation and the Federal State, the Regional States and to the City Halls, to subsidize any cult directly or indirectly'. Even though this project was never discussed, it is interesting because it is an important precedent concerning religious freedom, and the relation of the Church-state within a lay state.¹⁷

VIII. The Constitution of 1876

It is the longest Constitution that Spain has had (1876–1931) except for the period between 1923 and 1930 during which its application was interrupted. It stated in Article 11 that:

... the Catholic, Apostolic and Roman religion is that of the State. The Nations binds itself to maintain the cult and its ministers.

Nobody will be bothered within the Spanish territory because of his/her religious opinions or because of the exercise of its cult, except in the case it attacks to the Christian moral. However, any ceremonies or public manifestations others than those of the religion of the State will not be allowed.¹⁸

¹⁶ M.E. Olmos Ortega and M. Vento Torres, *supra* note 10, at p. 176.

¹⁷ J.J. Amoros Azpilicueta, *La Libertad Religiosa en la Constitución Española de 1978* (Madrid) at pp. 24–25, 1984.

¹⁸ E. Tierno Galvan, *supra* note 4, at p. 158.

Therefore, this was a formula of Catholic denominationalism in which tolerance had two limits: the reduction of the exercise of the cult to a private context and the respect of the Christian moral.¹⁹

IX. The Republican Constitution of 1931

The Constitution of 1931 meant a breaking-off with all former precedents concerning religious matters. The new text had a new non-confessional attitude, but without articulating an effective system of religious freedom: oppositely, it introduced discrimination for religious reasons and, even, having an openly hostile disposition towards confessions, and especially against the Catholic one.²⁰

The attempt of reformation had, in respect of religious issues, two main objectives: the introduction at schools of laic education or in its absence, the disappearance of confessional education and the incorporation of the full freedom of belief and cults.²¹ What is more, part of the intellectual Left Wing tried to eliminate the Catholic Church, by associating it with conservatism and opposed to Republicanism.

The popular anti-clericalism was more emotional and violent, and it expressed itself through the burning of convents and anti-religious attacks, which took place during the Republican period.²²

Therefore, it is not surprising that the policy regarding the 'religious issue' is considered as one of the direct causes of the Spanish Civil War of 1936–1939, because it irreconcilably divided the Spanish people. Without adding any further comments on such a profusely analysed question the exposition of the articles concerning the 'religious issue', and among them the polemic Article 26 contained in the Constitution of 1931, should be enough to reflect it.

According to Article 3, 'the Spanish State has no official religion'. The principles of equality and freedom regarding religious matters were dealt with in Articles 25 and 27. Thus, the first paragraph of Article 25 stated that 'the nature, filiation, sex, social class, wealth, political ideology or religious beliefs will not be the basis for any judicial privilege'.

Article 26 stated that:

... all religious confessions will be considered as societies subject to a special law. The state, the regions, the provinces and the city halls will not economically sustain, favour or help the Churches, Societies and Religious

¹⁹ J.J. Amorós Azpilicueta, *supra* note 17, at p. 24.

²⁰ *Ibid.*, pp. 25–26.

²¹ F. de Meer Lecha-Mazo, *La Cuestión Religiosa en las Cortes Constituyentes de la II República Española* (Pamplona 1975) at p. 13.

²² D. Basterra Montserrat, *supra* note 15, at pp. 264–267.

Institutions. A special law will regulate the total extinction of the clergy's budget within a two year period.

Those religious orders which statutorily impose, not only the three canonical votes, but also a special one of obedience to an authority other than the legitimate one of the state are to be dissolved. Their possessions will be nationalized and destined to charitable and educational purposes. The rest of the religious orders will be subjected to a special law voted by these 'Constitutional Courts' ('Cortes Constituyentes'), adjusting to the following basis:

- (a) Dissolution of those which, due to their activities, represent a danger to the security of the State.
- (b) Registering in a special register dependent on the Secretary of Justice of those that shall subsist.
- (c) Incapacity of acquiring and keeping, by themselves or by an intermediary, no other possession than those which, previously justified, are destined to their accommodation or to the direct meeting of private needs.
- (d) Prohibition of the exercise of industry, commerce and teaching.
- (e) Submission to all tributary laws of the country.
- (f) Obligation to yearly justify to the State the accounts of the conversion in relation to the aims of the society assets.

The possessions of the religious orders could be nationalized.²³

According to Article 27:

... the freedom of conscience and the right to profess and freely practice any religion are guaranteed within the Spanish territory excepting those cases that do not respect the public moral. The cemeteries will be exclusively subject to the civil jurisdiction. There shall not be any division of places for religious reasons. All confessions will be allowed to privately exercise their cults. Public manifestations of the cult would have to be, in each case, authorized by the government. Nobody will be compelled to officially state his/her religious beliefs. The religious status will not mean a change of the civil or political personality except for that stated in the Constitution for the appointment either of the President of the Republic and that of the Presidency of the Council of Ministers.²⁴

For these offices, the ministers of the confessions were excluded, with specific reference to those of the Catholic religion.²⁵

Once this document was approved, 'the Vatican complained about what they

²³ J.J. Amoros Azpilicueta, *supra* note 17, at pp. 25–28.

²⁴ D. Basterra Montserrat, *supra* note 15, p. 280.

²⁵ J.J. Amoros Azpilicueta, *supra* note 17, at p. 27.

considered a violation of the current Concordat of 1851, but they did not oppose directly to the separation between the Church and the state'.

This separation gave some advantages for the Vatican such as the disappearance of the privilege that the Chief of State held to appoint bishop positions. This was a negotiable issue. Some parts of Article 26 were also negotiable, such as the submission of confessions and religious orders to a special law concerning societies, and perhaps the disappearance of the clergy's budget. But the Vatican was not concede other precepts of the same article, such as:

- (1) the dissolution of the religious orders which impose vote of obedience to an authority other than the state's legitimate one; this rule was directed to, in too elusive terms, the Holy See and the Society of Jesus;
- (2) prohibition of teaching to the religious orders; and
- (3) the nationalization of the possessions of the religious orders.

Article 27, concerning the freedom of conscience and worship and the secularization of cemeteries, presented fewer problems. Even negotiation about divorce introduced by Article 23 was possible. After all, it already existed in other countries. But the precepts included in Article 26 were considered intolerable by the Catholic Right Wing, and even rejected by Alcalá Zamora, the President of the Republic at that time, who resigned. Therefore, even before the Constitution was promulgated, the Catholic right standard of its alteration was already taken up. Even the Vatican itself demanded the alteration of Article 26 as a requirement for the completion of a new Concordat.²⁶

With this prospect, and having the Concordat of 1851 been infringed by the Republican legislation regarding religious matters, the Spanish Episcopate, in its collective declaration of 20 December 1931, condemned the constitutional text. Moreover, they advised the Spanish Catholics that they would not have to necessarily obey the civil legislation 'in that which was opposed to the law of God and that of the Church'.²⁷

As a consequence of the above being exposed, and also of a later legislation which achieved nothing except to worsen things, especially the law of confessions and of religious societies of the Law of 2 June 1933, once again the religious issue was a political problem.

Thus, the religious issue was used by the Right Wing as the common ground for its union and the progressive radicalization against the regime. Likewise, the Left Wing used it as a relief for the deficiencies in its accomplishments whilst in government.

The same happened with the Vatican: not even in 1935, when the Right Wing Catholic association (CEDA) won the elections, did the Vatican conclude a religious agreement with the Republican regime.²⁸

²⁶ A. Torres del Moral, *Constitucionalismo Histórico Español* (Madrid 1986) at pp. 184–185.

²⁷ J.J. Amoros Azpilicueta, *supra* note 17, at p. 29.

²⁸ A. Torres del Moral, *supra* note 26, at p. 185.

X. The System of Fundamental Laws of the Franco Regime

In the complex constitutional process which begun during the Civil War of 1936, dealing with the religious phenomenon was initially characterized by a return to the formulas of the pre-Republican tradition, especially those of the Constitution of 1876. However the principle of denominationalism became more accentuated to the point that a new denominationalism was forged, which had its most marked manifestations in the Second Principle of the Law of Fundamental Principles of the 'National Movement' (*Movimiento Nacional*). Through this idea of denominationalism the new state assumed the doctrine of the Catholic Church as the criterion for justice, not only for matters of religious nature but also as the basis on which to elaborate its legal code. As a consequence of the former, the evaluation of religious freedom was dependent on the evolution of the official doctrine of the Catholic Church.²⁹ Thus, after the Second Vatican Council, the regime passed the 'Law of Religious Freedom' of 1967, which was not a law of religious freedom but one of simple tolerance, as will be explained later on in this article.

Another characteristic of the regime regarding religious matters was the use of the Concordat procedure to establish a legislation regarding the Catholic Church.³⁰ As fundamental law, the first article of the 'Charter of the Spanish People' (*Fuero de los Españoles*) stated that:

... the Spanish State claims as the guiding principle of its acts the respect to dignity, integrity and freedom of any human being. Likewise, it recognizes man as the holder of rights and duties, whose exercise guarantees the common well-being since he is the bearer of eternal values and member of a national community.

However, this legally ambiguous text was not in agreement with what was stated in Article 6 of the 'Charter of the Spanish People':

... the profession and practise of the Catholic religion which is that of the Spanish State will be officially protected. No one will be bothered either because of his/her religious beliefs or because of the private exercise of his/her worship.

Other ceremonies and external manifestations different to those of the Catholic religion will not be allowed.³¹

This explicit denominationalism was to be, if possible, emphasized by Principle Two of the Law of Fundamental Principles of the 'National Movement' of 1958:

²⁹ J.J. Amorós Azpilicueta, *supra* note 17, at p. 30.

³⁰ *Loc. cit.*

³¹ J. Solé Tura, *Introducción al Régimen Político Español* (Barcelona 1971) at p. 34.

... the Spanish Nation is proud of respecting the law of God accordingly to the doctrine of the Holy Catholic, Apostolic, and Roman Church. This doctrine is both the true one and the inseparable faith of the national conscience. The legislation of the Nation will be inspired by those principles.³²

This renewed denominationalism can be also found in the Concordat signed by the Vatican and the Spanish state on 27 August 1953, which in Article I stated that 'the Catholic, Apostolic and Roman religion is still the only one of the Spanish Nation'. This whole set of laws was completed in its use at a public order level by Article 33 of the Charter of the Spanish People. This article stated that 'the exercise of the rights recognised by this Charter may not threaten the spiritual, national and social unity of Spain'.³³

After the Declaration 'Dignitatis Humanae' of the Second Vatican Council, Article 6 of the Charter had to be rewritten stating:

... the State assumes the protection of religious freedom. This freedom is guaranteed by an efficient legal protection which, at the same time, safeguards both the moral and the public order.³⁴

Subsequently, the Law of 28 June 1967 of 'Religious Freedom' was approved. This law intended to protect the right to religious freedom. However, its Articles 1 and 3 stated that 'the exercise of the right to religious freedom, as conceived by the Catholic doctrine, must be always compatible with the denominationalism of the Spanish State that is proclaimed by its Fundamental Laws'. This article illustrated that this law was a law of 'religious tolerance' but not an authentic law of religious freedom.³⁵

C. The Treatment of the Religious Issue in the Constitution of 1978 – its Judicial Protection

Without considering the historical circumstances, or the political development which allowed 'the transition' from an authoritarian regime to a democratic one, it may be affirmed that the Constitution of 1978 created a common framework which has allowed a process of modernization, to a considerable extend, of the Spanish society. It is generally maintained in Spain that the 'consensus' between the different political parties regarding the most serious problems was a key element to make such a political transition successful.

³² J.J. Amoros Azpilicueta, *supra* note 17, at p. 32.

³³ D. Basterra Montserrat, *supra* note 15, pp. 230–232.

³⁴ J.J. Amoros Azpilicueta, *supra* note 17, at pp. 33–34.

³⁵ D. Basterra Montserrat, *supra* note 15, p. 234.

Regarding the treatment of the 'religious issue' in the Constitution, this treatment must be placed under the perspective of the so-called 'superior values' of the code, which are set out in Article 1. These are freedom, justice, equality and political pluralism.

Thus, Article 10.1 states that 'the dignity of the person, the inviolable rights which are inherent to the person, the free development of personality, the respect for law and the rights of others, are fundamental to both the political order and the social peace'. Being both based on 'the dignity of the person' and 'inviolable and inherent to the person', this article lays down a generic definition of human rights and achieves a legal quality which determines its subsequent legislative development.

These human rights are constitutionally expressed in the so-called 'fundamental rights', which together with the Public Rights or Freedoms, are contained in Section I, Chapter 2. The religious freedom is included among these rights.

By warrant of Article 81 every fundamental right has to be developed through an 'Organic Law', which in order to be passed, modified or abolished require an absolute majority of the Congress in the final vote.

For the performance of this constitutional precept, religious freedom has been developed by the 'Organic Law of Religious Freedom' which will be discussed later on in this article.

Article 9 is also important. It makes the authorities responsible for promoting the requirements for the freedom and equality of the individual and the groups in which the individual integrates into, in order to make them real and effective. Likewise, it is the responsibility of the state to remove of the obstacles that may impede the full exercise of these conditions.

Being of the same nature as the former, Article 53 states that:

1. The rights and human rights recognised in the Second Chapter of the present section bind the authorities (. . .)
2. Any citizen will be able to claim the protection of the rights and human rights recognised in both article 14 and the first Section of the second Chapter before a civil court. This protection shall be guaranteed through a procedure based on the principles of preference and summariness, when it applies, through an appeal on the grounds of unconstitutionality before the Constitutional Court (. . .)' (*recurso de amparo*).

In addition to this, it is possible to go to the European Court for the protection of the right which has allegedly been violated, but it is first necessary to exhaust the domestic remedies available (Article 26 of the European Convention). Subsequently, the Commission tries to obtain an agreement between the Member States and the parties whose right has allegedly been violated (Article 28). If such an agreement cannot be found the European Court will deal with it (Article 47), its decision being compulsory on the state (Article 53).

Spain recognized the competence of the European Commission on Human Rights

on 18 October 1985 and the jurisdiction of the European Court of Human Rights on 10 October 1990 (BOE 15 October).³⁶

Lastly, Article 10.2 establishes that the rules referring to the basic rights and human rights contained in the Constitution 'will be construed in accordance with the Universal Declaration of Human Rights and the rest of international treaties and agreements on the same issue ratified by Spain'.

Having exposed the constitutional framework regarding the subject of this article, the constitutional principles concerning religious freedom now require full consideration.

Article 16 is the basic precept concerning the right of religious freedom. It states that:

1. The ideological and religious freedom and the freedom of worship of both the individuals and the communities are guaranteed as well as the freedom to profess any belief or ideology. The only limitation shall be the respect of the public order protected by the law in its external manifestation.
2. No one will be obliged to declare his/her religious beliefs or ideology.
3. No confession will have a state nature. The authorities will take into account the religious beliefs of the Spanish society and will keep the respective relationship of co-operation with the Catholic Church and other confessions.

Likewise, the religious factor is specifically mentioned in the Constitution in Articles 14 and 27.3. In Article 14, any discrimination due to religious reasons, amongst other motives, is prohibited. Article 27.3 states that parents have the right to choose, according to their convictions, the moral and religious education to be received by their children.

I. Analysis of Article 16 of the Constitution

1. Subjects of the Religious Freedom

The subjects of religious freedom are two: the individuals and the religious communities. In their inner world, individuals have the freedom to believe or not. Externally, they have the freedom to publicly manifest their beliefs.

The religious communities are similarly subjects who hold the right to religious freedom in both their internal and external aspects. The internal aspect implies that the state recognizes the autonomy of each entity to organize themselves according to their ideals, requirements and beliefs, without interference on the part of the public powers. The external aspect relates to their external or social autonomy. This includes the social manifestation of the group for proselytism, freedom of purpose, expression and association that are similar to those that cultural and political groups have.³⁷

³⁶ J. Mantecon Sancho, *supra* note 2, at p. 168.

³⁷ M.E. Olmos Ortega and M. Vento Torres, *supra* note 10, at pp. 179–180.

2. Contents of the Right to Religious Freedom

This has a three-sided nature. First, the Constitution safeguards the religious freedom of the Spaniards to profess, or not, a certain religion.³⁸

Secondly, the right to religious freedom implies that the state, within the context of a democratic society, has no religion.

Thirdly, the right to religious freedom is that original right which may be developed and specified in a series of derived rights, which differ depending on whether they regulate individual or collective activities. This aspect is defined by the Organic Law of Religious Freedom (OLRF) of 5 July 1989 (BOE 24 July) which specifies these individuals and community rights.³⁹

D. The Organic Law of Religious Freedom of 5 July 1980

This law develops the fundamental right to religious freedom and follows the new constitutional requirements. These are the state religious freedom for both people and for religious groups, the non-denominationalism of the state and non-discrimination for religious reasons. Moreover, these requirements include a legal-political principle whereby the authorities will have to take into account the religious opinions of the citizens, and will have to maintain the consequent relationship of co-operation with the religious confessions.

Summarizing the law, Article 1 contains the constitutional religious principles guaranteeing religious freedom and freedom of worship. Likewise, it establishes the non-denominationalism of the state.

Equally, Article 1(2) states that:

... the religious beliefs will not be the grounds for discrimination by the law. Religious reasons could not be claimed in order to prevent someone from exercising any type of work activity, working as a civil servant or holding public office.⁴⁰

Synthesizing Articles 2, 5, and 6, the OLRF contains the following rights:

- (1) to profess the religious beliefs freely chosen or not to profess any religion; to change denomination or to denounce the ones he/she professed; to freely manifest his/her own religious beliefs or the lack of those, or to refrain from declaring those beliefs;

³⁸ D. Tettamendi, 'Diccionario Enciclopédico de Teología Moral, Voz Religión' in *Diez Años de Régimen Constitucional* (Departamento de Derecho Constitucional de la Universidad de Valencia (ed.)) (Madrid 1989) at p. 932.

³⁹ *Loc. cit.*

- (2) to carry out acts of worship and to obtain religious assistance from his/her denomination; to commemorate its festivities; to celebrate its own marital rites; to receive burial without religious discrimination and the right not to be obliged to practise acts of worship or to receive religious assistance that may conflict with his/her own personal convictions.⁴¹ This point is especially relevant for those persons subjected to certain disciplines such as the military service, prisoners in prison, etc. who were in the past obliged to attend Catholic rites as an act of discipline of those institutions in question;⁴²
- (3) to teach and to be taught; to obtain and/or disseminate information concerning all religions by oral, written or any other means; to choose for one self and for the non-emancipated, the disabled, and the minors under his/her responsibility, within and outside the school, their religion and moral education according to his/her own convictions;
- (4) to meet and to manifest in public for religious purposes and to collaborate in order to develop within the community various religious activities in accordance with both the general legal order and the present OLRF;
- (5) to establish places of worship and meeting places with religious purposes; to designate and to educate their ministers; to spread and to propagate its own beliefs; and, to stay in contact with own organizations or with other religious denominations, whether it be in national territory or abroad;
- (6) to acquire a civil legal status once they have been registered in the relevant Public Registry of the Secretary of Justice created for that purpose;
- (7) to have full authority to establish their own rules of organization and staff regime. These rules may include safeguard-clauses to preserve their own identity and character. Moreover, they may contain rules to keep their beliefs respected;
- (8) to create and promote societies, foundations and institutions in accordance with the general legal order for the execution of their purposes.⁴³

Regarding the limitation to the right to religious freedom, Article 3 of the OLRF specifies Article 16(1) of the Constitution as follows:

... the exercise of the rights arising from religious freedom and freedom of worship has as only limitation the protection of the right of others to exercise their public and fundamental rights, as well as the defence of public safety, health and morality which are constituent elements of the public order protected by law within a democratic society.

In the widely-held opinion of the doctrine, when saying '(...) within a democratic

⁴⁰ D. Basterra Montserrat, *supra* note 15, pp. 316–317.

⁴¹ M.E. Olmos Ortega and M. Vento Torres, *supra* note 10, at pp. 181–182.

⁴² D. Basterra Montserrat, *supra* note 15, p. 317.

⁴³ M.E. Olmos Ortega and M. Vento Torres, *supra* note 10, at p. 182.

society', the exercise of religious freedom is to be understood in a wide sense; that is to say, in accordance with the Universal Declaration of Human Rights and other international obligations agreed to by Spain.⁴⁴

Article 17 of the OLRF anticipates the completion of agreements of co-operation between the state and those denominations registered in the Registry of the Secretary of Justice. These must be 'well-established' in Spain, both in their nature and number of believers, in order to conclude such agreements. These pacts will be discussed further on in this article.

Lastly, the law creates the Advisory Commission of Religious Freedom (Article 8). This consists of representatives of the administration, professionals of prestige and representatives of denominations. Their functions are to analyse, report and propose questions related to the application of the OLRF, and compulsorily, the preparation of the agreements with the denominations. Despite their heterogeneous composition, the Commission in fact acts as an administrative organ of control on religious denominations. This power is illustrated by the fact that the Commission could deny the concession of the 'well-established' quality to a denomination which pretends to conclude an agreement of co-operation with the state. Furthermore, it can deny the denomination's registration in the Registry as cited above.⁴⁵

On the negative side, it is possible to consider the OLRF as favouring non-Catholic denominations. In fact, the OLRF was passed in 1989 while the state had already signed five agreements with the Holy See in 1979. These agreements bilaterally regulate aspects which were, later on, discussed in a different way by the OLRF. Moreover, these agreements are considered as international treaties which may only be modified in accordance with those matters contained in those treaties or according to the regulations of international law concerning those matters.

Due to this, most authors maintain that, in reality, the legal regime which applies to the different denominations is double sided: one established in the agreements of 1979 for the Catholic Church, and the other, of the OLRF, for the remaining denominations.⁴⁶

As a result of these differences, a disparity could well be established concerning the treatment that the state concedes to the Catholic Church and that to the non-Catholic denominations.

However, it may be concluded that the OLRF is to be applied to all denominations, except when the OLRF is opposed to the previous state-Vatican agreements.⁴⁷

⁴⁴ D. Basterra Montserrat, *supra* note 15, pp. 319–323. M.E. Olmos Ortega and M. Vento Torres, *supra* note 10, at pp. 182–183. J. Mantecon Sancho, *supra* note 2, at pp. 134–136.

⁴⁵ J. Mantecon Sancho, *supra* note 2, at pp. 128–163.

⁴⁶ *Ibid.* at pp. 128–129.

⁴⁷ *Ibid.* at pp. 130.

E. The Agreements of Co-operation between the Spanish State and the Religious Denominations

According to the constitutional mandate, especially Article 16 and Article 7 of the OLRF, the Spanish State has signed agreements of co-operation with three 'well-established' religious denominations in Spain:

- (1) the Federation of Religious Protestant Entities of Spain (FEREDE);
- (2) the Federation of Israelite Communities (FCI); and
- (3) the Islamic Commission of Spain (CIE).

Five agreements signed with the Vatican must be added to this: the first one of 1976 and the four others of 1979.⁴⁸

In brief, the main points of the co-operation with the different denominations could be summarized as set out below.

I. Agreements with the Catholic Church

In the agreement of 1976, the most important issue was the establishment of a new model of relationship between the Vatican and Spain. This model was to be based on mutual collaboration, the adjustment of their relationship to the new Spanish socio-political reality, the religious freedom as a right of the individual, and the '*Libertas Ecclesiae*' (freedom for the Church to carry out its purposes in society). All of this was a result of both the political change in Spain and the change in the Catholic Church originated by the Vatican II Council.

Moreover, partial agreements for the substitution of the Concordat of 1953 were agreed upon. There are four agreements and they deal with 'legal matters', the 'religious assistance to the armed forces and military service of the clergy and religious persons', 'education and cultural matters', and 'economic matters'.

The 'Agreements of Legal Matters' basically regulates the right of the Church to freely carry out its religious tasks, its right to freely organize itself and the recognition of its civil personality, if it canonically possesses it, and that it communicates it to the relevant administration. This agreement also regulates the inviolability of the places of worship, the Church's freedom of communication, the recognition of the civil validity of the canonical matrimony and the right of the Church to give religious assistance in prisons and public hospitals. This last agreement was extended to military institutions suppressing the former Religious Corps of the Armed Forces. Likewise, it was stated that members of religious orders would perform military service according to their condition.

Regarding education, the Constitution establishes the freedom to create teaching centres with their own ideology. It also establishes the right of parents to decide by

⁴⁸ Ibid. at p. 141.

which religion and morals their children should be educated. Regarding the agreed educational regime, the agreed model establishes the compulsory teaching of the Catholic religion in public schools, but the students' attendance is voluntary.

In the economic agreement, a transition towards the self-financing of the Catholic Church is set out. However, on the one hand, it was agreed to maintain financial help for the Church, and on the other hand the Catholic Church holds the right to obtain part of the annual direct taxes on individuals (IRPF) whether those individuals expressly agree or not. In between the two, the state is to maintain its help to the Church together with a percentage of the tax named above. Furthermore, due to its non-lucrative purposes,⁴⁹ the Church enjoys tax exemptions.

II. Agreements with the Non-Catholic Denominations

These agreements solemnize some specific manifestations of the right to religious freedom, e.g. Article 2 guarantees the inviolability of religious cemeteries and of places of worship, Article 12 guarantees the celebration of religious feasts, Article 10 guarantees the teaching of religion at public school and Articles 8 and 9 guarantee religious assistance in prisons, hospitals and the Armed Forces. The economic collaboration, and the civil effect of religious marriages, are guaranteed by Articles 7, 8 and 11.

Furthermore, legal concepts are established such as the concept of places of worship (Article 2), the concept of the minister of religion (Article 3) and the concept of the functions of the ministers of worship: *pastor*, *imam* or *rabbi*.

To summarize, this regime follows the model of the state-Catholic Church's agreement.

However, there are some occurrences of discrimination against non-Catholics, such as the fact that the non-Catholic education in public schools takes place after school hours and that the cost of this education is paid for by the corresponding denomination. Also, the transitional state-financing of the Catholic Church, although the objective is its own self-financing, is yet another discrimination against non-Catholics.

Likewise, the principle of a 'well-established group', as required by Article 10 of the OLRF in order to conclude agreements of co-operation, was denied to the ever-growing non-Catholic group, the Jehovah Witnesses. Therefore no agreement was reached with them.

Furthermore, the reason given for the agreements with the others denominations was due to their 'historical establishment in Spain'. This argument shows that the authorities did not consider the 'well-established' requirements of the OLRF that have been exposed above.

Another problem was that the signatories of the agreements were not Churches or communities, as established by the OLRF, but federations of Churches (Protestants)

⁴⁹ Ibid. at pp. 143–154.

or communities (Jewish and Muslims). This was a requirement made by the state for the negotiation of the agreements.⁵⁰

According to Fernandez Coronado, it is possible to conclude that regarding the nature of co-operation, the agreements 'State-Confessions' are not the only possible means of co-operation for the state since it can co-operate unilaterally without the existence of a previous accord, with confessions based on the existing law.

Regarding the requirements concerning confessions for incorporation into the agreements, the Churches, denominations or communities have to be registered in the Registry of Religious Entities. They have to belong to a federation and this must also be inscribed in the Registry, as well as the federation itself, and finally the agreement must be signed separately with each federation in their own legal entity.⁵¹

F. The Freedom of Religion in International Conventions

Spain places much importance upon international agreements that guarantee the freedom of religion. Moreover, Article 10.2 of its Constitution states that the rules referring to the basic rights and human rights contained in the Constitution 'will be in agreement with the Universal Declaration of Human Rights and the international treaties and agreements on the same issue ratified by Spain'.

As a member of the United Nations, Spain has ratified both Article 1(3) of the UN Charter and Article 18 of the Universal Declaration, considering respect for the freedom of religion as a core element of the UN's purposes. It has also ratified the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief proclaimed by the General Assembly on 25 November 1981 (G.A. Resolution 36/55). Equally, Spain has signed the following international agreements:

- (1) the International Covenant on Economic, Social and Cultural Rights (see Article 13) (BOE 30 April 1977);
- (2) the International Covenant on Civil and Political Rights (see Articles 18 and 27) (BOE 30 April 1977);
- (3) the Declaration regarding Article 41 of ICCPR (competence of the Human Rights Committee (HRC) to receive communications by a State Party against another State Party) (30 January 1998);
- (4) the Optional Protocol to the ICCPR (HRC's ability to receive individual communications) (25 January 1985);

⁵⁰ Ibid. at pp. 141–157.

⁵¹ A. Fernandez-Coronado Gonzalez, *Estado y Confesiones Religiosas: Un Nuevo Modelo de Relación* (Madrid 1996) at pp. 110–112.

- (5) the International Convention on the Elimination of All Forms of Racial Discrimination;
- (5) the Convention on the Elimination of All Forms of Discrimination Against Women (5 October 1981);
- (6) the European Convention on Human Rights (see Articles 9 and 10) (BOE 10 October 1979);
- (7) the UN Convention on the Rights of the Child (BOE 31 December 1990).

Spain has also ratified the following international instruments or resolutions that are related to freedom of religion:

- (1) the Convention on the Prevention and Punishment of the Crime of Genocide (see Article 2) (BOE 8 February 1969);
- (2) the Geneva Convention 3 (see Articles 33 to 37) (BOE 5 September 1952);
- (3) the Convention on Refugees Statute (see Articles 1, 3, 4 and 33) (BOE 21 October 1978);
- (4) the Convention against Discrimination in Education;
- (5) the Final Act of the CSCE;
- (6) the following General Assembly Resolutions: 37/187 of December 1982; 41/112 of December 1986; 43/108 of December 1989; 45/136 of December 1990; 46/131 of December 1991; 47/129 of December 1992 and 48/128 of December 1993.

Finally, it is remarkable that Spain achieves the goals drawn by the HRC in its General Comment 22, under Article 40 of ICCPR, CRP 2/Rev 1 20 July 1993, perhaps with the only exception of still existing positive economic discrimination in favour of the Catholic Church.

In its 1995 Report, Mr Abdelfattah Amor, Special Rapporteur, has acknowledged the receipt of the Report of the Spanish government.

G. Conscientious Objection

Spain's constitution recognizes the right to conscientious objection to compulsory military service (Article 30.2). According to the 1984 legislation, which regulates conscientious objection, an alternative social service is provided for – of twice the length of military service – if objection to military service is due to reasons of conscience related to religious, ethnic, moral, humanitarian, philosophical or other convictions of a similar nature. Conscientious objection occurring after recruitment into military service is not accepted.

In public hospitals where terminations of pregnancy may be performed, according to legal precedent, doctors may invoke the right of conscientious objection.⁵²

⁵² K. Boyle and J. Sheen, *Freedom of Religion and Belief* (London 1997) at p. 385.

H. Conclusion

Every study of the Spanish historical constitutionalism will emphasize the importance of the religious conflicts in Spain. However, following the twentieth anniversary of the Constitution of 1978 a couple of years ago, it is possible to affirm that the 'religious issue' has been overcome in Spain. This does not appear in the newspapers headlines, nor is it used as the main argument of political struggle between the political parties. Despite small discriminatory circumstances which still exist against non-Catholic denominations, and which should be resolved by specific agreements, the peaceful religious coexistence has been something 'normal' in Spain, which reassures the legislator's sensible choice:

The Constitution of 1978 has resolved the religious issue in such an innovative way to the point of establishing a new system for the treatment of the religious factor with no previous cases in the Spanish Constitutional history, and which is based on the principles of religious freedom, laicism, equality and co-operation.⁵³

There are three essential elements in the state's change of attitude: the establishment of a system of non-denominationalism, i.e. the separation between the Church and the state, and the state's neutrality towards the religious phenomenon, the principle of equality for the religious and ideological freedoms as fundamentals of the system; and lastly, the guarantee of the existence of a relationship between the state and the religious phenomenon through the principle of co-operation in Article 16 of the Constitution. The combination of these three elements leads to one conclusion: the state (which is neutral before the religiousness) considers the religious phenomenon to be positive insofar as it is necessary for individuals to develop fully their fundamental rights of freedom and equality.⁵⁴

It is suggested that the foregoing can be seen to be the result of the following three factors:

- (1) the historical memory was present in the mind of all the participants of the Spanish political transition. They especially kept in mind the consequences provoked by the policies during the periods of the Republic II and that of the Franquism;
- (2) the change which took place within the Catholic Church due to the Second Vatican Council; and
- (3) the wish of all parliamentary political parties to avoid the emergence of the 'religious problem'.

⁵³ J.A. Souto Paz, *Derecho Canónico*, Universidad Nacional de Educación a Distancia (UNED) (Madrid 1986) at p. 242.

⁵⁴ A. Fernandez-Coronado Gonzalez, *supra* note 51, at pp. 31–32.

Similarly, the solution is a solution adapted to the Spanish social reality. In Spain, the Catholic Church has 22,186 parish churches, 67 dioceses, 20,058 priests and 17,686 members of a religious order (out of which 9,918 are priests), 55,999 nuns and 95 per cent of the Spanish people are baptised under this denomination. However, and despite the obvious weight of the Catholic Church in Spain, the main purpose is that the principle of equality among the Spanish people is not violated, even if a specific mention of the Catholic Church appears in Article 16 of the Constitution, and despite the existence of a legal statute for the Catholic Church. And these rights to equality and religious freedom are basically respected.⁵⁵

As a result of the treatment of religion in the Constitution of 1978, it is highly desirable that a period of peaceful coexistence between the religions should exist. This should take inspiration from the coexistence in Toledo of the three religions of the Holy Book – Catholic, Muslim and Jewish – even more so when religious intolerance is returning to Europe and whose saddest symbol is Sarajevo.

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⁵⁵ J. Mantecon Sancho, *supra* note 2, at p. 130.

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