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The Spanish Experience in Church-State Relations: A Comparative Study of the Interrelationship Between Church-State Identification and Religious Liberty*

On December 9, 1978, the people of Spain ratified a new constitution whose article sixteen brings complete religious freedom to Spain for the first time in nearly half a century. Article sixteen of the new Constitution also outlines a parallel change in the identification of the Spanish State with the Spanish Catholic Church. This Comment is the most recent Spanish answer to two questions that have confronted constitution drafters since Madison penned the first amendment to the United States Constitution: 1) to what degree should the state restrict the individual's free religious choice, and 2) to what extent should the state identify with the church (or churches in a pluralistic society). This Comment explores the interplay between these two questions in Spanish constitutional history, with particular emphasis on developments since 1966.

Spain has been chosen for this comparative study for several reasons. First, its constitutional experience since 1800 has included a wide variety of approaches to the religious question. This large number of different approaches within basically the same system of variables facilitates the development of a model to demonstrate the relationship between church-state identification and religious freedom. Secondly, Spanish religious homogeneity—ninety-eight percent of the population nominally belongs to only one church—is ideal for developing a model because it contains fewer variables than the American pluralistic society. Thirdly, the extensive but gradual changes that have occurred in Spanish church-state relations since 1963 allow examination of the model as it functions.

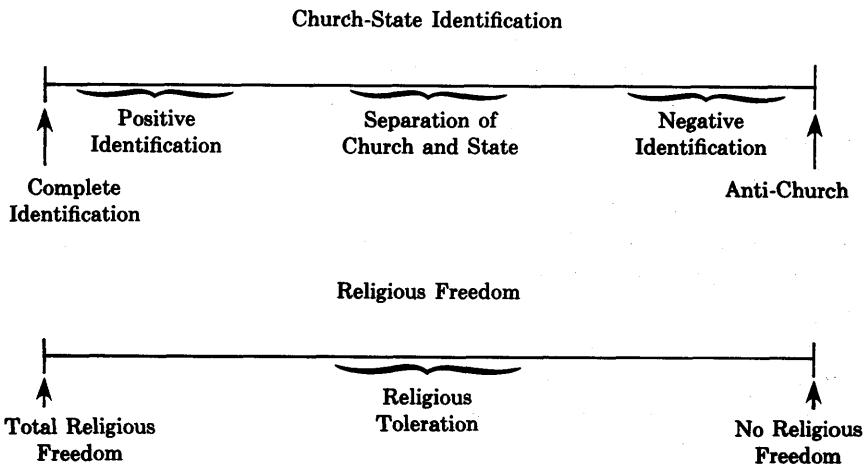
I. INTRODUCTION OF THE MODEL

Church-state questions involve two central issues: 1) state

* Unless otherwise indicated all translations from Spanish material are by the author. The author did much of the research and observation that led to the writing of this Comment while living and working in Madrid, Spain in the late 1970's.

identification with one or more religious establishments versus nonidentification by the state with religious establishments, and 2) religious freedom versus no religious freedom. Church-state identification refers to the degree and type of interrelation between the state, as the governmental expression of society, and the church, as the institutional manifestations of society's religious expression. In other words, the identification question refers to the relations of the state with the institutional manifestations of man's religious expression. Religious freedom refers to the position taken by the state and the society toward the individual's forms of religious expression. Full religious freedom can be described as the right to be free from societal and governmental coercion in religious matters. The degree to which a state allows its citizens freedom from religious coercion is a measure of the amount of religious freedom that that state provides.

For the purpose of developing a model to illustrate the relation between church-state identification and religious freedom, the two concepts will be viewed as two separate lines:



Although these concepts appear as polarities in the linear model, they should be considered as spectra, distinct and not necessarily codeterminant, but obviously interrelated.

The identification line extends from one extreme where identification is complete, meaning the church is the state,¹

1. Such total identification is approached in the modern world only in certain Islamic states or in isolated situations such as Tibet prior to the Communist invasion.

through a variety of "confessional states,"² to systems of clear separation between church and state. From mere separation of church and state this line continues to a position of negative identification where the state is not merely indifferent or impartial toward religious establishments, but actually discourages, restricts, and even prohibits institutional manifestations of religion.³

At one extreme of the religious freedom line, the state protects the individual from all forms of coercion in religious matters. At the opposite extreme, the state denies religious freedom to the individual and either demands adoption of a particular religious creed or denies religious experience altogether. Between the extremes on the religious freedom line lie varying degrees of religious toleration, either for members of all churches or for members of all but one church which might receive favorable treatment or be entirely prohibited.

A brief overview of the church-state positions of several different countries will clarify the church-state model. The positions of the states that formed the original nucleus of the European Economic Community vary widely on the identification line despite their common subscription to the principles of religious freedom outlined in the 1950 European Convention of Rome and in the United Nations Declaration on Human Rights.⁴ France has a system of total separation of church and state that might best be characterized as a liberal indifference. Religious institutions are treated basically the same as other civil associations and are allowed to function as they wish provided they do not threaten public order as defined by the state.⁵ Holland, by contrast, has a system of separation, but the government maintains a more watchful legal stance toward religious associations.⁶ Belgium allows full religious liberty and officially recognizes no

2. A confessional state can be defined as one where the great majority of the political community practices a single religion and especially where the ethical, moral, and social principles of this religion have decisively influenced the formation of the population's ethical-cultural heritage. See A. BERNARDEZ, *APUNTES SOBRE REACCIONES ENTRE LA IGLESIA Y EL ESTADO* 221 (1974).

3. M. FRAGA IRIBARNE & J. PEREZ ALLANA, *EL ESTADO Y LA IGLESIA EN ESPAÑA* 30 (1972) [hereinafter cited as M. FRAGA]. In developing the model the author has drawn ideas from several Spanish authors. See generally *Id.* at 30; A. BERNARDEZ, *supra* note 2, at 18-21, 35-65; C. CORRAL SALVADOR, *LA LIBERTAD RELIGIOSA EN LA COMUNIDAD EUROPEA* (1973).

4. See C. CORRAL SALVADOR, *supra* note 3, at 14-49.

5. See *id.* at 70-118.

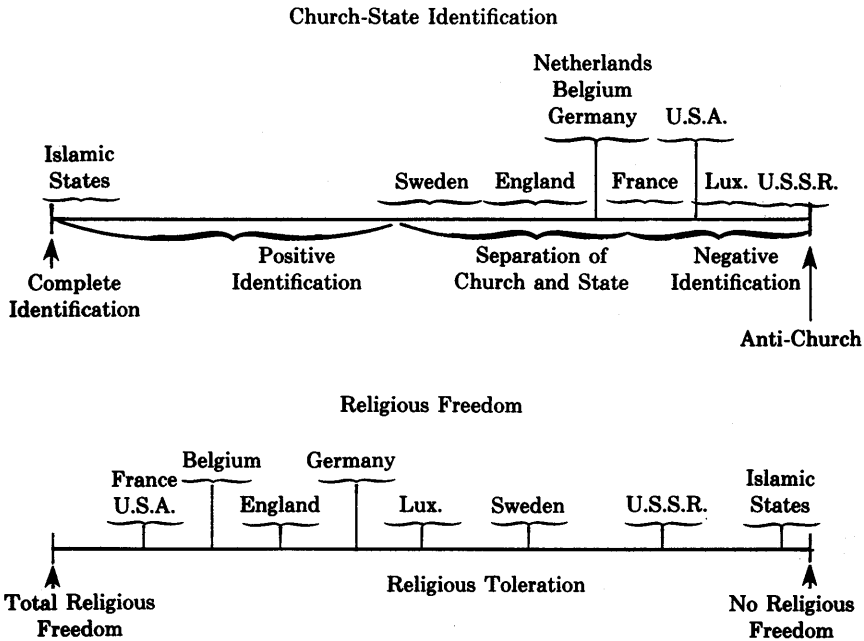
6. See *id.* at 156-222.

single religion, but its Constitution specifically authorizes the payment of salaries and pensions for ministers of several "recognized" religions, including the Catholic, Protestant and Jewish religions.⁷ Luxembourg follows a similar pattern, but restricts some activities of religious associations.⁸ Germany takes an equally strong position on religious liberty. Although its Constitution declares there is to be no state church, major churches are given special status as public associations, and the government collects mandatory contributions for the two major denominations from their members.⁹

Other parts of the world exhibit even greater diversity in the patterns of church-state relations. The United States, by its Constitution, lies within the separation of church and state portion of the identification line and on the freedom end of the religious liberty line. The Soviet Union is positioned on the negative identification end of the separation of church and state line. On the religious freedom line the Soviet Union is found, at least in practice, on the heavy restriction side.¹⁰ England offers religious freedom while maintaining a ceremonial identification with an established church.¹¹ In Sweden the Lutheran Church is the state church, and non-Lutherans, especially Catholics, receive only religious toleration.¹² In South America there are countries spread across both lines with no readily apparent correlation between one line and the other.¹³

By assigning the various countries positions on the lines of the model according to their relative degrees of church-state identification and religious freedom, the model appears this way:

7. *See id.* at 282-89.
8. *See id.* at 307-60.
9. *See id.* at 361-496.
10. M. FRAGA, *supra* note 3, at 30.
11. C. CORRAL SALVADOR, *supra* note 3, at 38.
12. R. PATTEE, THIS IS SPAIN 377-78 (1951); C. CORRAL SALVADOR, *supra* note 3, at 36.
13. *See generally* J. MECHAM, CHURCH AND STATE IN LATIN AMERICA (rev. ed. 1966).



Examination of the relationship between a country's position on the identification line versus its position on the religious freedom line yields no clear pattern. The widely held belief that decreasing religious freedom is synonymous with increasing church-state identification is contradicted by the conditions in countries such as the Islamic states and the Soviet Union which are at the same end of the religious freedom line and at opposite ends of the identification line. Apparently any degree of church-state identification can be coupled with some form of religious freedom or restriction. The following historical analysis of church-state relations in Spain over the last 150 years will bring this interrelationship into clearer focus through examination of Spain's dramatic shifts in church-state identification and religious freedom.

II. THE CONSTITUTIONAL HISTORY OF SPANISH CHURCH-STATE RELATIONS

A. *Early Constitutional Period 1800-1869*

By 1800 the Spanish State had sufficiently felt the impact of both the Enlightenment and modern concepts of constitutionalism to make possible an evaluation of church-state relations in

modern terms. At that time, Spain was found high on the positive end of the identification line and approaching no religious freedom on the other line. Under the Concordat of 1753, the Catholic Church was clearly state-established; more accurately, it was controlled by the State.¹⁴

The first written Constitution, in 1812, evidenced little desire to change the position of high positive identification and no religious freedom. A measure in the original draft had proposed that "no citizen be inconvenienced in his religion, whatever it might be," but was soundly defeated.¹⁵ The document as adopted read: "The religion of the Spanish nation is, and shall be perpetually, Apostolic Roman Catholic, the only true religion. The nation protects it by wise and just laws and prohibits the exercise of any other, whatsoever."¹⁶

The fact that this otherwise liberal document provided for high identification and no religious freedom was indicative of the view held by most Spaniards concerning the role of the Catholic Church. Most interests of the Church and the State were, in the minds of the people, synonymous. The implementing legislation, however, indicated that not all interests of the Church and the State were parallel. The *Cortes* (national legislative body) took action against the Inquisition and the Catholic Orders.¹⁷ When the members of the Church hierarchy protested these measures, several bishops were exiled or imprisoned and the papal nuncio was expelled from Spain. When Ferdinand VII returned to the throne he declared all actions of the 1811 *Cortes* null and void, and therefore these anti-church actions by the *Cortes* were never fully implemented.¹⁸

In 1820 a military revolt forced Ferdinand VII to convoke a *Cortes* and reinstate the Constitution of 1812. Many of the leaders of the revolt were active Masons and were very liberal for their time.¹⁹ After coming to power, the liberal government moved immediately against the Church. The Jesuits and at least one bishop were expelled, other orders were severely restricted

14. E. PEERS, *SPAIN, THE CHURCH AND THE ORDERS* 56-58 (1945).

15. J. MONROY, *LIBERTAD RELIGIOSA Y ECUMENISMO* 74 (1967).

16. Constitution of 1812, tit. II, ch. II, art. 12 translated in A. VERDUIN, *MANUAL OF SPANISH CONSTITUTIONS 1808-1931*, at 12 (1941). This book contains good English translations of all Spanish constitutional documents up to and including the 1931 Constitution.

17. J. HUGHEY, *RELIGIOUS FREEDOM IN SPAIN* 18 (2nd ed. 1970).

18. *Id.*

19. R. SMITH, *SPAIN: A MODERN HISTORY* 302 (1965).

and Church property was seized.²⁰ A period of violent anticlericalism in various parts of the country followed in which many monks, nuns, and clergy lost their lives.²¹ Without changing the Constitution of 1812 the government and society had turned the high positive identification between the Church and the State into an attempt to control the Church by force and intimidation.

Foreign intervention, under the direction of Metternich and Talleyrand, freed the monarch and restored reactionary rule and the Church's position. That position remained the same until the death of Ferdinand, when his daughter, Isabel II, and her supporters (generally the more liberal portions of Spanish society) came into power.²² At this time Spain experienced nationwide anticlerical riots where "[h]undreds of religious houses were wholly or partially destroyed by fire; hundreds of priests and laymen were killed; [and] hundreds of works of art [were] lost for ever [sic]."²³ The government did not quell the rioting, rather it chose to expel the Jesuits, close religious houses, and seize the Church's lands to help pay the costs of the civil war.²⁴ This strong anticlerical sentiment had greatly subsided by 1837 when a new Constitution was drafted and moderate groups tempered the constitutional convention.

The Constitution of 1837 was a statement of classical nineteenth century liberalism and "served as a model for the structure of most of the later nineteenth century Spanish constitutions."²⁵ In the area of religion, the Constitution was surprisingly moderate. Title I, article 11, the only provision pertaining to religion, reads: "The nation is obliged to maintain the cult and the ministers of the Catholic religion which Spaniards profess."²⁶

Despite the Constitution's positive identification of the Spanish State and society with the Catholic Church, the anticlerical attitude of the government continued. During the regency of the progressive General Espartero,²⁷ bishops and priests were removed from office, bishops were appointed without the

20. E. PEERS, *supra* note 14, at 64-65.

21. *Id.* at 65-66, 69-71.

22. *Id.* at 68-71.

23. *Id.* at 71.

24. R. SMITH, *supra* note 19, at 315-16.

25. A. VERDUIN, *supra* note 16, at 40.

26. *Id.* at 41.

27. Espartero became regent in May 1841 and was forced to flee Spain in July 1843. R. SMITH, *supra* note 19, at 323-25.

approval of Rome, and the nunciature was closed.²⁸ A series of provocative exchanges between the government and the Vatican followed, and the Pope addressed an encyclical to the world on the sad state of the Spanish Church, calling on all Catholics to pray for change.²⁹

In 1844 after nearly a decade of turbulent Progressive rule, the Moderates once again regained control and drafted a new and extremely conservative Constitution.³⁰ The approach to church-state relations was representative of the Moderate policy of reconciliation with the Church. Article eleven in the new Constitution read: "The religion of the Spanish nation is the Apostolic Roman Catholic religion. The State binds itself to maintain the cult and its ministers."³¹

The Penal Code of 1848, a key part of the implementing legislation, is illustrative of the high degree of identification between the Spanish State and the Catholic Church under the Constitution of 1845. While there were no penalties for failure to practice the Catholic religion or for personally rejecting Catholic dogma, the penalties for public acts against the Church or its dogmas were severe. Anyone who tried to change or abolish the Roman Catholic religion or who celebrated public acts of worship of a non-Catholic religion could be imprisoned for twelve to twenty years. Lesser prison sentences were imposed for "inculcating the non-observance of the religious precepts, or making mock of the sacraments of the Church, or persisting in publishing doctrines condemned by the ecclesiastical authorities."³² Implementation of this code moved the Spanish State toward extreme non-religious freedom and enhanced the positive identification of the Church with the State.

The identification of the Catholic Church and the State was further enhanced by the concordat negotiated with the Vatican in 1851.³³ Article one is representative of this document's total commitment to church-state identification:

The Apostolic Roman Catholic religion, which with the exclusion of all other cults continues to be the only one of the Spanish nation, will be conserved always in the domains of His

28. J. HUGHEY, *supra* note 17, at 21-22.

29. *Id.*

30. A. VERDUIN, *supra* note 16, at 45.

31. *Id.* at 46.

32. J. HUGHEY, *supra* note 17, at 22-23.

33. E. PEERS, *supra* note 14, at 79.

Catholic Majesty, with all the rights and prerogatives which it should enjoy according to the law of God and the prescriptions of the sacred Canons.³⁴

The church-state identification imposed by the Concordat of 1851 eliminated religious freedom, completing the impetus given by the Constitution of 1845 and the Penal Code of 1848. All instruction, both public and private, was to be controlled by the Catholic hierarchy and in accordance with Catholic dogma. The public authorities were to support the clergy in all their activities, especially those involving censorship of undesirable propaganda. The special privileges enjoyed by Catholic clergy under Canon law were protected by the government. The Church was guaranteed the right to hold property and the government agreed to pay all the clergy a stipend as remuneration for the property seized during the past century.³⁵

Most of the opposition to the Concordat came from the Progressives (liberals) who were out of power. Some opposition to such high positive identification of the Church and the State was raised by individuals in the Church.³⁶ These individuals feared that too close an association between Church and State would work to the Church's detriment. Their fears concerning the subordination of the Catholic Church to the State were soon confirmed when the liberals once again gained control of the government in 1854. Neither the Constitution, the Penal Code, nor the Concordat prevented the liberals from immediately renewing their attack on the Church. An expropriation law was enacted to take away the lands returned to the Church under the Concordat and any property newly acquired by the religious orders. The Jesuits were once again expelled, several bishops and the nuncio were exiled, all religious processions in the streets were banned, and government censorship was imposed on Catholic newspapers.³⁷ All of these actions were not intended to establish religious freedom, rather they were intended to disestablish the Catholic Church, or at least reduce it to total subservience to the State.

Only two years later the Moderates regained control of the government and reinstated the Constitution of 1845 with its

34. J. HUGHEY, *supra* note 17, at 23.

35. R. PATTEE, *supra* note 12, at 348-49.

36. *See id.* at 72.

37. J. HUGHEY, *supra* note 17, at 23-24; E. PEERS, *supra* note 14, at 85.

high positive identification and total lack of religious freedom. This remained the position of the Spanish government until the revolution of 1868, which deposed Isabel II and brought the liberals back into power.³⁸

Several characteristics of Spanish church-state relations are evident in this early period. Perhaps most obvious is the ease with which a change in government brought a shift from positive identification to negative, antichurch identification. Based on this history, positive identification and negative identification appear to be closely related. Equally clear is the fact that religious freedom is not an inherent characteristic of either positive or negative church-state identification. Religious freedom was never a part of any Constitution from 1812 to 1869 and was defeated when proposed for inclusion in both liberal and conservative Constitutions.

B. The Constitution of 1869 and the First Republic

At the beginning of the revolution of 1868, local revolutionary committees took immediate actions against the Catholic Church. Some local bishops and priests as well as the Jesuits were expelled, and many chapels were confiscated.³⁹ Several of the local juntas declared religious freedom a universal principle, yet ironically, ordered the demolition of local Catholic churches. The provisional government in Madrid suppressed the Jesuits, closed certain monasteries and convents, and granted permission for the establishment of several non-Catholic schools. It also ordered the confiscation of all libraries, archives, museums, and art collections held by the Church.⁴⁰ Religious freedom became the official policy of the Spanish government. The complicated questions concerning relations between the Catholic Church and the State were deferred to the constituent power.⁴¹ That constituent power took the form of a new *Cortes* that was elected in 1869. Its first task was to draft a new Constitution.

The articles on religion in the proposed draft evoked widespread debate, in which three basic positions emerged: 1) those who favored a return to absolute Catholic unity as manifested in the Constitution of 1845; 2) those who favored a total separation

38. R. HERR, AN HISTORICAL ESSAY ON MODERN SPAIN 103-05 (1971).

39. J. HUGHEY, *supra* note 17, at 34.

40. *Id.* at 36.

41. *Id.*

of church and state and religious freedom for all (although, ironically this group also favored anti-Catholic legislation as the only means of reducing the Catholic Church's immense power); and 3) those who sought some form of compromise, either by maintaining the positive identification of the Catholic Church with the State while granting minimal religious toleration to non-Catholic individuals, or conversely, by granting religious freedom but maintaining some identification of the Church and the State in recognition of the basically Catholic nature of the Spanish people.⁴² The latter compromise approach held sway in the Constitution of 1869 as finally promulgated in title I, article 21:

The nation binds itself to maintain the cult and the ministers of the Catholic religion.

The public or private observance of any other cult is guaranteed to all foreigners resident in Spain, without any further limitations than the universal rules of morality and right.

All the provisions of the preceding paragraph are applicable to those Spanish people who profess religion other than Catholicism.⁴³

The legislation adopted under the Constitution of 1869 implemented the policy of religious freedom. The new Penal Code promulgated in 1870 offered protection to all religions. It punished anyone who forced others to practice religious acts or who hindered or disturbed religious services. The legislative provisions remained completely neutral in regard to Catholicism.⁴⁴ Civil registry of births, marriages, and deaths was instituted. Because religious marriages were no longer recognized, there were no prohibitions against their accompanying the civil marriage.⁴⁵ Orders were issued providing for the burial of non-Catholics in the cemeteries.⁴⁶ Non-Catholic children were excused from religious instruction.⁴⁷

The Constitution of 1869 and the religious freedom it enshrined were short-lived. After two turbulent years, the new king of Spain abdicated,⁴⁸ and a republic was proclaimed. Religious

42. *Id.* at 38-49.

43. Constitution of 1869, tit. I, art. 21, translated in A. VERDUIN, *supra* note 16, at 60.

44. J. HUGHEY, *supra* note 17, at 54.

45. *Id.*

46. *Id.* at 57.

47. *Id.* at 55.

48. R. SMITH, *supra* note 19, at 357.

freedom was to be augmented by the separation of the Catholic Church and the State in the proposed draft of a republican constitution.⁴⁹ This draft was never debated in the full *Cortes* because the dissatisfaction with the instability of the Republic became so great that in December, 1874, several generals declared Isabel II's son, Alfonso XII, King of Spain.⁵⁰

This period represented, for the first time in Spanish history, a move toward the religious freedom end of the line and a concurrent move away from the extremes of positive or negative identification. The implementing legislation, defining the parameters of the constitutional grant of religious freedom, not only protected the individual from antireligious governmental action, but also assured Catholics that they were to be equally protected from a governmental switch to negative identification. One unanswered question was whether separation of the Catholic Church and the State, as proposed in the draft constitution of the First Republic, could have been achieved without endangering the religious freedom of the Catholic majority.

C. *The Constitution of 1876*

The Constitution of the Restoration, promulgated in 1876, brought at least a minimum of stability to Spain and was in force until 1931, longer than any other Spanish Constitution. In an attempt to achieve political unity and stability, the Constitution of 1876 tried to satisfy the Catholic Church and its partisans, more than the constitution of 1869 had done, yet still salve the consciences of the liberals.⁵¹ In an effort to forge a compromise acceptable to at least a large majority, the Constitution of 1876 enshrined a new concept in Spanish history: reli-

49. The articles on religion in the Constitution proposed in 1873 read:

Article 34-The observance of all cults shall be free in Spain.

Article 35-The church is separated from the state.

Article 36-The direct or indirect subsidizing of any cult is forbidden to the nation or federal state, and to regional states, and municipalities.

Article 37-Records of birth, marriage, and death shall be registered by the civil [sic] authorities.

A. VERDUIN, *supra* note 16, at 70.

50. R. HERR, *supra* note 38, at 110.

51. Two diametrically opposed foreign influences were also being balanced: papal pressure which extended to the point of a papal decree specifically condemning the paragraphs in the 1876 Constitution dealing with the concept of religious toleration, and pressure from the more liberal nations, particularly Britain, whose embassies and consulates frequently intervened on behalf of non-Catholics who were being harassed or persecuted.

gious toleration.

Article 11—The Apostolic Roman Catholic religion is the religion of the state. The nation binds itself to maintain this cult and its ministers.

No one in Spanish territory shall be molested for his religious opinions, or for the observance of his particular form of worship, provided that he shows proper respect to Christian morality.

Public manifestations and ceremonies other than those of the religion of the state, however, shall not be permitted.⁵²

The identification between the Catholic Church and the State remained relatively positive and the Church maintained a position of great favor and control, but non-Catholic sects were legally recognized, and freedom of conscience and private religious practice were tolerated.

Toleration proved to be a concept that lent itself to a variety of interpretations and practices. The point where Spain was found on the religious freedom line varied greatly depending on the government in power. During the early years of the Constitution of 1876, the interpretation of religious toleration in the Royal Order of October 1876 pushed the definition of religious toleration as close to no religious freedom as was possible within the constitutional framework:

1. From this date all public manifestations of the cults or sects dissident from the Catholic religion are forbidden outside the precincts of their temples or cemeteries.
2. For the effects of the previous rule, by public manifestation will be understood everything in the street or on the exterior walls of the temple or of the cemetery which gives knowledge of the ceremonies, rites, usages, and customs of the dissident cult, including signs, banners, emblems, advertisements, and posters.⁵³

Under the Constitution of 1876, civil marriage was denied to those who were Catholics—although civil registration of the canonical marriage was required;⁵⁴ former priests and monks were not allowed to marry; anti-Catholic statements were not permitted to be published by the press;⁵⁵ religion was taught in the

52. A. VERDUIN, *supra* note 16, at 78.

53. J. HUGHEY, *supra* note 17, at 87-88.

54. S. DE MADARIAGA, *SPAIN: A MODERN HISTORY* 162-63 (1958).

55. J. HUGHEY, *supra* note 17, at 71-72.

public schools;⁵⁶ and attendance at mass was compulsory for those in the armed forces.⁵⁷

During the early twentieth century, a slight trend toward religious freedom emerged. Under the liberal government of 1910, the restrictions on public manifestations of non-Catholic religions were modified to allow signs and symbols on the outside of Protestant churches and to permit some public meetings.⁵⁸ During this period several courts upheld the rights of non-Catholics in cases involving freedom of conscience and personal religious actions.⁵⁹ Mandatory attendance at mass for those serving in the armed forces was also relaxed.⁶⁰ The government manifested a willingness to treat fairly those who chose not to adhere to the Catholic dogma as long as they did not openly proselyte or openly criticize or ridicule Catholic beliefs and practices.

On the surface, the Constitution of 1876 had achieved peace and stability, but the compromises making that possible failed to reach the underlying stresses and strains in the fabric of Spanish society. Inability to participate effectively in the electoral process eventually alienated the industrial workers, the agrarian poor, and the liberal intellectuals.⁶¹ As new doctrines of communism, anarchism, and socialism grew, the political system deteriorated. Finally, in 1923, Miguel Primo de Rivera, declared himself military dictator.⁶²

Under Primo de Rivera, the doctrine of religious toleration was restricted to its narrowest definition and virtually eliminated. Many of the Church supporters of the dictator believed the policies of the liberals in broadening religious freedom had contributed to a general decline in order. The new Penal Code of 1928, which replaced that of 1870, returned to the concepts embodied in the Penal Code of 1848. It was again a crime to attempt to abolish the religion of the State or to mock the Catholic Church. Any public manifestation of a non-Catholic faith was punishable by three to six years in prison.⁶³

56. *Id.* at 105. However, religious study was not mandatory for primary or secondary students whose parents were not Catholic. *Id.*

57. *Id.* at 106.

58. *Id.* at 108.

59. *Id.* at 109-10.

60. *Id.* at 107.

61. R. HERR, *supra* note 38, at 115, 136-37.

62. R. SMITH, *supra* note 19, at 404.

63. J. HUGHEY, *supra* note 17, at 110-12.

Several important concepts are evident from the history of the Constitution of 1876. First, considerable latitude exists within a broad constitutional grant of religious toleration which, depending on the implementing legislation, allows for greater or lesser religious freedom. Secondly, it is possible to maintain relatively close church-state identification and still have some religious freedom. Thirdly, as long as religious toleration is maintained, no crossover to negative identification arises. The following section demonstrates that only when Primo de Rivera eliminated religious toleration did the positive identification become sufficiently high to prompt the transition to negative identification under the Second Republic.

D. The Constitution of 1931 and the Second Republic

In 1931, after the fall of Primo de Rivera, the King allowed free municipal elections that resulted in a substantial victory for the Republicans.⁶⁴ Hoping to avoid civil war, Alfonso XIII went into voluntary exile, and a provisional Republican government came to power.⁶⁵ This government acted immediately to reduce the powers of those segments of society that had supported the monarchy. The army was reorganized, and its power was restricted. Separation of church and state became a primary objective.⁶⁶

A new *Cortes* was elected to draft a new constitution. The vast majority of the deputies elected were either Socialist or Republican.⁶⁷ As a result, the document they produced was much too liberal for much of the country that identified closely with Catholicism, but after years of repression the group now in control was not interested in compromise. The positive identification of the Primo de Rivera years made possible a simple and rapid transition to negative identification.

In the *Cortes* the debate on the Constitution proceeded smoothly until the first of the religious articles. The draft written by the provisional government called for separation of church and state, but gave the Catholic Church the position of a special corporation *de derecho publico* (of public right). This moderate approach was unacceptable to a majority of the depu-

64. R. SMITH, *supra* note 19, at 413.

65. *Id.*

66. *Id.* at 431-32.

67. R. HERR, *supra* note at 38, at 158.

ties who proposed total separation of church and state.⁶⁸ Their viewpoint clearly dominated the religious articles as adopted:

Article 3-The Spanish state has no official religion.

Article 26-All religious denominations shall be considered as associations subject to special laws.

The state, regions, provinces, and municipalities may not maintain, favour, or subsidize financially churches or religious associations and institutions.

Those religious orders which impose by rule, in addition to the three canonical vows, the special vow of obedience to an authority other than the state, are dissolved. Their property shall be nationalized and employed for charitable and educational purposes.

The other religious orders shall be subject to a special law voted by this constituent *Cortes* on the following basis:

1) Dissolution of those orders which, by their activities, constitute a menace to the safety of the state. . . .

3) Inability to acquire and hold, either by themselves or through an agent, any more property than that assigned, after previous justification, for their support or for the direct attainment of their particular aims;

4) Prohibition of their participation in industry, commerce, or teaching. . . .

6) . . . The property of the religious orders may be nationalized.

Article 27-Liberty of conscience and the right to profess and practice any religion freely are guaranteed in Spanish territory, save for due respect to demands of public morality.

Cemeteries shall be subject exclusively to civil jurisdiction. There may not be a separation of districts therein for religious reasons.

All denominations may observe their rites privately. Public manifestations of the cults must be authorized, in any case, by the government.

No one may be compelled to declare officially his religious beliefs.⁶⁹

Since a majority of the Spanish people were still Catholic, these articles must be viewed as a form of negative identification or hostile separation of church and state rather than as establishing religious freedom. This attitude is equally evident in the details of the separation of church and state, normally left to

68. J. HUGHEY, *supra* note 17, at 120-25.

69. A. VERDUIN, *supra* note 16, at 85, 88-89.

implementing legislation, which were spelled out in the Constitution of the Second Republic. Even ardent supporters of the Republic today recognize that the treatment of the religious question was ineffective and counterproductive, and probably the gravest error the Republicans made.⁷⁰

E. *The Franco Period to 1963*

The actions of the Second Republic solidified Catholic opposition to the Republic and won Catholic support for Franco's forces when the Army finally revolted in 1936. The military revolt was heralded as a crusade to save the Church from the communist infidels of the Republican government.⁷¹ The civil war lasted nearly three years, leaving the country "exhausted materially and psychologically."⁷² A hundred thousand young men had been killed in the fighting and nearly half a million people were in exile.⁷³

During the civil war there were numerous antireligious atrocities committed by both sides. Catholic worship was suspended during the war in all Republican-held areas outside of the Basque countries; many churches were converted to other purposes or destroyed.⁷⁴ Thousands of clergy were killed—many brutally murdered in cold-blooded executions for no other crime than having been a priest.⁷⁵ Such actions were not limited to the Republican side. The Basque clergy, the most closely united with their people of any clergy in Spain, supported the Republic, and, as a result, large numbers of them were executed by Franco

70. E. PEERS, *supra* note 14, at 155. The Republican government, and the implementing legislation it passed were so anticlerical that some people characterized the Republican government as a "Holy Anti-clerical Church." The deputies of the government not only adopted a divorce law, but enacted a law allowing for divorce by mutual consent after two years of marriage without any requirement of governmental approval. J. CROW, *SPAIN: THE ROOT AND THE FLOWER* 311 (1975). The cemeteries were not merely opened to all people, but a law was passed forbidding any form of religious burial unless it was specifically requested in a written will. *Id.* at 263. All Church properties were nationalized except those used for worship and all religious orders were forbidden to take part in any industrial, commercial, agricultural, or educational activities. E. PEERS, *supra* note 14, at 147-49.

71. J. CROW, *supra* note 70, at 320. See also P. BLANSHARD, *FREEDOM AND CATHOLIC POWER IN SPAIN AND PORTUGAL* 21 (1962).

72. R. HERR, *supra* note 38, at 211.

73. *Id.*

74. J. HUGHEY, *supra* note 17, at 132-33.

75. E. PEERS, *supra* note 14, at 167-76.

forces.⁷⁶ Whether there was positive identification or negative identification, where no guarantees of religious freedom existed, the Church and its clergy suffered when their course did not parallel that of the government in power.

With the victory of the Franco forces, positive identification became official Spanish policy, and the doctrine of Catholic unity was stronger than at any time since the Inquisition. As at the time of the Inquisition, during the first twenty years under Franco all forms of repression were evident: censorship of the press,⁷⁷ imprisonment for purely politico-religious crimes, and outright persecution of non-Catholic sects.⁷⁸

To insure the very high identification of the Catholic Church and the State and to help legitimize his government, Franco negotiated a new Concordat in 1953. The traditional power of patronage was extended to Franco, which allowed him to control the Church by submitting to the Pope the names from which any new bishops would be selected. Under the Concordat the Church was given such traditional privileges as the annual financial grant to clergy (this time with an escalation clause) and immunity for the clergy from arrest and imprisonment. Canon law was made an integral part of the governing law of Spain. Compulsory religious education was provided as a part of educational instruction in all institutions of learning, whether state-owned or church-owned. The Catholic Church was to be the sole religion, and the only concession to religious toleration was that children of non-Catholic parents could be excused from the mandatory religion classes.⁷⁹

Beginning in 1947 a written constitutional framework was developed. The religion clauses found in title I, chapter I of the *Fuero*, the Spanish Bill of Rights originally read:

The profession and practice of the Catholic religion, which is that of the Spanish State, will enjoy official protection.

Nobody will be molested because of his religious beliefs or the private exercise of his cult. No external ceremonies or manifestations will be permitted except those of the Catholic

76. J. HUGHEY, *supra* note 17, at 133. See also CENTRO DE INFORMACIÓN CATÓLICA INTERNACIONAL, *EL CLERO Y LOS CATÓLICOS VASCO-SEPARATISTAS Y EL MOVIMIENTO NACIONAL* (1974).

77. J. HUGHEY, *supra* note 17, at 140, 142.

78. *Id.* at 142-43.

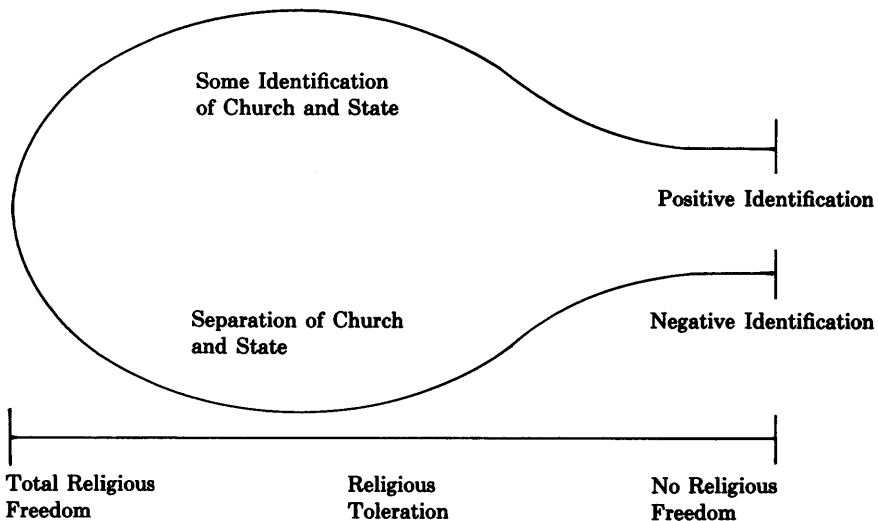
79. P. BLANSHARD, *supra* note 71, at 267-74; J. CROW, *supra* note 70, at 353.

religion.⁸⁰

This amounted to an explicit statement of the most conservative interpretation of the religious toleration concept of the Constitution of 1876, and in practice restricted non-Catholics more than any nineteenth-century approach.

III. CONCLUSIONS ABOUT THE APPLICATION OF THE MODEL TO CHURCH-STATE RELATIONS IN SPANISH HISTORY

Periods of strong positive identification or strong negative identification in all of the cases so far considered have also been periods of little or no religious freedom. Such is the case in the Communist countries, in Franco Spain, in the Spain of 1848, and in the Islamic confessional states. As a country moves toward greater positive identification or negative identification, religious freedom decreases. This suggests a modification of the model. The straight line representing church-state identification ought to be bent into a loop and placed over the religious freedom line so that both the negative identification and the total identification ends of the line are above the no religious freedom end of that line.



Bending the identification line and placing both positive

80. A. PEASLEE, CONSTITUTIONS OF NATIONS 77 (1950).

and negative identification over the no religious freedom portion of the freedom line illustrates two further principles that can be derived from the model:

1) High positive identification of the church with the state and negative identification are very close, which allows for relative ease of transition from one to the other. During several periods of Spanish history the government took actions—without any change in the written constitution—that represented a high degree of negative identification. Where no religious freedom exists, there appears to be no protection against a rapid transition from high positive identification of church and state to anti-church or negative identification actions.

2) The model suggests that movement along the identification line would require some corresponding movement on the religious liberty line and vice versa. A country may, therefore, move away from the religious freedom section of the line by confusing anti-identification actions with those designed to provide religious freedom. This was precisely what happened in both Spanish Republics. Legislation designed to eliminate the identification of the Catholic Church with the State resulted in the elimination of any vestiges of religious freedom. The opposite is also possible since increasing church-state identification is usually associated with decreasing religious freedom.

A more general principle that can be derived from the model is that there can be a variety of identification approaches associated with religious freedom, including either separation of church and state or some church-state identification. While Spain has had little experience in this area, the positioning of other European nations along the curved portion of the loop illustrates this diversity.

Several additional conclusions, specifically relevant to contemporary Spanish experience (although with some general application), need to be mentioned. First, the importance of implementing legislation is made clear by the circumstances surrounding the constitutions of 1837, 1876, and 1931. In each instance, apparently moderate positions in the written constitutions were pushed completely outside the area of religious liberty by the implementing legislation. Secondly, written laws dealing with religious matters can remain the same while the actual governmental practice affecting religious freedom changes dramatically. Such was the case under the Constitution of 1876, and the same is true of the modern Communist states with their

constitutional guarantees of religious freedom. Thirdly, because of positive identification throughout Spain's entire constitutional period, the Catholic Church became more and more an integral part of the ruling oligarchy and closely tied, therefore, to conservative politics. This alignment prevented the Church from maintaining the viability and flexibility necessary to be an independent institution. Thus, the Church was unable to meet the challenges of changing political and social situations.

IV. SPANISH CHURCH-STATE RELATIONS 1963-1978

Beginning as early as the mid-nineteenth century, foreign powers opposed the high church-state identification in Spain and the lack of religious freedom. This opposition came from two primary sources, the Vatican and non-Catholic liberal countries such as Britain and the United States. While the influence of the former has been obvious during the entire constitutional period of Spanish history, the latter's influence became increasingly important during the Franco period following the 1953 treaty between Spain and the United States. The growth of American military installations and international tourism in Spain also added foreign pressures.⁸¹ The reality of these pressures is evidenced by the fact that when Spanish laws of religious toleration were introduced toward the end of the Franco period, the Spanish Minister of Foreign Affairs played a leading role in their adoption.⁸²

In earlier Spanish history, foreign pressure for increased religious freedom had always been counteracted by pressure from the Vatican to maintain Catholic unity. That situation changed dramatically in the early 1960's because of Vatican II. In 1965 the international Catholic Church adopted an encyclical on religious freedom,⁸³ wherein, for the first time, the Catholic Church officially encouraged religious freedom for all countries. The Spanish bishops at that conference were the strongest and most outspoken opponents of the new policy;⁸⁴ nevertheless, it was clear that changes were necessary in Spain.

Following Vatican II an amendment to the religious article of the *Fuero*, the Spanish Bill of Rights, was proposed as part of

81. J. HUGHEY, *supra* note 17, v-vi; J. MONROY, *supra* note 15, at 60.

82. J. HUGHEY, *supra* note 17, at v-vi.

83. J. MONROY, *supra* note 15, at 52.

84. N. COOPER, *CATHOLICISM AND THE FRANCO REGIME* 29 (1975).

an entire reworking of the Spanish constitutional framework under the Organic Law of 1967. The first paragraph of that article, which established positive identification of church and state, was left intact, but the following declaration of religious freedom was added: "The State will assume the protection of religious liberty which will be guaranteed by effective juridical tutelage that at the same time safeguards public morality and order."⁸⁵

The legislation implementing this modification was more effective than the ambiguous language of the constitutional guarantee in causing real movement along the religious liberty line. And, perhaps of even more significance, Spain was about to experience more than a decade of trauma in church-state relations which would gradually move it on the identification line to a point where religious liberty became a real possibility.

At the beginning of this period forces were mounting that would make changes in the structure of church-state relations in Spain inevitable. One, already discussed briefly, was the amount of pressure from the Vatican and from democratic countries demanding changes in return for greater integration of Spain into the community of nations. At this same time Spain was experiencing extensive social changes. The economic improvements that accompanied the rapid growth of the large cities and which triggered a large influx of tourists with foreign ideas wrought many changes in Spanish society.⁸⁶ Both the Catholic Church and the Spanish government felt the impact of such changes, however, the Church reacted first. The year 1966 marked the establishment of the *Conferencia Episcopal Española* (CEE) in which all Spanish bishops participated in making national Church decisions, rather than only the twelve or thirteen archbishops.⁸⁷ The result was that many younger, more liberal bishops, and through them, younger priests and lay members, now had a means of effectively expressing their opinions, which more closely paralleled those of the international Catholic Church as expressed in Vatican II.

Conservative groups stood against these forces for change in church-state relations, and in spite of their clear minority status, they held effective power in both Church and State matters. The Church was dominated by older Franco-appointed prelates

85. *Fuero de los Españoles*, tit. I, ch. I, art. 6, LEYES FUNDAMENTALES DEL REINO (1976).

86. See R. HERR, *supra* note 38, at 19-25.

87. F. GIL DELGADO, *CONFLICTO IGLESIA-ESTADO* 191-92 (1975).

whose ultraconservative position and outspoken intransigence at Vatican II focused the attention of the world on the archaic, if not absurd, conditions in the Spanish Church.⁸⁸ The government was controlled by staunch Francoists who saw Catholic unity and national Catholicism as the principal bulwarks of the authoritarian, oligarchic state upon which their power and positions were based.⁸⁹ These groups waged an unsuccessful, though protracted, battle to keep Spain high on the positive end of the identification line and definitely on the no religious liberty portion of the other line.

The forces pushing for modifications in church-state relations in Spain reflected the extensive changes in Spanish society. By 1966 those forces were much more evident in the Church than in the State. As the Church tried to induce Spain to adopt less church-state identification the State resisted, resulting in a series of conflicts between the Catholic Church and the Spanish government.

In 1968 the CEE established a commission to analyze the condition of the Church in Spain. In response to the commission's survey the CEE called for elections of priests to an *Asemblea Conjunta de Sacerdotes y Obispos* (Joint Assembly of Priests and Bishops) to be held in 1971.⁹⁰ The resolutions adopted by the Joint Assembly clergy amounted to an expression on the part of the Church which was tantamount to wholesale transformation.⁹¹

The Church was now conscious of the needs of the people and of the political situation under which they lived. The Joint Assembly passed measures calling for an elimination of all civic and political discrimination based on faith or religion, and calling for the Church hierarchy to speak out when human rights were violated. Another resolution called for the right of the people within the Church to choose their own bishops. Other proposals called for a revision of the 1953 Concordat or preferably its replacement with a series of partial agreements. One especially interesting proposal, which passed by a vote of 215 to 26, stated: "The juridical ordering which regulates relations between the Church and the State must safeguard the autonomy and independence of both and, without diminishing the healthy coop-

88. See N. COOPER, *supra* note 84, at 29.

89. J. MONROY, *supra* note 15, at 51-52.

90. F. GIL DELGADO, *supra* note 87, at 26.

91. *Id.* at 27-28.

eration between them for the common good, eliminate every real or apparent situation of mutual concession of privileges."⁹²

The Church desired to move on the identification line to a point of mutual independence, eliminating even the appearance of mutual concessions of privileges. This desire to lessen church-state identification reflects the significant changes that occurred in the 1960's in the Spanish Church hierarchy. The combined effects of natural attrition and Pope Paul VI's petition that all bishops retire at age seventy-five eliminated nearly a dozen of the most conservative prelates; on the other hand, only two of those viewed as liberal passed away during the same period. In replacing these men, the Pope appointed liberals who viewed the Church and its role in harmony with the perspective of Vatican II.⁹³

The emergence of a new philosophical orientation was clear evidence of change in the Spanish Church during the early 1970's. Gone was the National Catholicism of the civil war years and in its place appeared a universalist outlook that embraced the doctrines of Vatican II and world Catholicism. The Church was, and is, struggling to shed its image as one of the principal pillars of the ruling oligarchy, and thereby realign itself with the working and middle classes. Several of the bishops have called for greater social justice and have instituted extensive social reform programs in their dioceses.⁹⁴ Even the Jesuits, who in the past were bastions of traditionalism, have become reformers by organizing institutes for teaching theology to laymen.⁹⁵

The Vatican has had at least a supportive role in all the changes that have taken place. Despite government opposition, liberal bishops have continually been appointed, and when governmental opposition has become too great, the Vatican has circumvented provisions of the Concordat by leaving the bishoprics officially vacant and appointing auxiliary bishops for whom no government approval is necessary.⁹⁶ In 1967 the Pope sent Luigi Dadaglio, a liberal with worldwide experience in difficult church-state situations, as nuncio to Madrid. He was specifically instructed to push the conciliar movement forward in Spain.⁹⁷

92. *Id.* at 28.

93. S. PETSCHEN, *LA IGLESIA EN LA ESPAÑA DE FRANCO* 156-66 (1977).

94. S. CLISSOLD, *SPAIN* 151 (1969).

95. N. COOPER, *supra* note 84, at 38.

96. *Id.* at 39.

97. S. PETSCHEN, *supra* note 93, at 156.

Dadaglio's involvement at some points became so great that he was personally attacked in the press and widely criticized, especially by the conservative elements in Spanish society.⁹⁸ However, instead of cooperating with Spanish conservatives in state and church matters, Pope Paul continually rewarded liberal Spanish bishops with Cardinal's hats while passing over older, more conservative bishops.⁹⁹

On the international level the Spanish Church and clergy are still very conservative; for example, the Spanish clergy wholeheartedly endorsed Pope Paul VI's ultraconservative encyclical on sex,¹⁰⁰ but the position of the Spanish Church in Spanish society has been dramatically liberalized since 1967.

A. *State Conflict with the Church 1967-1975*

The changes in the Catholic Church brought it into direct and nearly continual conflict with the Spanish State until Franco's death. By the end of the 1960's the bishops of Spain encountered steadily increasing opposition from the government as they tried to bring the Church closer to the people. As early as 1966 the Church felt the wrath of public pressure over the government sponsored appointment of a non-Catalan to the Archbishopric of Barcelona.¹⁰¹

Perhaps the strongest evidence of the growing conflict was the 1971 statement from the *Asemblea Conjunta* (Joint Assembly) in which Spanish bishops and priests called for independence and autonomy for the Church from the State.¹⁰² The Joint Assembly barely missed the two-thirds majority required to pass a resolution—in obvious reference to the Church's civil war involvement—that stated: "We humbly recognize and ask forgiveness for not having been true ministers of reconciliation, when it was necessary."¹⁰³ The days when the Church was solidly united with the State, as it had been since the civil war, were clearly past by 1971, and the Church was seeking to move away from the strict conservatism Franco's government still espoused.

The year 1973 proved to be the most bitter in church-state

98. *Id.* at 157.

99. N. COOPER, *supra* note 84, at 40.

100. TRIUNFO, Feb. 21, 1976, at 33.

101. S. PETSCHEN, *supra* note 93, at 157.

102. F. GIL DELGADO, *supra* note 87, at 28.

103. N. COOPER, *supra* note 84, at 40.

relations.¹⁰⁴ The CEE issued "*La Iglesia y la Comunidad Política*" ("The Church and the Political Community"), which called for separation of the Church and the State and made specific recommendations as to certain rights and actions that bishops should demand for their people.¹⁰⁵ During a heated debate in the *Cortes* over a proposed bill on conscientious objectors and military service, the CEE offered strong support for the more liberal antigovernment stands on the subject.¹⁰⁶ In April, right-wing *Guerrilleros de Cristo Rey* (Guerillas of Christ the King) attacked and severely beat a group of fifteen Basque nationalist demonstrators, including five priests who were derisively referred to as *curas rojas* (red priests).¹⁰⁷ The Bishop of Bilbao excommunicated the *Guerrilleros* involved in the incident, whereas the government judge before whom the *Guerrilleros* appeared dismissed the case without a trial.¹⁰⁸ Right-wing, government-condoned agitation became so pervasive that at the official funeral of Carrero Blanco, the Vice President of Spain who was assassinated in December 1973, the mass given by Archbishop Tarancon was interrupted by offensive shouts, such as "Tarancon to the firing squad" and "death to the red bishops."¹⁰⁹

In February 1974, Anoveros, the Bishop of Bilbao, released a pastoral letter declaring that the Basques were hindered in their just liberty and their rightful cultural expression; he called for changes to allow them to be given such rights. The Franco government responded by placing Anoveros under house arrest and asking him to leave the country. Anoveros refused and threatened to excommunicate anyone who forced him. Only frantic negotiations involving Archbishop Tarancon and the papal nuncio resolved the crisis.¹¹⁰

Throughout this period the conflict was not limited to the level of bishops. Numerous fines were imposed on priests for speaking out in homilies or disturbing the public order in other ways.¹¹¹ Rightists continued to attack liberal, reform-minded

104. F. GIL DELGADO, *supra* note 87, at 235.

105. *Id.* at 204, 216-34.

106. *Id.* at 204-05.

107. *Id.* at 235. See also N. COOPER, *supra* note 84, at 42; S. PETSCHEN, *supra* note 93, at 143.

108. F. GIL DELGADO, *supra* note 87, at 236.

109. *Id.* at 238. See also N. COOPER, *supra* note 84, at 42.

110. N. COOPER, *supra* note 84, at 43.

111. TRIUNFO, Jan. 17, 1976, at 49. Fines were used because they were not prohibited in the Concordat.

priests and laymen.¹¹² When the Catholic moderate paper, *Ya*, called for a "radical reassessment of the political situation" since reform was "long overdue," the editor was indicted, but the case was dismissed.¹¹³ The Church was moving away from the close church-state identification of the Franco period, and the government resisted that movement wherever possible. The Spanish Church was learning a lesson that should have been evident from its own history: When no real provisions have been made for safeguarding religious freedom, close ties between church and state can result in severe restrictions on a church, when either it or the government changes direction.

B. Church-State Relations 1975-1977

An incident of church-state conflict in March, 1975, has been hailed as marking the beginning of the separation of church and state in Spain.¹¹⁴ At that time the Archdiocese of Madrid had planned a "Christian Assembly" in the Madrid working class suburb of Vallecas as a dialogue between parishioners and priests on the social needs of the people and what the Church could do to meet those needs. A day before the assembly was to begin, the government refused to grant the necessary permit for such a large meeting. Archbishop Tarancon issued a pastoral letter condemning the government action and demanded an explanation, which never came.¹¹⁵

Immediately after Franco's death the situation seemed to continue as before. On December 7, 1975, a recently released priest and labor organizer was returned to prison on a charge of organizing an unauthorized demonstration. The priest had merely addressed a crowd that had gathered to welcome him back to Madrid.¹¹⁶ One priest was arrested for involvement in demonstrations demanding amnesty, a focal point in the conflict between the Church and the State.¹¹⁷ In February, 1976, the Abbot of the Montserrat Monastery called for amnesty at a mass attended by the King and Queen.¹¹⁸ The Church's new attitude was summarized in statements by Tarancon in December, 1975,

112. 35 FACTS ON FILE 861 (1975).

113. *Id.*

114. F. GIL DELGADO, *supra* note 87, at 271.

115. *Id.* at 271-76.

116. 35 FACTS ON FILE 943 (1975).

117. *Id.*; 36 FACTS ON FILE 12 (1976).

118. 36 FACTS ON FILE 144 (1976).

at the annual meeting of the *Conferencia Episcopal Española* (CEE). He advocated amnesty for all those who had been imprisoned or forced into exile for purely political reasons, and stated:

The theme that a Spain which is not Catholic is not Spain, no longer serves to express today the new relations between the Church and the rest of the world between religion and the *Patria*, nor between faith and politics. That change must be accepted because each day the difference between civil and ecclesiastical society becomes more and more accentuated.¹¹⁹

At first the position of the government toward these changes appeared uncertain. Interior Minister Manuel Fraga Iribarne issued a statement that many of the laws restricting assembly and religion would be only selectively enforced,¹²⁰ however, such statements were given little credence after incidents like the tear-gassing of a workers' meeting in a church in Vittoria, where police killed four workers.¹²¹

In 1976, however, the posture of the government gradually changed. A series of amnesties freed most of the political prisoners, and the exiles returned.¹²² A political reform law created a new freely-elected *Cortes*, and all political parties, including the Communist party, were legalized.¹²³ The attitude of the new government toward religious questions is best illustrated by the recent change in the Concordat of 1953. On July 28, 1976, Spain surrendered the right of Juan Carlos, as Chief of State, to appoint Spanish bishops, and the Vatican surrendered the right of priests to an ecclesiastical forum, by which bishops had been able to block the civil trials of priests and nuns.¹²⁴ Although it was only the first step in a delicate and difficult job of disentanglement, this change reflected the more moderate direction church-state identification was taking in Spain. Spain was finally moving away from its former confessional-state status to a more moderate position.

Where the Church and the State for four decades have been so thoroughly enmeshed, and where both historically and culturally the union has been complete, except for brief and bitter mo-

119. TRIUNFO, Jan. 24, 1976, at 49.

120. 36 FACTS ON FILE 12 (1976).

121. *Id.*

122. TIME, Aug. 16, 1976, at 28.

123. TIME, June 27, 1977, at 18-23.

124. 36 FACTS ON FILE 753 (1976).

ments, the process of separation is difficult and can be very emotional. In 1976 three major legal tasks confronted Spain: first, the issues of church-state identification and religious freedom had to be constitutionally delineated; secondly, within those constitutional limits the implementing legislation had to be carefully drafted to treat a myriad of key issues, including marriage, death, education and taxes; and finally, the Concordat with the Vatican had to be replaced with an arrangement that recognized the new realities and eliminated the conflicts that already existed in the legal structure established by the Concordat in areas such as Spanish family law.

The question of church-state relations was at the forefront of the debate surrounding the new Constitution. In November, 1977, the rough draft of the new Constitution was leaked from the closed-door committee to the press. Its appearance coincided with the annual meeting of the CEE. The Catholic leaders in this meeting issued a statement analyzing the problems of declaring Spain a nonconfessional state.¹²⁵ The CEE was concerned not only with article 3 of the rough draft, which guaranteed religious liberty and also stated that the Spanish State is not confessional, but also with article 31, which guaranteed free education for everyone, yet made no provision for handling the large number of government-financed Catholic schools.¹²⁶ The CEE spoke out on both of these issues. In what was an apparent contradiction to the position taken by the Church in recent years favoring separation of the Church and the State, the bishops called for the elimination of any statement that the State is nonconfessional; they also advocated an explicit recognition of the historical and social reality of the role the Catholic Church plays in Spanish society.¹²⁷ The CEE's statements against total secularization of education and removal of public financing of parochial schools have been followed by an impressive campaign for freedom of education, which means continued support of Church schools for those parents who wish to send their children to Catholic schools. Two weeks after the CEE statements the campaign surfaced with a massive public rally in Madrid calling attention to the dangers inherent in having only lay schools.¹²⁸

These developments were reminiscent of the early days of

125. BLANCO Y NEGRO, Nov. 30, 1977, at 22.

126. YA, Nov. 23, 1977, at 9-10.

127. BLANCO Y NEGRO, Nov. 30, 1977, at 22.

128. CAMBIO, Dec. 19, 1977, at 10-11.

the Second Republic, causing emotions and fears to run high in Madrid. Fortunately under the surface were calmer waters so that the new Constitution and the accompanying implementing legislation avoided the extremes of both the Second Republic and the Franco years.

From this climate of moderation and compromise came the Spanish Constitution of 1978 that separated the Catholic Church from the State by declaring in section 3 of article sixteen: "No religion shall have a state character. The public powers shall take into account the religious beliefs of Spanish society and maintain the appropriate relations of cooperation with the Catholic Church and other denominations."¹²⁹ This moves Spain along the line of church-state identification to the clear separation called for by the Church during the last years of the Franco era and sought by nearly everyone since Franco's death. For the first time in a long and bitter constitutional history, it appears that Spain may find a point on the identification line that suits her cultural and national composition.

Unlike all past Spanish constitutions, this one was the result of the efforts of nearly all sectors of Spanish society. It passed by an almost unanimous vote in both houses of the Spanish *Cortes* on October 31, 1978. As one Spanish newspaper observed:

The Constitution of 1978 is different than all others. It has been composed by the enemies of yesterday, working elbow to elbow, converted for this high occasion to cooperating adversaries. It arises not from a forced imposition, but from a pact. It is not the Constitution of half of Spain against the other half, but of nearly all Spaniards for all Spaniards. Neither the Church as such nor the Armed Forces as such have participated in the debates nor in the votes; the renowned military men designated senators by the King have not contended to represent the Armed Forces, nor have the respectable priests, [elected deputies and senators from the center and socialist parties] represented the Church. The vote of neither the former nor the latter was unanimous. Church and Army have fulfilled, in the constituent process, their secular function as internal supportive institutions, rather than their long-attributed role as supplementary political institutions.¹³⁰

129. 13 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, SPAIN 4 (A. Blaustein & G. Flanz eds. 1979).

130. *ABC*, Nov. 15, 1978, at 3.

Separation of church and state is now established not only constitutionally in Spain, but also in the attitudes and philosophies of both secular and ecclesiastical leaders. While the new Constitution does not "forcefully impose the name of God"¹³¹ on the Spanish people, it does recognize the special character of churches, particularly the Catholic Church. For example, all churches have been extended special status as public corporations.

Implementing legislation will of necessity further delineate the exact nature of the roles state and church will play in Spain under the new Constitution. However, unlike many nations of the world, the separation of church and state in Spain will not remove the Catholic Church from the active involvement dictated by its dominant position in Spanish culture and society. The exact point Spain will assume on the separation portion of the identification line will be determined by the political process of the new Spanish democracy.

C. *Religious Liberty in Spain 1967-1977*

The Organic Law of 1967 introduced the concept, or at least the language, of religious liberty into the Spanish Constitution. As with other constitutional declarations, such as the one found in the Constitution of 1876, the actual degree of religious liberty permitted depends on the implementing legislation that interprets the constitutional terms. That legislation principally took the form of the Religious Liberty Act of 1967.¹³² Enactment of this Act was delayed for much of 1967 by opposition within the *Cortes* where conservative groups, in both the Church and the State, still held almost total power.¹³³ Those within the Church feared a sudden onslaught of proselyting among a Catholic population totally unprepared to handle it, and those within the State feared a loss of the kind of total control that the government had been able to maintain, even over Catholics.¹³⁴ These forces shaped the form the law took. The new law met the constitutional mandate of religious freedom, fulfilled Vatican II's declaration on religious liberty, and preserved the State's control. However, the ultimate confessionality of Spain was guaran-

131. *Id.*

132. Ley 44/1967, 156 Boletín Oficial del Estado 9191-94 (July 4, 1967).

Ed. Note - After this Comment was written, the Spanish *Cortes* passed a new Organic Law of Religious Liberty. The law nullifies Ley 44/1967 and is another step towards religious freedom in Spain. A full evaluation of the new law must await the enactment of more detailed implementation legislation by the *Cortes* and its application by national and local officials.

133. J. MONROY, *supra* note 15, at 8.

134. S. PETSCHEN, *supra* note 93, at 147.

teed in such a way as to place Spain not in the religious liberty portion, but the religious toleration portion, of that line.

The Religious Liberty Act of 1967 guaranteed the right to profess both privately and publicly one's religion within certain limitations. Religious liberty was subordinated to the Catholic confessionality of the Spanish State. All persons had to manifest respect for the official religion of the State and for public order.¹³⁵ The Religious Liberty Act of 1967, much like the Constitution of 1876, guaranteed the individual's right to religious liberty provided the exercise of that right did not encroach upon the Catholic Church or in some way endanger the State.

Confessional associations (the term applied to non-Catholic churches) were recognized and given the right to hold meetings, but only in temples and other authorized places.¹³⁶ Before the status of a confessional association could be attained, each church had to register with the government and be approved.¹³⁷ The possessions of such associations, limited to those things actually used by its membership, had to be registered and used only for statutorily allowed purposes.¹³⁸ All confessional associations were required to submit a yearly report on the receipt and disposition of donations.¹³⁹ The Ministry of Justice reserved the right to suspend the activities of any association believed to be expending money for impermissible purposes.¹⁴⁰ Finally, all acts by the associations or individual members which could be viewed as proselyting were prohibited.¹⁴¹

Four major principles characterized the Religious Liberty Act of 1967:

1) The Spanish State tried to make compatible the continuance of traditional control of non-Catholics (just as it controlled Catholics) with the new Catholic doctrines of religious freedom.¹⁴²

2) The Act continued to respect the position of Spain as a Catholic, confessional state.¹⁴³

3) The Act reflected the Spanish legislature's preoccupation

135. Ley 44/1967, art. 2.1, 156 Boletín Oficial del Estado 9191-94 (July 4, 1967).

136. *Id.* art. 21.

137. *Id.* art. 14.

138. *Id.* art. 18.

139. *Id.* art. 18.2.

140. *Id.* art. 18.3.

141. *Id.* art. 2.2.

142. A. DE LA HERA, *PLURALISMO Y LIBERTAD RELIGIOSA* 85 (1971).

143. *Id.* at 85-86.

with expressly incorporating each aspect of Vatican II into its laws of religious liberty.¹⁴⁴

4) Because the right to register could be denied only if mechanical procedures were not followed, in effect, all non-Catholic groups could achieve legal status. In that registration process there was a danger that the law could become a kind of apartheid for non-Catholics because even though it insured equality of rights on the individual level, it prohibited most forms of aggressive proselyting, required registration of all ministers, and allowed close governmental control of all finances.¹⁴⁵

Criticism and opposition to the Act came from many quarters. Many of the non-Catholic groups in Spain refused to register either because they feared that such registration would only make harassment or persecution easier, or because they believed that the law did not in reality represent true religious freedom and therefore should not be complied with.¹⁴⁶ As recently as 1970, three major Protestant groups still refused to register.¹⁴⁷

The Religious Liberty Act of 1967 has also been criticized for failing to meet the spirit of Vatican II.¹⁴⁸ By protecting the confessional status of the State and leaving control over other religions in the hands of the government, the Act failed to meet the Vatican II concept that there can be no special recognition for one religion unless religious liberty for others is concomitantly guaranteed.¹⁴⁹ The Act not only left more legal control with the state than Vatican II prescribed, it also failed to comply with Vatican II in social matters, especially in its limitation of non-Catholic public religious manifestations.¹⁵⁰ In reality, the Religious Liberty Act of 1967 was merely a statute of religious toleration conceded to the non-Catholic minority, and was not the kind of constitutional safeguard of religious liberty envisioned by Vatican II.¹⁵¹

Because of the Spanish State's extensive control of the application of the law, and the limitations placed on the confes-

144. *Id.* at 86-87.

145. *Id.* at 87-91.

146. See N. COOPER, *supra* note 84, at 37-38.

147. A. DE LA HERA, *supra* note 142, at 91.

148. J. PEREZ-LLANTADA, *LA LIBERTAD RELIGIOSA EN ESPAÑA Y EL VATICANO II* 470 (1974).

149. *Id.*

150. *Id.* at 471.

151. *Id.*

sional associations, the efficacy of the law depended greatly on whether the civil rights of non-Catholics were respected in local incidents. Generally, non-Catholic groups found that during the early years of the law they were able to hold regular religious services without harrassment, but activity beyond that depended on the attitude of the local officials and police. Although little has been written about those years and the operation of the law of religious liberty, discussions with leaders of non-Catholic groups indicate a varying pattern of toleration and harassment. Missionaries were sometimes jailed for street proselyting and in some cases ordered out of towns. Plainclothes police kept close surveillance of non-Catholic individuals and were known to break up meetings held in private homes when attended by more than six persons.¹⁵²

Observations of the author and discussions with some religious leaders indicate that during the Juan Carlos years nearly all of the harassment has disappeared. The police no longer appear to be continually watching and interfering with the activities of non-Catholics. This expanded freedom has also been accompanied by an increase in the amount of media publicity given non-Catholic groups. The number of non-Catholic religious adherents, and the number of their physical facilities have significantly increased.

The high positive identification between the Catholic Church and the Spanish State has decreased, and religious freedom has correspondingly increased. Evidence of this is found in article sixteen of the new Constitution:

- 1) Freedom of ideology, religion, and cult of individuals and communities is guaranteed without any limitation in their demonstrations other than that which is necessary for the maintenance of public order protected by law.
- 2) No one may be obliged to make a declaration on his ideology, religion, or beliefs.¹⁵³

While further changes are expected because of modifications in the church-state identification provisions of the new Constitution, Spain has clearly moved into the full religious liberty sec-

152. The author spent considerable time in Spain during this period and these conclusions are drawn from his observations and from discussions with Catholic priests and non-Catholic church leaders.

153. 13 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, SPAIN 4 (A. Blaustein & G. Flanz eds. 1979).

tion of that line.

V. CONCLUSIONS

A. *Changes in Spain 1967-1979*

In 1967, the Spanish State passed the Organic Law that attempted to move Spain into the religious freedom portion of that line without making a change in church-state identification. However, as the model indicates, religious liberty was impossible without some corresponding movement in church-state identification. Consequently, the Religious Liberty Act of 1967 achieved only religious toleration because conservative elements in the Church and the State blocked any changes in church-state identification.

Although there were no further changes in the religious laws of the State until after Franco's death, there were dramatic changes within the Church throughout the late 1960's and early 1970's. Through a process of natural attrition by death and retirement combined with continuing papal influence in the appointment of new bishops, a group of younger bishops led by Cardinal Tarancon assumed the leadership of the Spanish Catholic Church. These new bishops, as well as a majority of the lower clergy, followed the philosophical lines of post-conciliar, international Catholicism. They saw the role of the Church as being social as well as spiritual. The Church was to help the masses, promote social justice, and defend and protect the oppressed. Gone were the days of National Catholicism when the Church was viewed as a mainstay of the oligarchy.

These new positions brought the Church into conflict with the State. For the first time in thirty or forty years the two institutions were not pursuing parallel, mutually beneficial courses. Relations between the State and the liberal Church hierarchy deteriorated to such an extent that a bishop was even arrested and threatened with exile. The Catholic Church painfully learned that where high positive identification exists there is in reality no religious freedom, even for the dominant church.

The death of Franco and the end of his dictatorship finally brought changes within the government. Juan Carlos and his ministers began to dismantle the dictatorship and erect a democracy within the same governmental superstructure. In the area of church-state relations, the only initial documental or structural change was an agreement with the Vatican wherein

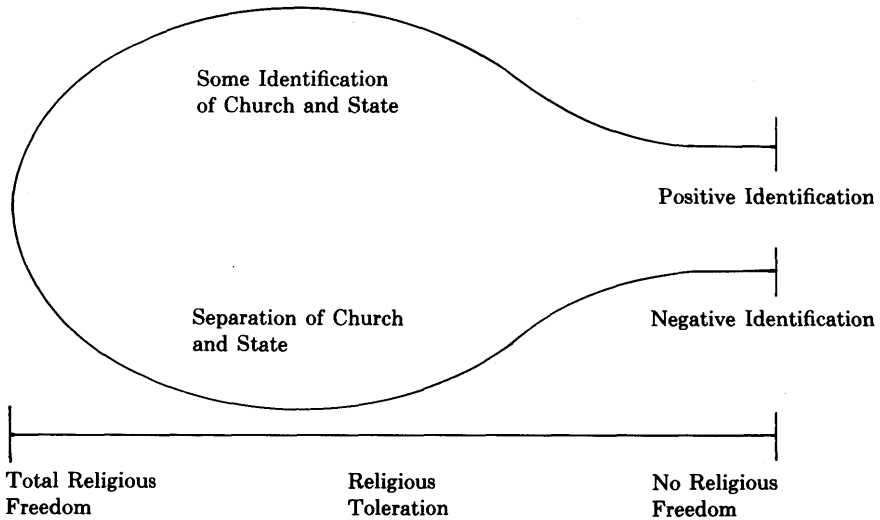
Juan Carlos surrendered the right of patronage and the Church in return gave up the right of ecclesiastical forum. Increased freedom of press, permitting open discussion of nearly everything, including religious matters, was visible evidence of further change. Although no formal separation of the Church and the State had been declared, there was, in the early stages, tacit agreement that such an approach was necessary. Groundwork for acceptance of the new Constitution was being laid.

With these changes in the Catholic Church and the State, Spain had unofficially shifted its position on the identification line. There was, therefore, a corresponding movement on the religious liberty line to an area of *de facto* religious liberty. The new Constitution made religious liberty *de jure*. Implementing legislation must soon follow to establish safeguards in the legal system to protect it. While the details of future Spanish church-state relations cannot be predicted, the following broad observations are evident from the developments of the past decade, especially in light of earlier church-state relations in Spain. Given the power of the Catholic Church and center- and right-wing forces in Spain and the apparent acceptance by the left-wing of the need to recognize the social reality of the Church, a higher degree of church-state identification in comparison to the degree of church-state separation in other nations will likely occur. Eventually, a system will probably emerge involving ceremonial and governmental connections like those between the Church of England and the government of Great Britain, coupled with financial and legal recognition arrangements similar to those in the Federal Republic of Germany. Government funding for Church programs in areas such as education, restoration of historical buildings, and social welfare will also likely continue.

Apart from the official relations between institutions, Church political involvement will almost certainly continue. In a country where a large percentage of the population is Catholic, the Church can be expected and ought to have every right to speak out in persuasive, but not commanding, tones on subjects affecting not only the Church as an institution, but her individual members. Real success in the separation of the Church and State and in the implementation of religious liberty will come when the Catholic Church can play the important role that its history and numerical superiority in Spain require and still allow the development of a more pluralistic society.

B. Implications Inherent in the Model

One of the purposes of this comparative analysis of church-state relations in Spain during her constitutional period is to develop a model that can be applied to church-state relations generally.



Although the model has proved valid in analyzing both historical and contemporary Spanish church-state problems, other useful observations may also be made. On several occasions in Spanish history, a change in government has taken place that, with no accompanying constitutional or institutional changes, has brought the Spanish State from a position of positive identification to one of negative or anti-Church identification. At least one historical example of the reverse process occurred when France moved from the anticlerical persecutions of the Revolution to the Concordat with the Vatican under Napoleon in relatively few years.¹⁵⁴ This ease of movement is explained by the close proximity in the model of both positive and negative identification to no religious freedom. As the Spanish Church has discovered several times in its history, and most recently during the last years of the Franco period, the church that maintains close identification with a state is free only as long as its desires parallel those of the state. When the church tries to take a different course than that of the state, conflicts and tensions, like

154. C. CORRAL SALVADOR, *supra* note 3, at 53-60.

those observed in the late 1960's and early 1970's in Spain, are likely to occur. The result is that the church will suffer because of the bonds that tie it to the state.

Another general principle, evident from the model, is that religious freedom can cease to exist whenever identification becomes either highly positive or highly negative. This conclusion is supported not only by Spanish history but by current conditions in many nations.

Another conclusion evident from Spanish history is that religious liberty can be destroyed by excessive actions to eliminate identification of church and state. Such was the case during the Second Spanish Republic. However, the Spanish experience in the last fifteen years has shown that it is possible to have a gradual movement from high positive identification to separation of church and state, provided the movement is accompanied by an ever-increasing amount of religious freedom, and the written laws governing religious liberty are sufficiently broad.

The model also demonstrates the wide area the identification loop provides in the religious freedom section of that line. The wide variety of identification combinations implied by the loop is evidenced by the varying patterns of friendly separation and mild identification found among the countries of the world recognizing and practicing religious freedom. Since each nation is different, each must find its own answers to the questions of church-state relations while maintaining the universal goal of religious freedom. The future will show if Spain and other nations can discover the degree of separation of church and state that meets the realities of their own unique social and historical circumstances, but that also establishes true religious freedom.

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