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## Perspectives on Religious Freedom in Spain

*José Antonio Souto Paz\**

### I. INTRODUCTION

Given that the theme of this symposium is “Emerging Perspectives on Religion and Human Rights,” Spain’s experience may be of particular interest, for it involves the transition from a secularly confessional political system to one that promotes religious freedom and cooperation between the state and all religious faiths. Spain’s political transition has, however, been more than a simple shift from an authoritarian regime to a democratic one. To this fact—itsself transcendent—one must add the task of reconciling a nation torn by a civil war that ultimately concluded with the imposition of an authoritarian regime in place of a democratic system. These historical underpinnings have affected the decisions of those politicians (both government and opposition) responsible for the transition and have profoundly affected Spanish society as a whole. This political sensitivity caused by Spain’s historical experiences became intensified during the drafting of the Constitution of 1978, when legislators attempted

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to look to the past without hatred, while simultaneously striving to avoid past errors.

In Spain's recent history, religion has faced two clearly distinct political environments: a) a situation of crisis stemming from Republican policies during the Second Republic (1931–1936), which ultimately resulted in the so-called “religion question” (“*cuestión religiosa*”); and b) an authoritarian regime characterized by religious support, with the Catholic Church regaining its traditional privileges and the state resuming its former position as a Catholic state.<sup>1</sup>

With this historical background in mind, the constitutional delegates responsible for drafting Spain's present Constitution, the Constitution of 1978, were forced to navigate between two seemingly irreconcilable positions. The delegates felt the urgency to offer a solution acceptable to all parties, sharing the general consensus that dominated the period preceding the adoption of the Constitution.<sup>2</sup>

It can be stated unequivocally that Spain has satisfactorily overcome the religion question faced by the constitutional delegates. To the delegates' credit, the juridical regime established by the Constitution of 1978 and subsequent legislation has provided a positive framework for the development of religious freedom and church-state relations in Spain. In particular, Spain has permitted the protection of individual and collective religious freedoms while fostering positive, cooperative relationships between the state and the various religious groups.

## II. HISTORICAL ANTECEDENTS: CHURCH-STATE RELATIONS AND THE RELIGION QUESTION PRIOR TO 1978

### *A. Freedom of Religion Through the Second Republic: 1812–1939*

The aforementioned religion question emerged during the Second Republic as a result of pre-constitutional actions taken by the provisional government as a means of secularizing the state.<sup>3</sup> The re-

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1. See *infra* Part II.B.

2. See *infra* Part III.A.

3. See generally FERNANDO DE MEER, LA CUESTIÓN RELIGIOSA EN LAS CORTES CONSTITUYENTES DE LA II REPÚBLICA ESPAÑOLA [THE RELIGION QUESTION IN THE PARLIAMENT OF THE SECOND SPANISH REPUBLIC] 23–58 (1975) (describing the evolution of the religious question as a result of the provisional government's religion-related policies and actions). For additional sources on this topic, see *id.* at 209–12, which contains de Meer's extensive bibliography.

actions of ecclesiastical leaders and those political officials and members of the media who supported them created an atmosphere of tension and hostility that increased following the burning of churches and convents by anticlerical groups.<sup>4</sup>

In this milieu, Republican religious policy manifested itself in the Constitution of 1931 in three fundamental aspects: 1) the separation of church and state;<sup>5</sup> 2) the recognition of religious freedom;<sup>6</sup> and 3) the subjection of religious faiths to special laws.<sup>7</sup> These measures presupposed a fundamental change in the status of the Catholic Church and, at the same time, an opening for non-Catholic denominations. Though novel for Spain, such measures had already been adopted in the First Amendment to the U.S. Constitution in 1789,<sup>8</sup> the French *Declaration of Rights of Man and of the Citizen* in 1789,<sup>9</sup> and the

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For Manuel Ramírez Jiménez, the origin of the religion question must be situated in the birth of Spanish constitutionalism: "It was the Parliament of Cádiz, together with the Constitution of 1812, that bequeathed the religion question to the future." MANUEL RAMÍREZ JIMÉNEZ, *LAS REFORMAS DE LA II REPÚBLICA* [THE REFORMS OF THE SECOND REPUBLIC] 11 (1977) (citing LUIS SÁNCHEZ AGESTA, *HISTORIA DEL CONSTITUCIONALISMO ESPAÑOL* [HISTORY OF SPANISH CONSTITUTIONALISM] 164 (2d ed. 1964)) ("Fueron las Cortes de Cádiz y con ellas la Constitución de 1812, las que legan al futuro la cuestión religiosa."). Among the works that have focused on this latter period, see, for example, VICENTE CÁRCEL ORTI, *POLÍTICA ECLESIAL DE LOS GOBIERNOS LIBERALES ESPAÑOLES (1830-1840)* [ECCLESIASTICAL POLICY OF THE SPANISH LIBERAL GOVERNMENTS (1830-1840)] (1975); JOSÉ MANUEL CUENCA TORIBIO, *RELACIONES IGLESIA-ESTADO EN LA ESPAÑA CONTEMPORÁNEA* [CHURCH-STATE RELATIONS IN CONTEMPORARY SPAIN] (1st ed. 1985); FRANCISCO MARTÍ GILBERT, *IGLESIA Y ESTADO EN EL REINADO DE ISABEL II* [CHURCH AND STATE DURING THE REIGN OF ISABEL II] (1996); and MANUEL MORÁN ORTI, *REVOLUCIÓN Y REFORMA RELIGIOSA EN LAS CORTES DE CÁDIZ* [REVOLUTION AND RELIGIOUS REFORM IN THE PARLIAMENT OF CÁDIZ] (1994).

4. See DE MEER, *supra* note 3, at 43-45.

5. See CONSTITUCIÓN DE ESPAÑA [C.E.] de 1931 [Constitution of 1931] art. 3 (Spain), *reprinted in* JOAQUÍN MANTECÓN SANCHO, *EL DERECHO FUNDAMENTAL DE LA LIBERTAD RELIGIOSA: TEXTOS, COMENTARIOS Y BIBLIOGRAFÍA* 267, 267 (1996) ("El Estado español no tiene religión oficial.").

6. See *id.* art. 27, *reprinted in* MANTECÓN SANCHO, *supra* note 5, at 267, 268 ("La libertad de conciencia y el derecho de profesar y practicar libremente cualquier religión quedan garantizados en el territorio español, salvo el respeto debido a las exigencias de la moral pública.").

7. See *id.* art. 26, *reprinted in* MANTECÓN SANCHO, *supra* note 5, at 267, 267 ("Todas las confesiones religiosas serán consideradas como Asociaciones sometidas a una ley especial.").

8. See U.S. CONST. amend. I, cl. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

9. See DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, art. 10 (Fr. 1789) (visited Mar. 1, 2001) <<http://www.hrcr.org/docs/frenchdec.html>> ("No one shall be disquieted because of his opinions, including his religious views, provided their manifestation

French Law of 1905 concerning the separation of church and state.<sup>10</sup>

To understand this situation, the primary question to be answered is, “What were the causes of the disagreement between Republicans and Catholics?” A principle cause of the crisis between Republicans and Catholics were certain measures taken by the provisional government. The following sections investigate the two most significant of these issues—the separation of church and state, and recognition of religious liberty—and the manner in which they affected the religion question during and after the Second Republic.

### *1. Separation of Church and State*

Let us now consider the history of separation of church and state in Spain. One must not forget that Spain’s conversion to a modern state—probably the first in Europe<sup>11</sup>—occurred by basing political

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does not disturb the public order established by law.”) [hereinafter DECLARATION OF THE RIGHTS OF MAN].

10. See Loi du 9 décembre 1905 [Law of December 9, 1905], arts. 1–2, CODE ADMINISTRATIF [C. ADM.] 443, 443 (Cultes) (26th ed. Éditions Dalloz 2000) (Fr.) [hereinafter Law of 1905] (“Art. 1<sup>er</sup> La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l’intérêt de l’ordre public. 2 La République ne reconnaît, ne salarie ni ne subventionne aucun culte.”). The separation of church and state in France was not accomplished until 1905. See Brigitte Basdevant-Gaudemet, *State and Church in France*, in STATE AND CHURCH IN THE EUROPEAN UNION 119, 122 (Gerhard Robbers ed., 1996) [hereinafter EUROPEAN UNION].

11. See GEORG JELLINEK, TEORÍA GENERAL DEL ESTADO [GENERAL THEORY OF THE STATE] (1970); JOSÉ ANTONIO MARAVALL, TEORÍA DEL ESTADO EN ESPAÑA EN EL SIGLO XVII [STATE THEORY IN SPAIN IN THE SEVENTEENTH CENTURY] (1944); HAGEN SCHULZE, ESTADO Y NACIÓN EN EUROPA [STATE AND NATION IN EUROPE] (1994). The medieval antecedent to the modern state is found in the Constitutions of Melfi promulgated by Emperor Frederick II, then King of Sicily. The Constitutions of Melfi established the foundation of a new political organization that was considered to be a “national enterprise,” ordained by law and developed through a bureaucratic administrative organization. The unity of power, territorial unity, and economic and bureaucratic organization formed the characteristic elements of this new political organization, which later appeared in the sixteenth century under the designation of “State.” See Manuel García Pelayo, *Federico II de Suábia y el nacimiento del Estado Moderno* [*Frederick II of Suábia and the Birth of the Modern State*], in 2 OBRAS COMPLETAS [COMPLETE WORKS] 1119. This unitary organization inspired Machiavelli’s concept of the State as developed in *The Prince*, see MARAVALL, *supra*, at 89, which recognizes the Catholic King Ferdinand of Spain as a model ruler. See NICCOLÒ MACHIAVELLI, THE PRINCE 60–61 (Robert M. Adams ed. & trans., 2d ed. W.W. Norton & Co. 1992) (1532). Georg Jellinek reproduced this same idea, stating that

in Spain and France, as in Brandenburg—Prussia—and the Hapsburg monarchy, the idea of the State, singular, indivisible, was accomplished by absolutist monarchs. . . .

Where the tendency to concentrate absolute power has not existed, neither has unity of the State been obtained. Rather, the State has divided into many, as in Germany

unity on religious unity.<sup>12</sup> Christian Spain's conquest of Granada from the Moors in 1492 and consequent recovery of the entire peninsula gave religious unity a political dimension it previously lacked.<sup>13</sup> Indeed, not much time had passed since religious and cultural coexistence had prevailed in the area. Both Spanish Christians and Muslims exhibited good faith in this matter, which allowed Islamic, Jewish, and Christian communities to reside within the same city. Toledo was an example of this tolerance, permitting Alfonso VII to declare himself Emperor of the three cultures.

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and Poland, or instead of State association, only confederations have been born, as has occurred in Switzerland and the Low Countries.

JELLINEK, *supra*, at 244 (“[E]n España y Francia, así como en Brandenburgo—Prusia—y en la monarquía de Habsburgo, la idea del Estado, uno, indivisible, fue realizada por los monarcas absolutos. . . . Allí donde no ha existido un poder absoluto que tendiera a la concentración, tampoco se ha alcanzado la unidad del Estado, sino que se ha dividido de éste, como en Alemania y Polonia, o en vez de la asociación Estado, ha nacido sólo una confederación, como ha ocurrido en Suiza y en los Países Bajos.”).

12. See Luis Suarez Fernández & Manuel Fernández Álvarez, *La España de los Reyes Católicos (1474–1516)* [*Spain of the Catholic Kings (1474–1516)*], in 17 HISTORIA DE ESPAÑA [HISTORY OF SPAIN] 26–27 (Ramón Menéndez Pidal ed., 3d ed. 1983) [hereinafter HISTORY OF SPAIN] (quoting Constancio Gutiérrez, *La política religiosa de los Reyes Católicos en España hasta la conquista de Granada* [*The Religious Policy of the Catholic Kings in Spain Until the Conquest of Granada*], 18 MISCELÁNEA 232 (1952) (“Fernando e Isabel contemplan la entidad política que han de gobernar como una comunidad que exige un signo igualatorio, un aglutinante común. El cristianismo la define. Los reyes creyeron que sólo la unidad católica, con exclusión de cualquier otra fe, podía dar a la comunidad que regían la estabilidad, orden y solidez que deseaban. . . . En ningún otro terreno se alcanza mejor la comprensión de esta idea que en la política religiosa de Fernando e Isabel, arranque de una postura que caracterizará luego a la España de los siglos XVI y XVII. ‘Los dos regios esposos se habían hecho del servicio divino una altísima razón de Estado que presidía su gobierno.’”)

13. See E. Levi-Provençal, *España musulmana* [*Muslim Spain*], in 4 HISTORY OF SPAIN, *supra* note 12; Gustav Edmund von Grunebaum, *El Islam*, in 1 EL ISLAM: EL NACIMIENTO DE EUROPA 19–185 (1985). The Muslim invasion of the Iberian Peninsula commenced in the year 711 A.D., as Arab troops debarked at Gibraltar in southern Spain. See E. Levi-Provençal, *España musulmana* [*Muslim Spain*], in 4 HISTORY OF SPAIN, *supra* note 4. Within five years, Muslim forces conquered and occupied the peninsula, transforming it into a province of the Damascus caliphate, under the rule of Al-Andalus, who established his capital in Córdoba. See *id.* The first Christian resistance against the Muslim invasion took place in Covadonga (Asturias), where Don Pelayo defeated the Muslims and thereby gave rise to the first nucleus of Christian resistance, the Asturian kingdom, which was the model for the appearance of the Christian kingdoms that proliferated throughout the peninsula during the Middle Ages. See *id.* The marriage of Isabella of Castile and Ferdinand of Aragon, commonly known today as the “Catholic Kings,” resulted in the unification of both the Christian kingdoms and the peninsular territory. See *id.* The unification of the peninsula under Christian rule ended with the conquest of the Muslim kingdom of Granada in 1492. See *id.*

The conquest of Granada, however, presumed that those Jews and Moors who refused to convert to Catholicism would be excluded from Christian Spain.<sup>14</sup> This expulsion preceded the European practice of maintaining state religions, a practice that dominated from the end of the sixteenth century.<sup>15</sup> The political dimension of religion in Spain, however, was not new;<sup>16</sup> rather, the true novelty involved Spain's exclusion of dissidents from Spanish territory and, perhaps, the royal zeal for religious reform, Catholicism having acquired a fundamental role in the national conscience.<sup>17</sup>

14. See Suárez Fernández & Fernández Álvarez, *supra* note 12, at 241–53, 285–300. The Catholic Kings decreed the expulsion of the Jews on March 31, 1492. *See id.* at 254. The decree granted the Jews a term of four months to abandon the Christian kingdoms; one could avoid this measure, however, by converting to Christianity and integrating into the Christian community. *See id.* On February 11, 1502, an additional decree, inspired by the first, granted the Muslim residents of Castilla a period of two months to choose between conversion to Christianity or exile. *See id.* at 300. “In the end, the expulsion of the Muslims established religious unity throughout the peninsula. Only this was enough to justify the measure in the eyes of Ferdinand and Isabella.” *Id.* (“Broche final, la expulsión de los musulmanes consagraba la unidad religiosa peninsular. Esto solo bastaba para justificar la medida ante los ojos de Fernando e Isabel.”).

15. See JOSÉ ANTONIO SOUTO PAZ, *COMUNIDAD POLÍTICA Y LIBERTAD DE CREENCIAS* [POLITICAL COMMUNITY AND FREEDOM OF BELIEF] 130 (1999).

16. See José Antonio Souto Paz, *La idea mediaval de nación* [*The Medieval Idea of Nation*], *CUADERNOS DE DERECHO PÚBLICO* 117, 117–139 (1997). The possession of some religious beliefs from the political community constituted a traditional element of ancient peoples and the classic world, see JOSÉ ANTONIO SOUTO PAZ, *DERECHO ECLESIASTICO DEL ESTADO: EL DERECHO DE LA LIBERTAD DE IDEAS Y CREENCIAS* 20–22 (3d ed. 1995), particularly in Greece and Rome, where religion existed as a political institution. *See SOUTO PAZ, supra* note 15, at 41–44, 50–58. The transformation of Christianity into an imperial religion solidified this concept, which was maintained throughout the Middle Ages in a Christian society with two heads: the Holy Roman Emperor and the Pope. *See id.* at 64–68, 80–84, 93–100. This distinction did not preclude the Pope from interfering in the temporal arena, nor the Emperor from meddling in the internal affairs of the Church. *See id.* at 93–100.

The rupture of religious unity in Europe resulting from the Protestant Reformation radicalized this type of religious identity, which was reflected in the principle *cuius regio eius religio* (“to each kingdom, its own religion”). *See id.* at 128–30; Iván C. Ibán, *State and Church in Spain, in EUROPEAN UNION, supra* note 10, at 93, 94. The European states, in accordance with the religion of each state's monarch, declared themselves Catholic or Protestant, either expelling dissidents from their territory or sentencing them to death. *See SOUTO PAZ, supra* note 15, at 130–38. Religious wars, forced population displacements, and death sentences comprised the most negative spectacle of this period, as well as the most pejorative expression of political use of religion. *See id.*

17. *See Ibán, supra* note 16, at 94. The identification of the state with the Catholic Church was underscored with special intensity with regard to the controversy regarding Machiavelli's “Reason of State” theory. *Cf. SOUTO PAZ, supra* note 16, at 41–44 (discussing the evolution of the Reason of State theory and its development in relation to the Counter-Reformation and, by association, Spain); SOUTO PAZ, *supra* note 15, at 125 (examining the

The Constitution of 1978's provision establishing the separation of church and state<sup>18</sup> undoubtedly constitutes an innovation in Spanish constitutionalism. The Constitution of 1812, for example, maintained the traditional principle of a state religion, a stance that was reinforced by radical religious intolerance.<sup>19</sup> Indeed, the Enlightenment and the French Revolution influenced the majority of the congressional delegates<sup>20</sup> and those principles were translated into a variety of constitutional precepts;<sup>21</sup> however, those schools of thought

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Reason of State doctrine in relation to the Catholic Counter-Reformation); Javier Peña Echeverría, *Estudio preliminar [Preliminary Study]*, in *LA RAZÓN DE ESTADO EN ESPAÑA SIGLOS XVI–XVII (ANTOLOGÍA DE TEXTOS) [THE REASON OF STATE IN SIXTEENTH-SEVENTEENTH CENTURY SPAIN (ANTHOLOGY OF TEXTS)]* 9, 18–38 (Jesús Castillo Vegas et al. eds., 1998) [hereinafter *THE REASON OF STATE*] (tracing the development of Reason of State theory with respect to the Counter-Reformation and in Spain). Under the protection of the Counter-Reformation, which was led by the Spanish monarchy, there emerged numerous writings defending religion as the true Reason of State. See, e.g., JUAN DE SALAZAR, *POLÍTICA ESPAÑOLA [SPANISH POLITICS]* 53 (Miguel Herrero García ed., Biblioteca Española de Escritores 1945) (1619) (“El fundamento y basa del alto edificio . . . [de la ] gran monarquía [española] . . . no son las reglas y documentos del impío Maquiavelo que el ateísmo llama *razón de Estado*; . . . sino la religión, el sacrificio y culto divino y el celo de la honra y servicio de Dios . . .”). An anthology of the debate regarding the Reason of State theory in Spain can be found in *THE REASON OF STATE*, *supra* note 17, at 1–262.

18. See C.E. art. 16, § 3, cl. 1 (Spain), translated in *La Constitución Española de 1978/Spanish Constitution of 1978*, 1978 DOCUMENTACIÓN ADMINISTRATIVA 1047, 1050 (Supp. 1978) (Provisional Unofficial Translation) [hereinafter *Spanish Constitution*] (“There shall be no state religion.”). The Spanish Department of Religious Affairs (*Dirección General de Asuntos Religiosos*) has provided its own unofficial translation of those provisions of the Constitution that involve religion in *SPANISH LEGISLATION ON RELIGIOUS AFFAIRS* 25, 25–40 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998) [hereinafter *SPANISH LEGISLATION*].

19. See C.E. de 1812 [Constitution of 1812] art. 12 (Spain), reprinted in MANTECÓN SANCHO, *supra* note 5, at 261, 261 (“La Religión de la Nación española es y será perpetuamente la católica, apostólica, romana, única verdadera. La Nación la protege por leyes sabias y justas, y prohíbe el ejercicio de qualquiera [sic] otra.”).

20. See SÁNCHEZ AGESTA, *supra* note 3, at 49–53.

21. The Constitution of 1812's most radical innovation was recognizing national sovereignty: “The Spanish nation is independent and is not, nor can be, the patrimony of any family or person. . . . [S]overeignty essentially resides in the nation, and for that reason the nation possesses the exclusive right to establish its fundamental laws.” C.E. de 1812 arts. 2–3, reprinted in S. CÁNOVAS CERVANTES, *LAS CORTES DE CÁDIZ (CONSTITUCIÓN DE 1812) [THE PARLIAMENT OF CÁDIZ (THE CONSTITUTION OF 1812)]* 117, 117 (1930) (“2. La nación española es independiente y no es ni puede ser patrimonio de ninguna familia o persona. 3. La soberanía reside esencialmente en la nación, y por lo mismo pertenece a ésta exclusivamente el derecho de establecer sus leyes fundamentales.”). In this manner, both of the above declarations annulled the forced abdications of King Charles IV and King Ferdinand VII of Spain, see SANCHEZ AGESTA, *supra* note 3, at 60–61, which occurred on May 10, 1808, in Bayona, France, where the royal Spanish family was held in custody following Napoleon Bonaparte's conquest of Spain in 1807. See Miguel Artola Gallego, *La España de Fernando VII*, in 32



were completely ignored in religious affairs. In his introductory speech presenting the Constitution of 1812, for example, parliamentary delegate Agustín de Argüelles made no reference to Article 12's provisions favoring the establishment of religion.<sup>22</sup> That omission suggests that the weight of history dammed Spain against the revitalizing currents that already existed in the rest of the contemporary world. The Spanish state's establishment of Catholicism, expressly formulated in the Constitution of 1812,<sup>23</sup> was reiterated in the Constitutions of 1845<sup>24</sup> and 1876,<sup>25</sup> and tacitly mentioned in the Constitutions of 1837<sup>26</sup> and of 1869.<sup>27</sup> The separation of church and

HISTORIA DE ESPAÑA, *supra* note 12, at 1, 30–37. Similarly, the two provisions nullified Napoleon's appointment of his brother, Joseph Bonaparte, as King of Spain. See SANCHEZ AGESTA, *supra* note 3, at 60–61. The reign of Joseph Bonaparte formally commenced in June 1808, approximately one month after the Spanish people first rebelled against French rule and initiated the Spanish War of Independence (1808–1814). See Artola Gallego, *supra*, at 48–50.

22. See *cf.* S. CÁNOVAS CERVANTES, *supra* note 21, at 115 (noting that in his speech introducing the proposed Constitution, Argüelles focused on how the document was based on pre-absolutist notions of government). Agustín de Argüelles served as a Deputy in the Parliament of Cádiz (1808–1812), and, as a member of the Constitutional Committee, was designated to submit the constitutional text to the Parliament. See *id.* He accomplished this assignment upon presenting his introductory speech, the purpose of which, in the Committee's opinion, was to “include with the draft Constitution a reasoned speech or introduction that might be worthy of such an important work.” (“[A]compañar al proyecto de Constitución un discurso o preámbulo razonado que sea digno de tan importante obra.”). Argüelles later recognized that the establishment of religion in Article 12 constituted a “grave . . . but inevitable error.” MORÁN ORTI, *supra* note 3, at 38 (quoting AGUSTÍN DE ARGÜELLES, EXAMEN HISTÓRICO DE LA REFORMA CONSTITUCIONAL QUE HICIERON LAS CORTES GENERALES Y EXTRAORDINARIAS [HISTORICAL EXAMINATION OF THE CONSTITUTIONAL REFORM MADE BY THE REGULAR AND SPECIAL SESSIONS OF PARLIAMENT], reprinted in LA REFORMA CONSTITUCIONAL DE CÁDIZ [THE CONSTITUTIONAL REFORM OF CÁDIZ] 262–63 (Jesús Longares ed., 1970)) (“En el punto de religión se cometía un error grave . . . pero inevitable.”). The coup d'état of May 4, 1814, and Ferdinand VII's subsequent ascension to the throne signified the return of political absolutism and derogation of the Constitution of 1812. See Artola Gallego, *supra* note 21, at 543–51. Argüelles's involvement in, and responsibility for, the development of the constitutional text converted him into an enemy of the absolutist regime. See I DICCIONARIO DE HISTORIA DE ESPAÑA: DESDE SUS ORÍGENES HASTA EL FIN DEL REINADO DE ALFONSO XIII 276 (1952). Prosecuted and condemned, he was exiled to the Balearic Islands. See *id.* During the *trienio liberal* (1820–1823), Argüelles served as *Ministro de Gobernación* until he went into self-imposed exile in London in 1823. See *id.* He then was named President of the Congress of Deputies in 1841, and later served as Queen Isabella II's guardian before passing away on March 27, 1844. See *id.*

23. See C.E. de 1812 art. 12, reprinted in MANTECÓN SANCHO, *supra* note 5, at 261, 261. See *supra* note 19 for the full Spanish text of this provision.

24. See C.E. de 1845 [Constitution of 1845] art. 11 (Spain), reprinted in MANTECÓN SANCHO, *supra* note 5, at 265, 265 (“La Religión de la Nación española es la católica, apostólica y romana. El Estado se obliga á mantener el culto y sus ministros.”).

25. See C.E. de 1876 [Constitution of 1876] art. 11, cls. 1–2 (Spain), reprinted in MANTECÓN SANCHO, *supra* note 5, at 266, 266 (“La Religión católica, apostólica, romana, es

tutions of 1837<sup>26</sup> and of 1869.<sup>27</sup> The separation of church and state as expressed in the Republican Constitution of 1931<sup>28</sup> thus constituted an innovation.

The Catholic Church rejected and condemned the new constitutional provision, following the doctrine of Pope Leo XIII and his successors in affirming both that (1) “it is the state’s obligation to publicly profess the true religion, which is to say, the Catholic religion,” and (2) “political and social structures should be imbued with the inspiration of Catholic teachings.”<sup>29</sup> As exemplified by a declaration drafted by bishops from the Archdiocese of Tarragona, the Spanish hierarchy adhered to this doctrine, reproving the Republic for its support of an atheistic state (or a state without religion) and vehemently condemning the separation of the church and the state.<sup>30</sup>

## 2. Recognition of religious liberty

In the history of Spanish constitutionalism, religious liberty is most notable by its absence. The recognition of religious freedom granted in the *Declaration of Virginia Rights*<sup>31</sup> in 1776 and the French *Declaration of the Rights of Man and of the Citizen*<sup>32</sup> in 1789

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la del Estado. La Nación se obliga á mantener el culto y sus ministros.”).

26. See C.E. de 1837 [Constitution of 1837] art. 11, cl. 1 (Spain), *reprinted in* MANTECÓN SANCHO, *supra* note 5, at 265, 265 (“La nación se obliga á mantener el culto y los ministros de la religión católica que profesan los españoles.”).

27. See C.E. de 1869 [Constitution of 1869] art. 21, cl. 1 (Spain), *reprinted in* MANTECÓN SANCHO, *supra* note 5, at 265, 265–66 (“La Nación se obliga á mantener el culto y los ministros de la religión católica.”).

28. See C.E. de 1931 art. 3, *reprinted in* MANTECÓN SANCHO, *supra* note 5, at 267, 267. See *supra* note 5 for the full Spanish text of this article.

29. DE MEER, *supra* note 3, at 80 (quoting 6 A. DE FUENMAYOR, PROBLEMAS ACTUALES DE LA CONFESIONALIDAD DEL ESTADO, *IUS CANONICUM* [CURRENT PROBLEMS OF THE CONFESIONALITY OF THE STATE, *IUS CONONICUM*] 386 (1966)) (“[La doctrina de León XIII] se reducía a: a) Es deber del Estado profesar públicamente la religión verdadera, es decir, la católica. b) Las estructuras políticas y sociales deben estar penetradas por la inspiración del Magisterio.”).

30. See *id.* at 80–81.

31. See VIRGINIA CONSTITUTIONAL CONVENTION, THE VIRGINIA DECLARATION OF RIGHTS § XVI (Va. 1776) (visited Mar. 1, 2001) <<http://www.nara.gov/exhall/charters/constitution/virginia.html>> (“That religion, of the duty which we owe our Creator, and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.”).

32. DECLARATION OF THE RIGHTS OF MAN, *supra* note 9, art.10.

had no effect whatsoever on the delegates of Cádiz who drafted the Constitution of 1812. Not only did they refuse to recognize religious freedom in the constitutional text, but they also established a strict regime of religious intolerance, banning the practice of any faith other than Catholicism.<sup>33</sup> The same was to occur with subsequent constitutions. Before 1876, the single exception to religious intolerance appeared in the Constitution of 1869, which in part recognized religious freedom for foreign residents in Spain.<sup>34</sup> This exception stated that “if Spaniards profess a faith other than Catholicism,” their religious beliefs will be treated like those of foreign counterparts.<sup>35</sup> Although this was a rather timid exception, the intolerance engendered by the Constitution of 1812 did come to an end, following long, hostile, and ultimately unsuccessful negotiations with the Holy See,<sup>36</sup> through a constitutional basis for tolerance appearing in the Constitution of 1876.<sup>37</sup> Additionally, the recognition of reli-

33. See C.E. de 1812 art. 12. See *supra* note 19 for the full Spanish text of this article.

34. See C.E. de 1869 art. 21, cl. 2, reprinted in MANTECÓN SANCHO, *supra* note 5, at 265, 266 (“El ejercicio público ó privado de cualquier otro culto queda garantizado á todos los extranjeros residentes en España, sin más limitaciones que las reglas universales de la moral y del derecho.”).

35. *Id.* art. 21, cl. 3 (“Si alguno de los españoles profesaren otra religión que la católica, es aplicable á los mismos todo lo dispuesto en el párrafo anterior.”).

36. See JAVIER RUBIO, EL REINADO DE ALFONSO XII: PROBLEMAS INICIALES Y RELACIONES CON LA SANTA SEDE 243–73 (1998). Prior to becoming king, Alfonso XII wrote the following words to Pope Pius IX: “I shall not cease being a good Spaniard or, like all my ancestors, a good Catholic, or a good man of the century, truly liberal.” Manuel Espadas Burgos, *Alfonso II y la Restauración*, in 10 HISTORIA DE ESPAÑA 9, 135 (Antonio Domínguez Ortiz ed., 1990) (“Ni dejaré de ser un buen español ni, como todos mis antepasados, buen católico, ni como hombre del siglo, verdaderamente liberal.”). The phrase was controversial, for Pope Pius IX himself had condemned liberalism in his encyclical *Quanta Cura* and *Syllabus of Errors*. See THOMAS BOKENKOTTER, A CONCISE HISTORY OF THE CATHOLIC CHURCH 281–82 (rev. & expanded ed. 1990). For that reason, when Alfonso XII ascended to the Spanish throne, Pius IX sent him a letter stating: “Spain cannot have in her breast any other religion than Catholicism.” Espada Burgos, *supra*, at 136 (“España no puede tener en su seno otro culto que el católico.”).

This statement assumed the suppression not only of religious liberty, but also of the regime of tolerance sought by the Restoration. Parliamentary debate over tolerance reflected how much of an indispensable presupposition to political unity many parliamentary members considered religious unity. See SÁNCHEZ AGESTA, *supra* note 3, at 387–90. Thus, the Catholic Union (*Unión Católica*), of the reactionary political right, asked whether the internal constitution did not comprehend, in addition to the monarchy and the parliament, the religious unity of Spain. See *id.* at 389. From the political left, Fernández Jiménez y Sagasta and the liberal left believed the principle of tolerance to be linked to history and, as a result, the internal constitution. See *id.*

37. See C.E. de 1876 art. 11, cls. 2–3, reprinted in MANTECÓN SANCHO, *supra* note 5,

gious freedom was a novelty for the Constitution of 1931. At that time, the Catholic Church did not recognize any right to religious freedom;<sup>38</sup> such freedom, however, was not the target of attacks in

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at 266, 266 (“La Religión católica, apostólica, romana, es la del Estado. La Nación se obliga á mantener el culto y los ministros. Nadie será molestado en el territorio español por sus opiniones religiosas, no por el ejercicio de su respectivo culto, salvo el respeto debido á la moral cristiana. No se permitirán, sin embargo, otras ceremonias ni manifestaciones públicas que las de la Religión del Estado.”).

38. See Laboa, *supra* note 36, at 305 (observing that the Vatican, while tolerating de facto religious freedom, vigorously opposed *de jure* religious freedom). Just over a decade prior to the promulgation of the Spanish Constitution of 1876, Pope Pius IX condemned the principle of religious liberty in his encyclical *Quanta Cura*, stating that some

persons do not hesitate to assert, that “the best condition of human society is that wherein no duty is recognized by the Government of correcting, by enacting penalties, the violators of the Catholic Religion, except when the maintenance of the public peace requires it.” From this totally false notion of social government, they fear not to uphold that erroneous opinion most pernicious to the Catholic Church, and to the salvation of souls, which was called by Our Predecessor, Gregory XVI . . . the insanity [*deliramentum*] (Encycl. 13 August, 1832): namely, “that the liberty of conscience and of worship is the peculiar (or inalienable) right of every man, which should be proclaimed by law, and that citizens have the right to all kinds of liberty, to be restrained by no law, whether ecclesiastical or civil, by which they may be enabled to manifest openly and publicly their ideas, by word of mouth, through the press, or by any other means.” But whilst these men make these rash assertions, they do not reflect, or consider, that they preach the liberty of perdition (St. Augustine, Epistle 105, al. 166), and that, “if it is always free to human arguments to discuss, men will never be wanting who will dare to resist the truth, and to rely upon the loquacity of human wisdom, when we know from the command of Our Lord Jesus Christ, how faith and Christian wisdom ought to avoid this most mischievous vanity.” (St. Leo, Epistle 164, al. 133, sec. 2, Boll. ed.)

Pope Pius IX, Catholic Church, Encyclical *Quanta Cura* (Dec. 8, 1864), translated in THE PAPAL ENCYCLICALS IN THEIR HISTORICAL CONTEXT: THE TEACHINGS OF THE POPES 135, 137 (Anne Fremantle ed. 1956).

Nearly a century later, the Church reversed its position and, through the promulgation of the Second Vatican Council’s *Declaration on Religious Freedom* (*Dignitatis Humanae*) in 1965, officially recognized the right of religious freedom. See BOKENKOTTER, *supra* note 36, at 363–64. In part, the Vatican II declaration stated:

This Vatican Synod declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits.

SECOND VATICAN COUNCIL, CATHOLIC CHURCH, DECLARATION ON RELIGIOUS FREEDOM (*DIGNITATIS HUMANAЕ*): ON THE RIGHT OF THE PERSON AND OF COMMUNITIES TO SOCIAL AND CIVIL FREEDOM IN MATTERS RELIGIOUS, no. 2 (1965), translated in THE DOCUMENTS OF VATICAN II 675, 678–79 (Walter M. Abbott & Joseph Gallagher eds., 1966) [hereinafter DOCUMENTS OF VATICAN II].

the Constitutional debate. Nevertheless, the issues monopolized the whole of Article 26.<sup>39</sup>

### 3. *State Laicism*

While state laicism was the objective of Republican and leftist parties,<sup>40</sup> laicism should not be confused with the separation of church and state. The laicism defended during the constitutional debates was more closely related to the concept of laicism found in the French Law of 1905,<sup>41</sup> which postulated that the Republic neither recognized nor subsidized any religious group.<sup>42</sup> In other words, the state maintained no relations of any kind with religious groups, and simply affirmed that religion ceased to exist as a public issue. The obvious corollary to this premise was that the Republic would no longer give financial aid to any religious group,<sup>43</sup> reducing religion to a purely individual and private matter. French laicism proposed an end to the classification of certain faiths—namely, the Catholic

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39. See C.E. de 1931 art. 26, reprinted in MANTECÓN SANCHO, *supra* note 5, at 267, 267–68 (“Todas las confesiones serán consideradas como Asociaciones sometidas a una ley especial. El Estado, las regiones, las provincias y los Municipios, no mantendrán, favorecerán, ni auxiliarán económicamente a las Iglesias, Asociaciones e Instituciones religiosas. Una ley especial regulará la total extinción, en un plazo máximo de dos años, del presupuesto del Clero. Quedan disueltas aquellas Ordenes religiosas que estatutariamente impongan, además de los tres votos canónicos, otro especial de obediencia distinta de la legítima del Estado. Sus bienes serán nacionalizados y afectados a fines benéficos y docentes. Las demás Ordenes religiosas se someterán a una ley especial votada por estas Cortes Constituyentes y ajustada a las siguientes bases: 1<sup>a</sup> Disolución de las que, por sus actividades, constituyan un peligro para la seguridad del Estado. 2<sup>a</sup> Inscripción de las que deban subsistir, en un Registro especial dependiente del Ministerio de Justicia. 3<sup>a</sup> Incapacidad de adquirir y conservar, por sí o por persona interpuesta, más bienes de los que, previa justificación, se destinen a su vivienda o al cumplimiento directo de sus fines privativos. 4<sup>a</sup> Prohibición de ejercer la industria, el comercio, o la enseñanza. 5<sup>a</sup> Sumisión a todas las leyes tributarias del país. 6<sup>a</sup> Obligación de rendir anualmente cuentas al Estado de la inversión de sus bienes en relación con los fines de la Asociación. Los bienes de las Ordenes religiosas podrán ser nacionalizados.”).

40. See I GONZALO REDONDO, *HISTORIA DE LA IGLESIA EN ESPAÑA 1931–1939* [History of the Church in Spain 1931–1939] 150–53 (1993). The Constitution of 1931 was not limited to establishing the separation of church and state, but also pursued a laic policy founded on diminishing the religious orders; establishing laicality in education; secularizing cemeteries, civil marriage and divorce; abolishing economic aid to religious faiths; and especially dissolving the religious orders. See *id.* at 150, 159–64.

41. Law of 1905, arts. 1–2, C. ADM. 443, 443 (Cultes) (26th ed. Éditions Dalloz 2000) (Fr.). See *supra* note 10 for the relevant text, in the original French, of these provisions.

42. See *id.* art. 2.

43. See JACQUES ROBERT, *DROITS DE L’HOMME ET LIBERTÉS FONDAMENTALES* [HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS] 515–517 (5th ed. 1993).

Church, the two main Protestant churches, and the Jewish faith—as public institutions, which classification had made necessary the creation of the Ministry of Religion.<sup>44</sup> Laicism eliminated these faiths' status as public institutions and reduced the principle of religious freedom to an individual right to freely choose a system of religious beliefs.<sup>45</sup>

Did French laicism, however, prohibit religious association? In principle, the Law of July 1, 1901<sup>46</sup> excluded religious groups from the established system for regulating associations.<sup>47</sup> Meanwhile, how-

44. See ROBERT, *supra* note 43, at 513. The Concordat of 1801 between the French Republic and the Catholic Church, signed by Napoleon Bonaparte in Paris on July 15, 1801, recognized that Catholicism was the religion of most Frenchmen, and granted the Catholic Church public legal status, which made the Church a public servant and Catholic priests public officials. See *id.*; Basdevant-Goudemet, *supra* note 10, at 121. Development of the Concordat through unilateral general acts also granted the same legal status to the two principal Protestant churches (the Reformed Church, and the Church of the Confession of Augsburg) and Judaism. See ROBERT, *supra* note 43, at 513. This situation gave rise to the creation of the Ministry of Religion and the *Budget des cultes*, a system of state financing of the Catholic Church. See *id.*; M. Jules Roche, Discussion du Budget des cultes, Address Before the Chamber of Deputies of France (Nov. 11, 1882), in LE BUDGET DES CULTES: LA SÉPARATION DE L'ÉGLISE ET DE L'ÉTAT ET LES CONGRÉGATIONS [STATE FINANCING OF CHURCHES: THE SEPARATION OF CHURCH AND STATE AND RELIGIOUS ORDERS] 19, 36–38 (C. Marpon & E. Flammarion eds., 1883).

45. See ROBERT, *supra* note 43, at 514–18. An example of this concept appears in Article 27 of the Spanish Constitution of 1931, which states that “[f]reedom of conscience and the right to freely profess and practice any religion are guaranteed . . . . All faiths may exercise their beliefs privately. Public manifestations of worship shall be, in each case, authorized by the Government.” C.E. de 1931 art. 27, reprinted in MANTECÓN SANCHO, *supra* note 5, at 267, 268 (“La libertad de conciencia y el derecho de profesar y practicar libremente cualquier religión quedan garantizados . . . . Todas las confesiones podrán ejercer sus cultos privadamente. Las manifestaciones públicas del culto habrán de ser, en cada caso, autorizadas por el Gobierno.”).

46. Loi du 1<sup>er</sup> juillet 1901 [Law of July 1, 1901], C. ADM. 109 (Association) (26th ed. Éditions Dalloz 2000) (Fr.) [hereinafter Law of 1901].

47. See *id.* art. 1, cl. 1, C. ADM. 109, 109 (“L’association est la convention par laquelle deux ou plusieurs personnes mettent en commun d’une façon permanente leurs connaissances ou leur activité dans un but autre que de partager des bénéfices.”). During the nineteenth century, French legislation did not recognize the right of association. See ROBERT, *supra* note 43, at 713–16. Article 1 of the Law of 1901 established this right subject to general principles of contract law. Law, art. 1, cl. 2, C. ADM. 109, 109 (“Elle est régie, quant à sa validité, par les principes généraux du droit applicables aux contrats et obligations.”). Under the Law of 1901, declared or recognized associations enjoy legal personality and can be declared of public interest. See ROBERT, *supra* note 43, at 718–19, 721. The law excludes from this general regime those religious congregations that, unlike ordinary associations, must obtain prior state authorization for their establishment. See *id.* at 717. Such authorization should be regulated by law, which may establish the requirements and conditions for the congregations’ establishment and operation. See *id.* Article 15 of the Law of 1901 mandates that the creation of such asso-

ever, the Law of 1905 created a special system allowing only those faiths duly recognized by the Law of January 2, 1907; all other religions would be considered illegal.<sup>48</sup>

Manuel Azana, who headed the provisional government for a time, clearly identified with this concept of French laicism in an address given to the Congress for Republican Action:

What is the religion problem? This could easily be written down as law and we could move on to other topics. . . . I repeat: What is the religion problem? Is it our relationship with the Catholic Church, or could it be the situation of Catholic religious orders in Spain?

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ciations without previous authorization is a crime subject to imprisonment. *See* Law art. 15, cl. 4, C. ADM. 109, 111 (“Seront punis des peines portées au paragraphe 2 de l’article 8, les représentants ou directeurs d’une congrégation qui auront fait des communications mensongères ou refusé d’obtempérer aux réquisitions du préfet dans les cas prévus par le présent article.”). As a result of this provision, most congregations disappeared and their goods were liquidated. *See* ROBERT, *supra* note 43, at 516.

48. *See* ROBERT, *supra* note 43, at 524–27. The Law of 1905 came to cover the gap created by the Law of 1901 with respect to religious associations. *See* Basdevant-Gaudemet, *supra* note 10, at 124–25. This law regulates the conditions for state recognition of religious associations, guaranteeing the free exercise of religious beliefs and abolishing the “recognized religions” established by Napoleonic legislation. *See id.* at 122, 124–25. This signified that “[n]o religion [may] receive any legal establishment,” and caused religious groups to “ceas[e] to be public institutions, to become part of the private sector.” *Id.* at 122.

A law specifically authorizing religious associations was enacted two years later, in 1907. *See* Loi du 2 janvier 1907 [Law of January 2, 1907], arts. 4–5, C. ADM. 448, 448–49 (Cultes) (26th ed. Éditions Dalloz 2000) (Fr.) [hereinafter Law of 1907]. Notably, Article 13 of the Law of 1901 had prohibited all congregations that had not received legal recognition. *See* ROBERT, *supra* note 43, at 516. Considered lawful congregations, Catholic congregations did not have recourse, in principle, to either the Law of 1901 or the Law of 1905. *See* Basdevant-Gaudemet, *supra* note 10, at 125. The Law of 1907 attempted to resolve this problem by “provid[ing] that the public exercise of religion could be advanced by associations conforming simply to the Law of 1901, or by meetings, called on an individual initiative, under the Law of 1881 on the freedom of public assembly,” and was favored by the courts’ flexible interpretation of the law’s provisions. *Id.* at 126.

This situation currently continues to repeat itself with respect to new religious movements (NRMs), which are frequently referred to as “sects.” *See* Hannah Clayson Smith, Liberté, Egalité, et Fraternité *at Risk for New Religious Movements in France*, 2000 BYU L. REV. 1099, 1100 n.4. NRMs’ aspirations of gaining recourse to the Law of 1905 clash with the administrative and legal interpretation maintaining that these groups do not satisfy the requirement established in Article 19 of that law, *see* ROBERT, *supra* note 43, at 519–20, which mandates that religious “associations should have the exercise of worship as their exclusive objective.” Law of 1905, art. 19, cl. 1, C. ADM. 443, 446 (“Ces associations devront avoir exclusivement pour objet l’exercice d’un culte . . .”). Similarly, in certain cases, NRMs also are deemed to fail the requirement established in Article 3 of the Law of 1901, *see* ROBERT, *supra* note 43, at 519–20, which maintains that associations may not have “an illegal purpose, contrary to the law or good customs.” Law of 1901, art. 3, C. ADM. 109, 109 (“[Toute association fondée sur une cause ou en vue] d’un objet illiSource, contraire aux lois, aux bonnes mœurs . . .”).

That is not a religion problem. A word as solemn as “religion” should not be used to describe the State’s dealings with its subjects, whoever they may be, nor should the word be employed in the State’s dealings with outside powers, whatever they may be. The religion problem is an intimate affair of conscience; yet here we speak of it as politicians and legislators, not as believers. What should generally be classified as a question of religion is often times reduced to a governmental issue; that is, it becomes a question of the government’s attitude towards a few habit-wearing citizens or a question of the State’s relationship with an outside power like the Catholic Church.<sup>49</sup>

Article 26 of the Constitution of 1931 was the main source for this secularized attitude and provoked the most hostile opposition,<sup>50</sup> establishing the principle that religious groups were subject to a special law.<sup>51</sup> The article also outlined the following bases upon which the law was to be administered: 1) all religious groups that presented a danger to state security were to be dissolved; 2) all groups had to be registered in a special registry within the Ministry of Justice; 3) groups could not acquire and maintain possessions, excepting those specifically designated for the groups’ upkeep and special needs; 4) groups could not engage in industrial, commercial, or proselytizing activities; 5) groups were subject to all tax laws and were required to inform the state annually of any investments of resources furthering group purposes; and 6) all group possessions were subject to nationalization.<sup>52</sup>

In addition to subjecting religious groups to a special law, Article 26 prohibited “the State, regions, provinces, and municipalities from favoring, aiding, or financially supporting churches, religious associa-

49. DE MEER, *supra* note 3, at 66 (quoting 2 MANUEL AZAÑA, OBRAS COMPLETAS [COMPLETE WORKS] 173 (Ediciones Oasis 1968)) (“¿Qué es el problema religioso? Esto se escribe en una ley y se pasa a otro asunto. . . ¿Qué es el problema religioso?, repito. ¿Concretamente el de nuestras relaciones con la Iglesia Católica o la situación de las órdenes religiosas en España? Ese no es un problema religioso; no debemos emplear una palabra tan solemne como la de religión para explicar las relaciones del Estado con sus propios súbditos, cualquiera que sea el traje que vistan; las relaciones del Estado republicano español con las potestades extranjeras, de cualquier orden que sean. El problema religioso es un problema íntimo de la conciencia; pero no un problema político, y nosotros hablamos aquí como políticos y legisladores, pero no como creyentes. De suerte que el que suele llamarse problema religioso se reduce a un problema de gobierno, es decir, a la actitud del Estado frente a un cierto número de ciudadanos que vistan hábito talar y a las relaciones del Estado con una potencia extranjera, que es la católico-romana.”).

50. *See infra* notes 56–61 and accompanying text.

51. *See* C.E. de 1931, art. 26, *reprinted in* MANTECÓN SANCHO, *supra* note 5, at 267, 267–68. *See supra* note 39 for the full Spanish text of this article.

52. *See id.*



tions, or institutions.”<sup>53</sup> Article 26 further provided that “in addition, the Clergy’s Budget will be dissolved within a period of two years.”<sup>54</sup> Finally, Article 26 disbanded the Jesuits—this time on constitutional grounds—under the following stipulation: “All religious orders that formally require, beyond the three canonical vows, a special vow of obedience to any power other than the State are hereby dissolved.”<sup>55</sup>

Catholic delegates reacted to the foregoing constitutional provisions in no uncertain terms: “If put into practice, and even by its mere proposal, the Constitution as presently conceived is an attack on the Catholic conscience of the nation, a challenge, an invitation to war.”<sup>56</sup> Even José Ortega y Gasset, one of Spain’s leading intellectuals and a proponent of separating church and state, said that “the article in which the Constitution legislates the actions of the Church seems highly improper to me.”<sup>57</sup> From the periodical *El Socialista* came the warning that dissolution and expulsion of religious groups “will cause a fatal split in the nation between those who accept the Constitution and those who flatly reject it because it contradicts the feelings that they hold most dear.”<sup>58</sup> Once the Constitution had been approved, the Spanish Episcopate openly disapproved of, and protested against, it. Specifically, the Episcopate stated that its acceptance of the power granted did not imply the Church’s conformity with, much less its obedience to, that which opposed the laws of God and the Church.<sup>59</sup>

Possibly the finest declaration regarding the constitutional debate and, by extension, the religion question, was that of Gregorio Marañón. His commentary appeared in *El Sol* under the title *The*

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53. *Id.*

54. *Id.*

55. *Id.*

56. DE MEER, *supra* note 3, at 92 (quoting 28 EXTRACTO OFICIAL SESIONES CORTES CONSTITUYENTES [OFFICIAL EXTRACT OF PARLIAMENTARY SESSIONS] 21 (Aug. 27, 1931)).

57. *Id.* at 107 (quoting 33 OFFICIAL EXTRACT OF PARLIAMENTARY SESSIONS 24 (Sept. 4, 1931)) (“[E]l artículo donde la Constitución legisla sobre la Iglesia me parece de gran improvidencia . . .”).

58. *Id.* at 131 (quoting *El problema religioso* [The Religion Problem], EL SOCIALISTA, Oct. 3, 1931) (“[T]raerá una consecuencia fatal: la escisión del país en dos porciones; la de quienes aceptan la Constitución y la de quienes la rechazan de plano, por estimar que contraría sus sentimientos más caros.”).

59. *See id.* at 204–06.

*Myth's Hypnotic Power*, and ran the night before the debate on Article 26.<sup>60</sup>

A hallucinatory myth weighs upon the delegates' judgment. This myth is a terrible parasite of our national psyche that has sucked rivers of our blood and of our moral and fiscal energy. This parasite is the myth of clericism-anticlericism, a myth to which many have attributed—with profound truth yet erroneous interpretations—the main causes for our lack of progress.

Half of Spain would propose that the cancer gnawing at us, the cancer hindering us from keeping pace with other European nations, is the excessive influence of clerical powers. The other half believes that without this priestly hegemony, the Spanish people would lose their vitality, their genuine character, and Spain would eventually disappear forever.<sup>61</sup>

#### *B. Freedom of Religion in the Post-Second Republic Period: 1939–1978*

Anticlericism triumphed in the aftermath of the debate over Article 26 with the onset of the Second Republic and the Constitution of 1931. After the Spanish Civil War,<sup>62</sup> however, clericism returned with Francisco Franco's new political regime, which reinstated Catholicism as the official state religion and substituted religious tolerance for the fleeting recognition granted to freedom of conscience by the Constitution of 1931.<sup>63</sup> The new regime also restored the

60. See *id.* at 163.

61. *Id.* at 163–64 (quoting Gregorio Marañón, *La sugestión del mito* [*The Myth's Hypnotic Power*], EL SOL, Oct. 13, 1931) (“[P]esa sobre el juicio de los diputados un mito alucinante, parásito terrible de la psicología nacional, que ha chupado ríos de nuestra sangre y de nuestra energía moral y monetaria. Es el mito del ‘clericalismo-anticlericalismo’, al cual se achaca, con profunda verdad, aunque con interpretaciones erróneas, gran parte de la razón de nuestro atraso. La mitad de los españoles supone que el cáncer que nos roe y que nos impide desenvolvernos al tono de los demás países civilizados es la influencia excesiva de los poderes clericales. La otra mitad cree que sin esa hegemonía clerical España dejaría de ser un pueblo dotado de vitalidad y de estructura genuina, y que acabaría por desaparecer.”).

62. See generally JOSÉ MANUEL CUENCA, *LA GUERRA CIVIL DE 1936* (1986) for a synthesis of the causes and effects of the Spanish Civil War (1936–1939). Among the extensive bibliography on this topic, see also, in English, GABRIEL JACKSON, *THE SPANISH REPUBLIC AND THE CIVIL WAR 1931–1939* (1965).

63. See SOUTO PAZ, *supra* note 16, at 61–62. Freedom of conscience, recognized in Article 27 of the Constitution of 1931, was replaced by an official policy of tolerance for non-Catholic faiths and the establishment of Catholicism as the state religion. See Art. 6 of the Fuero de los Españoles [Law of the Spaniards] (R.C.L. 1945, 1133), reprinted in MANTECÓN SANCHO, *supra* note 5, at 270, 271 (“La profesión y práctica de la Religión Católica, que es la

state's former privileges in religious matters and those of the Church in the political arena.<sup>64</sup> Specifically, through the Concordat of 1953, the regime outlined the principles for church-state cooperation in accordance with Church doctrine.<sup>65</sup>

The following state declaration, found in the Principles of the National Movement approved in 1958, further strengthened the relationship between church and state: "The Spanish Nation considers it an honor to faithfully comply with the laws of God according to the doctrines of the Holy Roman Catholic Church, the only true Church, the faith inseparable from our national conscience, which faith inspires our legislation."<sup>66</sup> As a result of this strong relationship between church and state, the Spanish legal system became subject to Catholic doctrine and morals, meaning that any laws or judicial decisions that did not comport with Catholic doctrine could be nullified.<sup>67</sup>

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del Estado español, gozará de la protección oficial. Nadie será molestado por sus creencias religiosas o por el ejercicio privado de su culto. No se permitirán otras ceremonias ni manifestaciones externas que las de la Religión Católica."). Expression of this policy was reformed in 1967 to recognize Vatican II's *Declaration on Religious Liberty*; in light of its establishment of Catholicism, the State acknowledged freedom of religion in the following terms: "The State shall assume the protection of religious freedom, which shall be guaranteed by an effective legal guardianship that, at the same time, safeguards morality and public order." Preamble of the Ley de Libertad Religiosa [Law of Religious Freedom] (June 28, 1967), *reprinted in* MANTECÓN SANCHO, *supra* note 5, at 288, 288 ("El Estado asumirá la protección de la libertad religiosa, que será garantizada por una eficaz tutela jurídica que a la vez salvaguarde la moral y el orden público.").

64. See SOUTO PAZ, *supra* note 16, at 61–64. The Spanish state once again established Catholicism as the state religion, *see supra* note 63, and regained ancient ecclesiastical privileges such as the *patronato*, or the right to appoint ecclesiastical officials. See SOUTO PAZ, *supra* note 16, at 62–63. In return, the government pledged to observe the first four articles of the Concordat of 1851, refrain from legislating matters that may interest the Catholic Church without having received prior agreement from the Holy See, and to conclude a new concordat as soon as possible. See *id.* Likewise, the Church reacquired the ecclesiastical *fuero*, or right to try church officials in church courts rather than civil courts; State financing of the Church and other economic rights (e.g., state support of ecclesiastical seminaries and universities), and the restoration of the *Tribunal de la Rota*. See *id.* at 63.

65. See CUENCA TORIBIO, *supra* note 3, at 116–18.

66. Principle II of the Ley de Principios del Movimiento Nacional [Law of Principles of the National Movement] (May 17, 1958), *reprinted in* MANTECÓN SANCHO, *supra* note 5, at 272, 272 ("La Nación española considera como timbre de honor el acatamiento a la Ley de Dios, según la doctrina de la Santa Iglesia Católica, Apostólica y Romana, única verdadera y fe inseparable de la conciencia nacional, que inspirará su legislación.").

67. See *id.* art. 3, *reprinted in* MANTECÓN SANCHO, *supra* note 5, at 272, 273 ("Serán nulas las leyes y disposiciones de cualquier clase que vulneren o menoscaben los Principios proclamados en la presente Ley fundamental del Reino.").

This church-state model, considered ideal from an ecclesiastical perspective,<sup>68</sup> quickly exhibited shortcomings.<sup>69</sup> For instance, the Concordat of 1953 began to show its fragility as illegal groups and unions began using Catholic institutions for their own purposes.<sup>70</sup> In particular, clergymen advocating particular union and political positions were sometimes considered to be involved in criminal activities, at least under the legal scheme of the time.<sup>71</sup> Those clergymen could not be tried by the normal court system, however, due to ecclesiastical privileges granted in the Concordat.<sup>72</sup>

While the foregoing problems complicated General Franco's church-state system, the Second Vatican Council ("Vatican II") produced a much more profound and intense shock to that system in the Council's attempts to fully reestablish the doctrinal bases for church-state relations. To accomplish this objective, the Church demanded autonomy and independence from civil powers,<sup>73</sup> and that Catholic states remove all obstacles to such autonomy (such as the state's power to name bishops)<sup>74</sup> and recognize religious freedom as

68. See CUENCA TORIBIO, *supra* note 3, at 121; Pedro Lombardía, *Actitud de la Iglesia ante el franquismo* [*The Church's Attitude Toward "Francoism"*], in *IGLESIA CATÓLICA Y RÉGIMENES AUTORITARIOS Y DEMOCRÁTICOS (EXPERIENCIA ESPAÑOLA E ITALIANA)* [THE CATHOLIC CHURCH AND AUTHORITARIAN AND DEMOCRATIC REGIMES (THE SPANISH AND ITALIAN EXPERIENCE)] 81, 88–89 (Iván C. Ibán ed., 1985) [hereinafter *THE CATHOLIC CHURCH AND AUTHORITARIAN AND DEMOCRATIC REGIMES*]; cf. Alberto de la Hera, *Actitud del Franquismo ante la Iglesia* [*The Attitude of "Francoism" Toward the Church*], in *THE CATHOLIC CHURCH AND AUTHORITARIAN AND DEMOCRATIC REGIMES*, *supra*, at 43, 66–67 (observing that the Spanish Church-State model under Franco harmonized with the doctrine of Pope Pius XII).

69. See CUENCA TORIBIO, *supra* note 3, at 122 (observing that the legal regime established by the Concordat of 1953 weakened due to its inability to resolve problems stemming from the ecclesiastical *fuero*, the right to proselytize, the appointment of ecclesiastical personnel by the State, and canonical marriage).

70. See *id.* at 131–32; Joaquín L. Ortega, *La Iglesia española desde 1939 hasta 1976: Resumen cronológico* [*The Spanish Church from 1939 to 1976: Chronological Summary*], in 5 *LA HISTORIA DE LA IGLESIA EN ESPAÑA* 665, 689–90, 694–96 (Vicente Cárcel Ortí ed. 1979) [hereinafter *HISTORIA DE LA IGLESIA*].

71. See CUENCA TORIBIO, *supra* note 3, at 131–32; Ortega, *supra* note 70, at 694–96.

72. See CUENCA TORIBIO, *supra* note 3, at 117; see also *Concordato entre la Santa Sede y España* [Concordat Between the Holy See and Spain], Aug. 27, 1953, Spain-Vatican, art. 16, reprinted in 5 *HISTORIA DE LA IGLESIA* 754, 757–58.

73. See SECOND VATICAN COUNCIL, CATHOLIC CHURCH, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD (*GAUDIUM ET SPES*) no. 76 (1965), translated in *DOCUMENTS OF VATICAN II*, *supra* note 38, at 199, 287–89.

74. SECOND VATICAN COUNCIL, CATHOLIC CHURCH, DECREE ON THE BISHOPS' PASTORAL OFFICE IN THE CHURCH (*CHRISTUS DOMINUS*) no. 20 (October 28, 1965), translated in *DOCUMENTS OF VATICAN II*, *supra* note 38, at 396, 411.

a civil right.<sup>75</sup> These demands presupposed an end to the traditional church-state model that had inspired national Catholicism and found its concrete manifestation in Spain in the Concordat of 1953.

As a result of Vatican II's doctrinal pronouncements state, Spain had to modify fundamental laws to replace the existing system of religious tolerance with official recognition of religious freedom.<sup>76</sup> The enactment of the 1967 Law of Religious Freedom (*Ley de Libertad Religiosa*) granting religious freedom to non-Catholic faiths further ensured this change.<sup>77</sup>

While the state's National Catholicism appeared to encourage a positive response to the Church's demand for religious freedom as a civil right, for a different situation emerged when the state renounced privileges that had been mutually recognized in the past. Consider, for example, Pope Paul VI's request that the head of state relinquish his privilege to name bishops.<sup>78</sup> The Spanish state granted that request, but only on the condition that the relationship between church and state be addressed completely anew.<sup>79</sup> The state's demand questioned the framework of the Concordat and initiated a period of negotiation seeking a new legal framework for church-state relations.<sup>80</sup> Not only did this attempt fail, but it exacerbated the crisis

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75. See *supra* note 38 (noting Vatican II's recognition of religious freedom in its *Declaration on Religious Freedom* (Dignitatis Humanae)).

76. See Preamble of the Ley de Libertad Religiosa [Law of Religious Freedom] (June 28, 1967), reprinted in MANTECÓN SANCHO, *supra* note 5, at 288, 288 (noting the modification made to Article 6 of the *Fuero de los Españoles* by the General Act of the State (*Ley Orgánica del Estado*), enacted on January 10, 1967, to comply with Vatican II's doctrine of religious liberty).

77. See *id.*, art. 1, §§ 1–2, reprinted in MANTECÓN SANCHO, *supra* note 5, at 288, 289 (“1. El Estado español reconoce el derecho de libertad religiosa fundado en la dignidad de la persona humana y asegura a ésta, con la protección necesaria, la inmunidad de toda coacción en el ejercicio legítimo de tal derecho. 2. La profesión y práctica privada y pública de cualquier religión será garantizada por el Estado sin otras limitaciones que las establecidas el en artículo 2º de esta Ley.”). As previously indicated, these modifications also required the government to amend Article 6, section 2 of the *Fuero de los Españoles*. See *supra* note 76. The Law of Religious Liberty of 1967 constituted the legislative development of the 1958 Law of National Movement Principles, see Law of Religious Freedom, preamble, once modified by referendum in 1966.

78. See Ortega, *supra* note 70, at 693; José María Díaz Moreno, *Historia del texto, in LOS ACUERDOS ENTRE IGLESIA Y ESPAÑA [THE AGREEMENTS BETWEEN THE CHURCH AND SPAIN]*, 79–95 (1980). The Pope made his request to General Franco in a letter following the promulgation of the Second Vatican Council's declaration on the matter. See Ortega, *supra* note 70, at 693.

79. See *id.*

80. See *id.*

between the two institutions: as a result, the process of naming bishops was impeded and police pressure increased against those clergymen who, for their political and union advocacy, now found themselves in conflict with the established order.<sup>81</sup> National Catholicism had reached its end, as had the regime that had supported it.

### III. FREEDOM OF RELIGION UNDER THE CONSTITUTION OF 1978

#### *A. The Constitution of 1978*

The drafters of the Constitution of 1978 were influenced both from within as well as from outside Spain. As they tackled the old religion question, the drafters of the Constitution of 1978<sup>82</sup> (“Constitution”) found themselves confronted with concrete historical experiences and failed political and legal solutions (both laicism and the religious state). Also available at their disposal were important resources derived from United Nations documents—beginning with the U.N. Charter<sup>83</sup> and including the Universal Declaration of Human Rights,<sup>84</sup> International Covenant on Civil and Political Rights (“ICCPR”),<sup>85</sup> and International Covenant on Economic, Social, and Cultural Rights (“ICESCR”)<sup>86</sup>—and the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”).<sup>87</sup> Freedom of thought, conscience, religion, and worship—both individually and collectively, in public and in private—are all recognized and guaranteed in these international documents.<sup>88</sup> In addition to these influences, in July 1976, just days before Adolfo Suarez was named President of Spain, the state and

81. *See id.* at 693–707.

82. C.E., *translated in Spanish Constitution*, *supra* note 18, at 1047.

83. U.N. CHARTER.

84. *Universal Declaration of Human Rights*, U.N. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

85. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, \_\_ Stat., \_\_, 999 U.N.T.S. 171 [hereinafter ICCPR].

86. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, \_\_ Stat., \_\_, 993 U.N.T.S. 3 [hereinafter ICESCR].

87. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, \_\_ Stat., \_\_, 213 U.N.T.S. 222 [hereinafter *European Convention*].

88. *See id.* art. 9, §§ 1–2; ICCPR, *supra* note 85, art. 18, §§ 1–4; ICESCR, *supra* note 86, art. 13, § 3; U.N. CHARTER, *supra* note 83, art. 1, para. 3, & art. 55, para. 1(a); *Universal Declaration*, *supra* note 87, art. 18.

the Catholic Church signed an agreement in (“1976 Agreement”) which the state waived its privilege to name bishops and the Church waived its privilege to legal exemption.<sup>89</sup> The 1976 Agreement contains a preamble that integrates the doctrines of Vatican II, but does so without a constitutional point of reference. Those doctrines embodied in the agreement include the following: 1) mutual independence of both church and state; 2) healthy collaboration between both institutions; and 3) recognition of religious freedom as a civil right.<sup>90</sup> The agreement also contains one fundamental addition:

[G]iven that the Spanish State included in its laws the right to religious freedom, based on the dignity of persons . . . and recognized in this same code that there shall be norms appropriate to the fact that the majority of the Spanish people profess the Catholic religion, [the Holy See and the Spanish government] deem it necessary to regulate by means of specific Agreements, those subjects of common interest that, under the new circumstances arising after the signing of the Concordat of 27 August 1953, require new regulation; therefore, they agree to undertake, by common consent, the study of these different subjects for the purpose of concluding, as soon as possible, the Agreements that will gradually [replace] the corresponding provisions of the Concordat currently in force.<sup>91</sup>

The compromise contemplated repealing the Concordat and substituting a new legal framework for the Catholic Church, one better adapted to the country’s changed circumstances. At the same time, however, the compromise exempted the Church from the possibility of being subject to a common regulatory system for all religions. This fact would have a decisive influence on the drafting of the constitutional text and its later development.

The first draft of the Constitution was leaked to the press on November 23, 1977, and the newspaper *La Vanguardia* printed the full proposed text two days later.<sup>92</sup> According to that publication, Ar-

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89. See arts. 1–2 of the Instrumento de Ratificación de España al Acuerdo entre la Santa Sede y el Estado español [Instrument of Ratification of the Agreement Between the Holy See and the Spanish State] (B.O.E. 1976, 230) [hereinafter 1976 Agreement], *translated in* SPANISH LEGISLATION, *supra* note 18, at 47, 48–49.

90. See *id.*, preamble, *translated in* SPANISH LEGISLATION, *supra* note 18, at 47, 47 (“Vatican Council II established as fundamental principles, to which the relations between the political community and the Church should adapt, both the mutual independence of both parties in their respective areas, as well as positive collaboration between them; asserted religious freedom as a right that should be recognized in society’s legal code . . .”).

91. *Id.*

92. See JOSÉ JAVIER AMORÓS AZPILICUETA, LA LIBERTAD RELIGIOSA EN LA CONSTITUCIÓN ESPAÑOLA DE 1978 [RELIGIOUS LIBERTY IN THE SPANISH CONSTITUTION OF

ticle 3 was to declare that “[t]he Spanish state has no state religion and guarantees religious freedom according to the terms of Article [17].”<sup>93</sup> In turn, Article 17 read as follows: “1) Freedom of religion and worship, as well as philosophical and ideological expression, is guaranteed, with the only limitation being the public order protected by law. 2) No person can be compelled to declare his or her religious beliefs.”<sup>94</sup>

The state’s lack of an official religion did not provoke any negative response from the Spanish ecclesiastical hierarchy. Catholic Church leaders limited themselves to affirming the independence and autonomy of both church and state, while simultaneously demanding full civil recognition for the Church’s institutional reality, autonomy, and freedom to act for itself.<sup>95</sup> Furthermore, religious leaders called for state recognition of the rights and duties of Catholic citizens in the judicial system, all activities of social, public, educational, or informative character, and the institution of marriage.<sup>96</sup> Previously, the press, commenting on a communiqué from the bishops, reported the following: “However, with or without a state religion, there are ethical and religious values that have been historically ingrained into our communities that, without disregarding the pluralism and social dynamics of our day and age, constitute the moral infrastructure of our common good . . . .”<sup>97</sup>

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1978] 70 n.5 (1984). The journal *Cuadernos para el Diálogo* had published the first thirty-nine articles of the draft constitution on Nov. 23. *See id.* On the same day that *La Vanguardia* published the draft in its entirety, the newspaper *Egin* published the first seventy articles. *See id.*

93. C.E. art. 3 (First Proposed Draft 1977), reprinted in *LA VANGUARDIA*, Nov. 23, 1977, at 10–11, quoted in AMORÓS AZPILICUETA, *supra* note 92, at 73 (alteration in original) (“El Estado español no es confesional. Garantiza la libertad religiosa en los términos del artículo [17] . . .”).

94. *Id.* art. 17, reprinted in *LA VANGUARDIA*, Nov. 23, 1977, at 10–11, quoted in AMORÓS AZPILICUETA, *supra* note 92, at 73 (1. Se garantiza la libertad religiosa y de cultos, así como la de profesión filosófica o ideológica, con la única limitación del orden público protegido por las leyes. 2. Nadie podrá ser compelido a declarar sobre sus creencias religiosas.”).

95. *See* AMORÓS AZPILICUETA, *supra* note 92, at 83–84. The Archbishop of Zaragoza, Father Yanes, espoused these ideas in a conference held at the “Siglo XXI” Club, representing the view of the Spanish Episcopal Conference. *See id.* at 83.

96. *See id.* at 84.

97. *Id.* at 80 (quoting *LA VANGUARDIA*, Sep. 28, 1977, at 5) (“Pero, con o sin confesionalidad, hay unos valores éticos y religiosos que han configurado históricamente nuestros pueblos y que, sin negar el pluralismo y la dinámica social de nuestro tiempo, constituyen la infraestructura moral del bien común . . .”). The editorial printed in *La Vanguardia* expressed the ideas shared in a homily by Cardinal Jubany. *See id.* at 80 n.33.



The second constitutional draft, which also was made public through publication in the press as well as the Official Bulletin of Parliament (*Boletín Oficial de las Cortes*),<sup>98</sup> amplified the religious freedoms granted in the first. While omitting the version of Article 3 proposed in the first draft,<sup>99</sup> the second draft revised Article 17 to state that:

1. Freedom religion and worship of individuals and communities, as well as philosophical and ideological expression, is guaranteed, provided such freedom does not disturb the public order protected by law.
2. No person may be compelled to declare his/her religious beliefs.
3. No faith may be designated as the State's own. Public authorities shall be mindful of Spain's religious groups and will maintain cooperative relationships with all.<sup>100</sup>

This second draft presented important breakthroughs by reflecting the social implementation of religious freedom. The document went beyond merely acknowledging the intimate and personal limits of conscience to guarantee religious freedom for communities.<sup>101</sup> This social dimension was complemented by the addition of Paragraph 3 to Article 17, which guaranteed that no faith could be recognized as the state religion while simultaneously marking a clear division between the state's secularism and society's religious pluralism. More specifically, Article 17(3) charged the civic authorities to take into account the beliefs of Spanish society,<sup>102</sup> thereby shifting the secular state from a policy of indifference regarding religious matters to the role of an attentive observer.<sup>103</sup> For what purpose? The text

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98. *See id.* at 94–95.

99. *See id.* at 95.

100. C.E. art. 17 (Second Proposed Draft 1977) (Spain), *reprinted in* LA VANGUARDIA, Dec. 14, 1977, at 3–4), *quoted in* AMORÓS AZPILICUETA, *supra* note 92, at 95. It should be noted that the version of Article 17 reprinted in *La Vanguardia* differed from the final version presented to Parliament and published in the *Boletín Oficial de las Cortes* in that the final version renumbered Article 17 to Article 16. *See id.* n.68.

101. *See id.* art. 17, § 1, *reprinted in* LA VANGUARDIA, Dec. 14, 1977, at 3–4), *quoted in* AMORÓS AZPILICUETA, *supra* note 92, at 95.

102. *See id.* art. 17, § 3, *reprinted in* LA VANGUARDIA, Dec. 14, 1977, at 3–4), *quoted in* AMORÓS AZPILICUETA, *supra* note 92, at 95.

103. This obligation, innovative in comparative law, implies that the neutrality of the state with respect to religion may not be interpreted as an attitude of indifference or disregard

itself answers the question with the following constitutional mandate to civic authorities: “[They] shall maintain cooperative relationships with all.”<sup>104</sup>

Comparing the principles that inspired the provisions set forth in the Constitution of 1931 and the second draft of the Constitution of 1978, one sees clear-cut congruities as well as stark discrepancies between the two. Both texts recognize religious freedom and state neutrality in religious affairs.<sup>105</sup> However, the documents differ in the priority given to the two principles. In the 1978 draft, freedom of religion is given superiority; hence, the state’s neutrality must be interpreted as a legislative guideline for matters of religious freedom. Priorities in the 1931 Constitution were precisely the opposite: religious freedom was subjugated to church-state separation and the state’s neutrality. This subjugation, in turn, translated into the Constitution of 1931’s strict limitations on the social implementation and collective dimension of the rights to religious freedom and association in their .

Thus, the principal advantage of the 1978 text is as follows: the 1978 draft recognizes religion not only as isolated within the confines of individual conscience, but as a collective, plural, social fact. In other words, religion, understood as a social reality, becomes a necessary link in the exercise of governmental power. Given the state’s recognition of this social reality, civic authorities were then required to be cooperative. Rather than restricting, preventing, or

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for religious beliefs; rather, the state should know and cooperate with such beliefs. For this reason, it is difficult to speak of the laic state as the terminology is established by French doctrine.

104. C.E. art. 17, § 3 (Second Proposed Draft 1977), *reprinted in* LA VANGUARDIA, Dec. 14, 1977, at 3–4), *quoted in* AMORÓS AZPILICUETA, *supra* note 92, at 95. The observations included *supra* in note 103 regarding laicism appear to be corroborated by the establishment in Article 17, section 3 of the reason why public officials have the obligation to take into account Spanish society’s religious beliefs—“to maintain cooperative relationships.” Nothing is further from laicism than the establishment of an obligation for public authorities to cooperate with religious faiths. The interpretation of this constitutional precept has been established in the signing of Agreements between the state and the Catholic Church, the Islamic and Jewish communities, and a federation of Evangelical churches. *See infra* Part III.B.2. Cooperation with these faiths has resulted in, inter alia, the concession of economic subsidies and tax exemptions, *see infra* Part III.B.2., which contradicts the laical principle that the state should not subsidize or pay religious groups.

105. *Compare* C.E. art. 17, § 3 (Second Proposed Draft 1977), *reprinted in* LA VANGUARDIA, Dec. 14, 1977, at 3–4), *quoted in* AMORÓS AZPILICUETA, *supra* note 92, at 95 (“Ninguna confesión tendrá carácter estatal.”), *with* C.E. de 1931 art. 3, *reprinted in* Mantecón Sancho, *supra* note 5, at 267, 267 (“El Estado español no tiene religión oficial.”).

controlling religious groups, as had been done under French laicism and the Second Republic's laicism, the Constitution of 1978 obliges civic authorities to actively cooperate with religious entities.

International texts and accords have openly recognized the right to religious association and its place in society, and have assumed an end to classic laicism.<sup>106</sup> The Spanish constitutional mandate that civic authorities cooperate with "the religious beliefs of Spanish society," however, constitutes a novelty in international comparative law.<sup>107</sup>

This "cooperation" addition to the second draft of the Constitution of 1978 appears to have arisen through government actions memorialized in a preconstitutional document; namely, the 1976 Agreement between the state and the Catholic Church.<sup>108</sup> That agreement's intent was to constitutionalize cooperation between the state and the Church.<sup>109</sup> This cooperative effort would then allow the government to comply with the compromise settled upon in the agreement. For this reason, the constitutional text would undergo new modifications in light of the fact that cooperative relationships were to be maintained with "the Catholic Church and the other [faiths]."<sup>110</sup> This modification, implemented through an amendment proffered by the Central Democratic Union ("*Unión del Centro Democrático*"), triggered protests by the socialist delegation, which consequently withdrew its delegate to the constitutional committee, Gregorio Peces-Barba, thereby rupturing the constitutional consensus.<sup>111</sup>

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106. See ROBERT, *supra* note 43, at 521–22. Lately, French laicism has been limited to recognize personal freedom of conscience in the private arena, *see id.* at 522–24, and the right to religious association has experienced many restrictions, and has been strictly limited to the private sphere. *See id.*

107. None of the non-Spanish constitutions consulted by the author contain any legal mechanism that obliges the State to establish relations with religious faiths in general or the Catholic Church in particular.

108. For a brief discussion of the 1976 Agreement, see *supra* notes 89–91 and accompanying text.

109. See *supra* note 91 and accompanying text.

110. C.E. art. 16, § 3, translated in *Spanish Constitution*, *supra* note 18, at 1047, 1050.

111. See AMORÓS AZPILICUETA, *supra* note 92, at 97–98. The Socialist Party representative, Gregorio Peces-Barba, affirmed that "the Articles 16 and 28 on education had remained the same and as the Catholic Church and U.C.D. had provided." *Id.* at 98 (quoting LA VANGUARDIA, Mar. 19, 1978, at 38) ("[L]os artículos 16 y 28 de enseñanza habían quedado tal y como había previsto la Iglesia católica y UCD.").

The Spanish episcopate's collective declaration regarding the religious and moral values found in the Constitution of 1978 did not place special emphasis on the constitutional formula of non-establishment of church and state, "leaving judgment to civil society and the state that incarnates it."<sup>112</sup> However, after reaffirming the Church's rights pertaining to the exercise of its mission, Church leaders accentuated the following points:

We observe . . . that it is not enough to affirm the State's non-confessionality in order to instill religious peace and constructive relations between the State and the Churches in our country. If ambiguous or negatively biased formulations that might support "laicizing" interpretations prevail in the constitutional text, the Constitution will not give sufficient response to the religiosity of the Spanish people, given the undeniable weight of Catholicism and the presence of other churches and religious faiths in our society.<sup>113</sup>

Furthermore, they added that "[i]t would be insufficient to abstractly proclaim all citizens' religious freedom, in which such freedom is reduced to a simple freedom of conscience or 'freedom of worship,' without assuring the freedom to proselytize, associate with the faithful, and support human brotherhood through educational, charitable, and socially advancing means."<sup>114</sup> Lastly, the Catholic hierarchy specified that the state

should open the door to a moderate and constructive treatment of the Catholic Church's significance in Spain; this treatment should occur in terms of reciprocal independence in relation to the State, respect for the Church's areas of responsibility, and the possibility

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112. *Id.* at 102 (quoting LA VANGUARDIA, Nov. 27, 1977, at 31) ("[D]ejando su decisión a la sociedad civil y al Estado que la encarna . . .").

113. *Id.* (quoting LA VANGUARDIA, Nov. 27, 1977, at 31) ("Observamos, sin embargo, que no basta afirmar la no confesionalidad del Estado para instaurar en nuestra patria la paz religiosa y las relaciones respetuosas y constructivas entre el Estado y las Iglesias. Si prevalecen en el texto constitucional formulaciones equívocas y de acento negativo, que pudieran dar pie a interpretaciones 'laicistas', [sic] no se daría respuesta suficiente a la realidad religiosa de los españoles, con el peso indudable del catolicismo y la presencia en nuestra sociedad de otras Iglesias y confesiones religiosas.").

114. *Id.* at 105 (quoting LA VANGUARDIA, Nov. 27, 1977, at 31) ("Sería insuficiente proclamar en abstracto la libertad religiosa de todos los ciudadanos, reducida a una simple libertad de conciencia o a la 'libertad de cultos', sin asegurar la libertad de evangelizar, de asociar a los fieles y de apoyar la fraternidad humana por medios educativos, asistenciales y de promoción integral.").

of establishing agreements on matters of mutual interest that demand a stable framework for action.<sup>115</sup>

Although it is impossible to determine with precision the degree of direct or indirect influence wielded by these manifestations, it is necessary to recognize that the constitutional text fully realizes the Catholic Church's aspirations in this respect. With the restoration of the constitutional consensus and the reincorporation of the socialist representative Peces-Barba, the second draft of the Constitution experienced slight modifications in terminology in the course of the parliamentary debate, maintaining those principles that had been established in the draft and the U.C.D.'s amendment.<sup>116</sup> Following parliamentary approval, the resultant final draft of the Constitution was ratified in a public referendum and signed by the King on December 27, 1978, prior to being published in the *Official State Bulletin* (*Boletín Oficial del Estado*) on December 29, 1978.<sup>117</sup>

As ratified, the Constitution of 1978 thus includes three significant provisions governing the individual and collective rights stemming from, and associated with, religious freedom. First, Article 16, section 1 guarantees the individual and collective right to "freedom of ideology, religion, and worship," with the manifestation of those freedoms subject to those restrictions necessary to "maintain public order as protected by law."<sup>118</sup> Second, Article 16, section 2 protects individuals' freedom of expression by recognizing that no one can be forced to declare his or her religious beliefs.<sup>119</sup> Finally, Article 16, section 3 prohibits the establishment of a state religion, and requires

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115. *Id.* at 109 (quoting LA VANGUARDIA, Nov. 27, 1977, at 31) ("[El Estado] debiera abrir la puerta a un tratamiento sobrio y constructivo de la significación de la Iglesia católica en España, en términos de independencia recíproca en relación con el Estado, de respeto de competencias y de posibilidad de establecer acuerdos entre materias de interés común que exigen una línea estable de actuación.").

116. *See id.* at 122–53. The text also maintained its mention of the Catholic Church in Article 16, Paragraph 3, *see id.* at 153, contrary to the efforts of UCD representative José Pedro Pérez Llorca, who argued that such mention stemmed from direct intervention of the Catholic hierarchy. *See id.* at 99.

117. *See id.* at 153.

118. C.E. art. 16, § 1, *translated in Spanish Constitution, supra* note 18, at 1047, 1050 ("Freedom of ideology, religion and worship of individuals and communities is guaranteed, with more restrictions on their expression as may be necessary to maintain the public order protected by law.").

119. *See id.* art. 16, § 2, *translated in Spanish Constitution, supra* note 18, at 1047, 1050 ("Nobody may be compelled to make declarations regarding his religion, beliefs or ideologies.").

the state to “maintain appropriate cooperation with the Catholic Church and the other [religious denominations].”<sup>120</sup>

In this manner, the constitutional formula has made it possible to consider the religion question—which, for some, commenced with the expulsion of the Jews in 1492;<sup>121</sup> for others, with the confessional Constitution of 1812;<sup>122</sup> and for still others with the Constitution of 1931<sup>123</sup>—resolved. The constitutional solution has received the support of parliamentary groups, and has permitted a peaceful social coexistence for the Spanish people as well as the religious groups.

### *B. The Legal Regime under the Constitution*

#### *1. The General Act on Religious Freedom*

While some delegates doubted the need for the law in light of the constitutional text, Article 16 of the Constitution of 1978 has been implemented by the General Act on Religious Freedom (“General Act”). The General Act is brief, comprised of only seven articles, two transitory provisions, one derogatory disposition, and a final disposition.<sup>124</sup> Aside from describing the various ways in which the right to religious freedom is demonstrated in both public and private,<sup>125</sup> the General Act contains two articles dedicated to religious communities. As the following subsections demonstrate, both articles establish rules governing the registration of religious groups,<sup>126</sup> and

outline the manner in which religious groups may establish cooperative agreements with the Spanish government.<sup>127</sup>

120. *Id.* art. 17, § 3, translated in *Spanish Constitution*, *supra* note 18, at 1047, 1050.

121. *See, e.g.*, José Antonio Souto Paz, *La libertad religiosa: Las relaciones Iglesia y Estado* [*Religious Freedom: Church-State Relations*], in *LA CONSTITUCIÓN ESPAÑOLA DE 1978, 20 AÑOS DE DEMOCRACIA* [THE SPANISH CONSTITUTION OF 1978, 20 YEARS OF DEMOCRACY] 193, 193–210 (1998).

122. *See, e.g.*, RAMÍREZ JIMÉNEZ, *supra* note 3, at 11.

123. *See, e.g.*, DE MEER, *supra* note 3, at 23–58.

124. *See* General Act of Religious Liberty, art. 1, translated in *SPANISH LEGISLATION*, *supra* note 18, at 41, 41–46.

125. *See id.*, arts. 1–3, translated in *SPANISH LEGISLATION*, *supra* note 18, at 41, 41–42.

126. *See infra* Part III.B.1.a.

127. *See infra* Part III.B.1.b.

*a. Article 5: Registration of religious groups.* To begin, Article 5 of the General Act first creates a public registry within the Ministry of Justice in which churches, faiths, and religious communities and their affiliates may enroll.<sup>128</sup> The registry—the official name of which is the Registry of Religious Entities (“*Registro de Entidades Religiosas*”)<sup>129</sup>—is similar to that created by the Constitution of 1931,<sup>130</sup> but has an entirely different purpose. The Constitution of 1931 sought to legalize and control religious groups while simultaneously limiting their rights within the standard system for associations by prohibiting certain activities and requiring religious groups to submit to the state’s economic control.<sup>131</sup> By contrast, the modern Registry of Religious Entities is not obligatory—groups may choose instead to enroll in the common registry for associations.<sup>132</sup> Furthermore, the Registry creates a broader juridical framework than did the common registry, thereby allowing greater development of religious associations.<sup>133</sup>

The Registry of Religious Entities limits enrollment to those

128. See General Act of Religious Liberty, art. 5, § 1, translated in SPANISH LEGISLATION, *supra* note 18, at 41, 43.

129. See Art. 1 of the R.D. 142/1981, de 9 de Enero, de la Organización y el Funcionamiento del Registro de Entidades Religiosas [Royal Decree 142/19981, of January 9, Concerning the Organization and Functioning of the Registry of Religious Entities] (B.O.E. 1981, 27) [hereinafter Royal Decree on the Registry of Religious Entities], translated in SPANISH LEGISLATION, *supra* note 18, at 123, 123.

130. Compare C.E. de 1931 art. 26, cl. 5, reprinted in Mantecón Sancho, *supra* note 5, at 267, 267 (“Las demás organizaciones [que no queden disueltas bajo Artículo 26] se someterán a una ley especial votada por estas Cortes Constituyentes y ajustada a las siguientes bases: . . . 2<sup>ª</sup> Inscripción de las que deben subsistir, en un Registro especial dependiente del Ministerio de Justicia.), with General Act of Religious Liberty, art. 5, § 1 (“Las Iglesias, Confesiones y Comunidades religiosas y sus Federaciones gozarán de personalidad jurídica una vez inscritas en el correspondiente Registro público, que se crea, a tal efecto, en el Ministerio de Justicia.”).

131. See C.E. de 1931 art. 26. See *supra* note 39 for the full Spanish text of this article and *supra* notes 51–55 and accompanying text for a brief analysis of its provisions.

132. See General Act of Religious Liberty, art. 5, § 2, translated in SPANISH LEGISLATION, *supra* note 18, at 41, 43 (“Registration shall be granted by virtue of an application . . .”); see also Royal Decree on the Registry of Religious Entities, art. 3, § 1, translated in SPANISH LEGISLATION, *supra* note 18, at 123, 124 (“Inscription shall be made by request of the respective Entity . . .”).

133. See *id.* art. 6, translated in SPANISH LEGISLATION, *supra* note 18, at 41, 43–44 (recognizing religious groups’ full autonomy and capacity to create associations and institutions consistent with their religious purposes); see also SOUTO PAZ, *supra* note 16, at 124–25 (discussing the differences between registration in the Registry of Religious Entities and the common registry).

groups that pursue a “religious purpose.”<sup>134</sup> The General Law expressly excludes all groups “related to or engaging in the study of and experimentation with psychic or parapsychological phenomena[,] or the dissemination of humanistic or spiritualist values or other similar non-religious aims.”<sup>135</sup> Denying membership to religious groups on the basis that they are not religious in character—meaning that they lack religious objectives<sup>136</sup>—has led to inconsistent administrative practices<sup>137</sup> and legal decisions.<sup>138</sup> At the heart of this matter is the debate as to what objectives and purposes should be considered religious. This question has not been simple for Spain—or any other country or entity, for that matter—to answer. During a meeting of the Congress of World Religions, for example, the issue was tabled because delegates from differing religions could not agree on a suitable definition of “religion.”<sup>139</sup> Similarly, in Spain, “the concept of ‘religious purposes’ is confusing because the law

provides no legal definition. It [only] comes close to defining religious purpose in the negative sense . . . .”<sup>140</sup>

134. *Id.* art. 5, § 2, translated in SPANISH LEGISLATION, *supra* note 18, at 41, 43; see also Royal Decree on the Registry of Religious Entities, art. 3, § 1(c), translated in SPANISH LEGISLATION, *supra* note 18, at 123, 124 (“The following information is necessary for inscription: . . . Religious objectives . . .”).

135. General Act of Religious Liberty, art. 3, translated in SPANISH LEGISLATION, *supra* note 18, at 41, 42.

136. See Javier Martínez Torrón, *Freedom of Religion in the Case Law of the Spanish Constitutional Court*, 2001 BYU L. REV. 711.

137. See BEATRIZ SOUTO GALVÁN, EL RECONOCIMIENTO ESTATAL DE LAS ENTIDADES RELIGIOSAS [STATE RECOGNITION OF RELIGIOUS ENTITIES] 94 (2000).

138. See Martínez Torrón, *supra* note 136.

139. See Hans Küng, *The History, Significance and Method of the Declaration Toward a Global Ethic*, in PARLIAMENT OF THE WORLD’S RELIGIONS, A GLOBAL ETHIC: THE DECLARATION OF THE PARLIAMENT OF THE WORLD’S RELIGIONS 43, 63–64 (Hans Küng & Karl-Josef Kusche eds., 1993) (“[B]ecause some religious leaders of the various guest committees [of the Parliament of the World’s Religions in 1993], with the best intentions in the world, had quite ingenuously used the names ‘God the Almighty’ and ‘God the Creator’ in their invocations, prayers and blessings at the opening plenary and on other occasions, and had spoken of the need to ‘strive for a unity of religions under God’, *leading Buddhists during the Parliament felt called on to protest*. . . . Buddhism is not a religion of God. Buddhism is a religion of wisdom, enlightenment and compassion.”). Significantly, if the Spanish Registry of Religious Entities were to apply the concept of religion formulated in several court opinions and some sectors of legal doctrine, it is evident that the Registry would not be able to permit any Buddhist group to register.

140. Rosa María Martínez de Codes, *The Contemporary Form of Registering Religious*



*b. Article 7: Cooperation Agreements*<sup>141</sup> *with the state.* The General Act implements the cooperation required by Article 16, section 3 of the Constitution of 1978 through “Co-operation Agreements or Conventions . . . with . . . Churches, Faiths or religious Communities” (“Cooperation Agreements”).<sup>142</sup> In order to participate in these agreements, the national legislature requires that groups be enrolled in the Registry of Religious Entities and to have achieved a “[conspicuous presence] in Spanish society, due to their [extent] [and] number of followers.”<sup>143</sup> The Spanish Parliament must then approve all agreements made between the government and the religious groups.<sup>144</sup>

In this regard, there has been difficulty both in interpreting the term “conspicuous presence”<sup>145</sup> and determining the scope of state cooperation, which may be regulated by the agreements themselves.<sup>146</sup> As for the cooperation requirement, only one reference explicitly states that such agreements may extend to religious entities “the tax benefits applied by ordinary legislation to non-profit Entities and other Charitable organisations.”<sup>147</sup>

In a state such as Spain where freedoms have been assured, it is difficult to identify issues that require bilateral treatment. The obvi-

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*Entities in Spain*, 1998 BYU L. REV. 369, 379.

141. Art. 7, § 1 of the General Act of Religious Freedom (B.O.E., 1980, 177), *translated in SPANISH LEGISLATION*, *supra* note 18, at 41, 44.

142. *Id.*, *translated in SPANISH LEGISLATION*, *supra* note 18, at 41, 44.

143. *Id.*, *translated in SPANISH LEGISLATION*, *supra* note 18, at 41, 44. Editors’ note: As used in the original Spanish text of Article 16, section 3, the term of art “*notorio arraigo*” lacks an English-language equivalent. Rather than using the term “notorious influence” adopted by the Spanish Department of Religious Affairs, *see id.*, *translated in SPANISH LEGISLATION*, *supra* note 18, at 41, 44, the editors, after much deliberation, have elected to use the term “conspicuous presence,” believing that it provides a more exact translation while avoiding the negative connotations associated with the word “notorious.” For similar reasons, this article also employs the term “extent,” rather than “domain,” *see id.*, *translated in SPANISH LEGISLATION*, *supra* note 18, at 41, 44, for the term “*ámbito*.”

144. *See* General Act of Religious Freedom, art. 7, § 1, *translated in SPANISH LEGISLATION*, *supra* note 18, at 41, 44.

145. *See* JOAQUÍN MANTECÓN SANCHO, LOS ACUERDOS DEL ESTADO CON LAS CONFESIONES ACATÓLICAS [THE STATE AGREEMENTS WITH NON-CATHOLIC FAITHS] 17–21, 155–56 (1995). *But see* Alberto de la Hera, *Relations with Religious Minorities: The Spanish Model*, 1998 BYU L. REV. 387, 391 (“The facts themselves have demonstrated what should be understood by the expression ‘[conspicuous presence]’ . . .”).

146. *See* de la Hera, *supra* note 145, at 388.

147. General Act of Religious Liberty, art. 7, § 2, *translated in SPANISH LEGISLATION*, *supra* note 18, at 41, 44.

ous exception lies with religious groups' peculiarities, which may be dealt with on an individual basis. Given the state's guarantee of religious and other freedoms, therefore, the Cooperation Agreements tend to focus more on state financial assistance designed to help religious groups accomplish their specific aims rather than on state recognition of specific liberties.<sup>148</sup> These Agreements will be considered in greater depth in the following subsection.

## 2. *Cooperation Agreements with religious entities*

Under Article 7 of the General Act, the Spanish government has further developed its legal regime governing religious freedom and authorized entering into Cooperation Agreements Cooperation Agreements with several religious entities. To date, the state has established Cooperation Agreements with the Catholic Church<sup>149</sup> and three non-Catholic religious groups—the Federation of Evangelical Religious Entities of Spain, the Federation of Jewish Communities of Spain, and the Islamic Commission of Spain.<sup>150</sup> As the following subsections demonstrate, these Cooperation Agreements benefit both the state and the religious entities involved by “regulat[ing] their mutual relations” while simultaneously obliging the state to “as-sum[e] certain commitments of cooperation.”<sup>151</sup>

*a. Agreements with the Catholic Church.* As noted previously, the Spanish state made a commitment with the Catholic Church to replace the Concordat of 1953 by signing sectorial agreements permitting state regulation of so-called “mixed issues.”<sup>152</sup> As memorialized in the 1976 Agreement, the state's commitment did not establish a precise deadline for action; nevertheless, the 1976 Agreement apparently contained a secret arrangement that entailed effectuation within two years.<sup>153</sup> The abbreviated process for drafting the Constitution did not permit fulfillment of this term: The sectorial agree-

148. *See infra* Part III.B.2.a–b.

149. *See infra* Part III.B.2.a.

150. *See infra* Part III.B.2.b.

151. Alberto de la Hera & Rosa María Martínez de Codes, *Introduction*, in SPANISH LEGISLATION ON RELIGIOUS AFFAIRS, *supra* note 18, at 11, 14.

152. *See supra* note 91 and accompanying text. According to ecclesiastical terminology, the term “mixed issues” encompasses those matters over which the Church for centuries exercised a certain monopoly, and that currently have become the responsibility of the state (e.g., marriage, education, etc.).

153. *See* SOUTO PAZ, *supra* note 16, at 290–91.

ments were completed, however, even as the Constitution was being debated and drafted, and were signed by government representatives and the Holy See on January 3, 1979,<sup>154</sup> just a few days after the promulgation of the Constitution.<sup>155</sup>

Thereafter, possessing constitutional authorization to maintain cooperative relations with the Catholic Church and having made the commitment outlined in the 1976 Agreement, the government could finally enter into agreements that were constitutionally authorized. Moreover, the government could proceed to void the Concordat of 1953, which had not been officially rejected but yet clearly contradicted the newly ratified Constitution.<sup>156</sup>

Though this article's limited scope does not permit an analysis of the sectorial agreements' content,<sup>157</sup> certain observations should be made. First, the sectorial agreements with the Holy See followed established procedures and thus enjoy the status of international treaties.<sup>158</sup> Second, the agreements were implemented before the promulgation of the General Act. Third, the agreements created certain mechanisms for interpreting and applying their content, which

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154. See Preamble of the Instrumento de Ratificación del Acuerdo entre el Estado español y la Santa Sede sobre asuntos económicos [Instrument of Ratification of the Agreement between the Spanish state and the Holy See Concerning Economic Affairs] (B.O.E. 1979, 300), translated in SPANISH LEGISLATION, *supra* note 18, at 63, 63 [hereinafter Agreement Concerning Economic Affairs]; Preamble of the Instrumento de Ratificación del Acuerdo entre el Estado español y la Santa Sede sobre asuntos jurídicos [Instrument of Ratification of the Agreement between the Spanish state and the Holy See Concerning Legal Affairs] (B.O.E. 1979, 300), translated in SPANISH LEGISLATION, *supra* note 18, at 51, 51 [hereinafter Agreement Concerning Legal Affairs]; Preamble of the Instrumento de Ratificación del Acuerdo entre el Estado español y la Santa Sede sobre Enseñanza y Asuntos Culturales [Spain's Instrument of Ratification of the Agreement Between the Spanish state and the Holy See Concerning Education and Cultural Affairs] (B.O.E., 1979, 300), translated in SPANISH LEGISLATION, *supra* note 18, at 57, 57 [hereinafter Agreement Concerning Education and Cultural Affairs]; Preamble of the Instrumento de Ratificación del Acuerdo entre el Estado español y la Santa Sede sobre la asistencia religiosa a las Fuerzas Armadas y el Servicio militar de clérigos y religiosos [Instrument of Ratification of the Agreement Between the Spanish state and the Holy See Concerning Religious Assistance to the Armed Forces and the Military Service of Clergymen and Members of Religious Orders] (B.O.E. 1979, 300), translated in SPANISH LEGISLATION, *supra* note 18, at 69, 69 [hereinafter Agreement Concerning Religious Assistance].

155. The Constitution was promulgated on December 31, 1978, only four days before the ratification of the 1979 Agreements. See *supra* note 117 and accompanying text.

156. Cf. SOUTO PAZ, *supra* note 16, at 291.

157. For such analyses, see generally, for example, SOUTO PAZ, *supra* note 16, at 289–344.

158. See Ibán, *supra* note 16, at 98.

mechanisms are aside from those provided in ordinary legislation about such matters.<sup>159</sup>

The sectorial agreements' recognition of freedoms granted to the Catholic Church for conducting its activities in Spain simply reiterates those freedoms guaranteed in the Constitution and legislation flowing from it. Singularities do appear, however, as to how the agreements treat state financial support of the Church. Under the rubric established by the Agreement Concerning Economic Affairs and subsequent legislation, the Spanish government and Catholic Church instituted a three-phase system designed to help the Church achieve financial self-sufficiency.<sup>160</sup> The first phase replaced the then-existing system with the provision of financing from the state's general budget.<sup>161</sup> Financing through the general budget was in turn replaced by a system that assigned tax revenues to the Catholic Church.<sup>162</sup> Under this so-called "tax-revenue assignment" system, the state grants the Church a certain percentage—calculated in 1991 to be 0.52%<sup>163</sup>—of the income taxes paid by those taxpayers who expressly designate on their tax returns that such an assignment should be made from their tax revenues.<sup>164</sup> The corresponding percentage of

159. Each of the Cooperation Agreements with the Catholic Church contains the following provision: "The Holy See and the Spanish Government shall proceed by common consent in the resolution of any doubts or differences that may arise in the interpretation or application of any clause of this Agreement, guided by the principles that inform it." Agreement Concerning Economic Affairs, art. 6, *translated in* SPANISH LEGISLATION, *supra* note 18, at 63, 66; *see also* Agreement Concerning Education and Cultural Affairs, art. 16, *translated in* SPANISH LEGISLATION, *supra* note 18, at 57, 61; Agreement Concerning Legal Affairs, art. 7, *translated in* SPANISH LEGISLATION, *supra* note 18, at 51, 54; Agreement Concerning Religious Assistance, art. 7, *translated in* SPANISH LEGISLATION, *supra* note 18, at 69, 71.

160. *See* Agreement Concerning Economic Affairs, art. 2, § 5, *translated in* SPANISH LEGISLATION, *supra* note 18, at 63, 64.

161. *See* Agreement Concerning Economic Affairs, art. 2, § 4, *translated in* SPANISH LEGISLATION, *supra* note 18, at 63, 64.

162. *See id.* art. 2, §§ 2–3, *translated in* SPANISH LEGISLATION, *supra* note 18, at 63, 63–64. Article 2, section 4 further mandates that during the three-year transitional period, the amount assigned to the Church would equal the amount of the "budgetary bequest" for the previous year. *Id.* art. 2, § 4, *translated in* SPANISH LEGISLATION, *supra* note 18, at 63, 64.

163. *See* SOUTO PAZ, *supra* note 16, at 326.

164. *See id.* art. 2, § 2, *translated in* SPANISH LEGISLATION, *supra* note 18, at 63, 63–64. The Spanish tax revenue assignment system, while inspired by the German system, differs in a significant way. Specifically, German legislation establishes an obligatory religion tax for all those who profess a religious denomination; the resulting tax is added to the personal income tax. *See* Gerhard Robbers, *State and Church in Germany*, in *EUROPEAN UNION*, *supra* note 10, at 57, 68–69. The German system is based on the conception of religious faiths as public

tax paid by persons who do not assign their tax money to the Church is used for “other [social] purposes.”<sup>165</sup> Notably, the time limits envisioned for changing from the general budget system to the tax assignment system<sup>166</sup> expired long ago, meaning that the strict tax-revenue assignment is not yet in force. Consequently, the current system of state financing of the Catholic Church combines aspects of the general budget and tax assignment systems, granting the Church an amount of the state budget equal to the amount attributed to the Church through the tax-revenue assignment system.<sup>167</sup>

Disagreements exist between the state and the Catholic hierarchy regarding such items as the rate applicable to tax-revenue assignment and how taxes not specifically earmarked for the Catholic Church should be distributed. Catholic leaders, for example, desire that the rate be increased.<sup>168</sup> Furthermore, the Church opposes both using such funds for “social purposes,” and the fact that tax revenues are automatically directed to social purposes if not specifically designated for the Catholic Church. The state’s fundamental objection to Catholic demands is that because the Catholic Church is the only faith that expressly receives financing through taxation, allowing the Church access to these other funds would violate the principle of equality.

Another reason for disagreement between the Catholic Church and the Spanish government can be found in the field of education. Education remains an area of constant conflict, as illustrated by the education laws passed during Spain’s socialist era: the General Act

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law corporations and the state’s corresponding right to impose taxes. *See id.* This system, established throughout the nineteenth century, currently adds a tax of between eight and nine percent to the regular personal income tax. *See id.*

The Spanish system, in contrast, deducts from the personal income tax an amount (0.52%) that goes to the Catholic Church, if the taxpayer so designates, or to other religious ends. *See* Agreement Concerning Economic Affairs, art. 2, § 2, *translated in* SPANISH LEGISLATION, *supra* note 18, at 63, 64.

165. Agreement Concerning Economic Affairs, art. 2, § 2, *translated in* SPANISH LEGISLATION, *supra* note 18, at 63, 63–64.

166. *See* CONCEPCIÓN PRESAS BARROSA, EL PATRIMONIO HISTÓRICO ECLESIAÍSTICO EN EL DERECHO ESPAÑOL [ECCLESIASTICAL HISTORICAL PATRIMONY IN SPANISH LAW] 223–27 (1994) (discussing the time periods changed and implemented by the Law of 33/1987).

167. *See* SOUTO PAZ, *supra* note 16, at 326–27, at 326–27.

168. In the Law of the General State Budget for the Year 2000, this criterion was modified, as those returns that failed to expressly assign their revenue to either the Catholic Church or social interest purposes had their revenues split equally between the two. *See* the Ley de Presupuestos Generales del Estado para 2000 [Law of the General Budget for the Year 2000].

Regulating the Right to Education (*Ley Orgánica 8/1985 Reguladora del Derecho a la Educación*, or LODE)<sup>169</sup> and the General Act on the General Regulation of the Educational System (*Ley Orgánica de Ordenación General del Sistema Educativo*, or LOGSE).<sup>170</sup> Prominent points of conflict center on such issues as the financing of private schools,<sup>171</sup> the composition of school councils and boards,<sup>172</sup> and the financing of primary education.<sup>173</sup>

The most debated question, however—and the subject of numerous judicial decisions<sup>174</sup>—concerns the teaching of Catholicism in public schools. The Agreement Concerning Education and Cultural Affairs provides that school curricula, except those at the university level, “shall include the teaching of the Catholic Religion in all Educational Centers, [under] conditions comparable to those of the basic subjects.”<sup>175</sup> “Out of respect for freedom of conscience,” however, classes on Catholic doctrine “shall not be obligatory for all students.”<sup>176</sup> Students nevertheless will enjoy the right to study Catholicism.<sup>177</sup> The content of this religious teaching, as well as the choice of textbooks and teachers, remains the responsibility of Catholic leaders.<sup>178</sup> Teachers of Catholicism form part of the faculty, and their salaries are paid according to agreements between the government and the Church.<sup>179</sup>

School administrators’ interpretations of the expression “[under] conditions comparable to those of the basic subjects” have engen-

169. Ley Orgánica 8/1985, de 3 de julio, Reguladora del Derecho a la Educación [General Act 8/1985, of July 3, 1985, Regulating the Right to Education] (B.O.E., 1985, 159).

170. Ley Orgánica 1/1990, de 3 de octubre, de Ordenación General del Sistema Educativo [General Act 1/1990, of October 3, of General Regulation of the Educational System] (B.O.E. 1990, 238).

171. See Articles 10, section 3 and Articles 47–51 of the General Act 9/1985, which contain the relevant provisions at issue.

172. The provisions at issue are found in Articles 54–61 of the General Act 9/1985.

173. Primary education is excluded from the concierto con los centros privados.

174. See Martínez Torrón, *supra* note 136.

175. Art. 2 of the Agreement Concerning Education and Cultural Affairs, (B.O.E. 1979, 300), translated in SPANISH LEGISLATION, *supra* note 18, at 57, 58.

176. *Id.*, translated in SPANISH LEGISLATION, *supra* note 18, at 57, 58.

177. See *id.*, translated in SPANISH LEGISLATION, *supra* note 18, at 57, 58.

178. See *id.* arts. 2–3, translated in SPANISH LEGISLATION, *supra* note 18, at 57, 58; see also *id.* art. 6, translated in SPANISH LEGISLATION, *supra* note 18, at 57, 59 (assigning the responsibility of selecting “the contents” course on teaching Catholicism to the Catholic hierarchy).

179. See *id.* arts. 3, 7, translated in SPANISH LEGISLATION, *supra* note 18, at 57, 58–59.

dered different responses. Some schools, for example, assign different values to religion grades and provide an alternative for students who choose not to take a religion class.<sup>180</sup> These varied responses have resulted in various Supreme Court decisions<sup>181</sup> as well as experimentation with alternative systems.<sup>182</sup> Similarly, schools have treated the academic and economic validation of religion teachers in different ways.<sup>183</sup>

The most profound disagreements between the Spanish state and the Catholic Church occur, when legislation attempting to implement certain constitutional precepts conflicts with Catholic ethics. State regulation of divorce, for example, was an issue that initially appeared to enjoy a consensus, at least in a broad sense. During parliamentary debate, however, the issue evolved into a divisive controversy, nearly splitting the ruling party and giving rise to condemnatory protests by the ecclesiastical hierarchy.<sup>184</sup>

The issue of abortion, like divorce, comprises another area of deep disagreement between the government and the Church. Though Article 15 of the Constitution states that "every person has the right to life,"<sup>185</sup> this rather ambiguous formula did not impede ratification of a law decriminalizing abortion.<sup>186</sup> Nevertheless, a law-

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180. See Martínez Torrón, *supra* note 136.

181. See *id.*

182. See *id.* Successive arrangements have established the following alternatives to instruction in Catholicism: instruction in ethics, assisted studies, and instruction on society, culture and religion. See *id.*

183. See *id.* Professors who teach Catholicism are selected by the ecclesiastical hierarchy, which also possesses the authority to terminate them; however, the obligation to pay religion teachers belongs to the state. See *id.* This situation complicates any attempt to draft a statute concerning teachers of Catholicism that would not be applied to other public-school teachers. The difficulty lies in the fact that the other teachers are selected by public institutions through a selection process that evaluates training and professional competence without regard to ideological or religious beliefs.

184. Aside from its habitual criticisms of divorce, the Catholic hierarchy sought to have canonical marriage excluded from regulation of divorce, invoking to that effect Article 6, section 3 of the Agreement Concerning Legal Affairs, see LA INDISOLUBILIDAD ES UNA PROPIEDAD ESENCIAL DE MATRIMONIO CANÓNICO, which states that "the Holy See affirms the permanent value of its doctrine concerning marriage and reminds those who celebrate marriage in accordance with canon law of the serious obligation they assume to abide by the canon rules regulating marriage and, especially, to respect such rules' essential meaning." Art. 6, § 3 of the Agreement Concerning Legal Affairs, (B.O.E. 1979, 300), translated in SPANISH LEGISLATION, *supra* note 18, at 51, 54.

185. C.E. art. 15, translated in *Spanish Constitution*, *supra* note 18, at 1047, 1050.

186. See SOUTO PAZ, *supra* note 15, at 350.

suit attacking the new law's constitutionality was soon filed.<sup>187</sup> In that case, the Supreme Court held that human life is a fundamental value worthy of judicial protection, and that such protection extends to the unborn.<sup>188</sup> The Court ultimately upheld the decriminalization law, however, by balancing the competing interests involved.<sup>189</sup>

Despite these difficulties, the state and Catholic Church have achieved high levels of cooperation in other areas. For example, the state has consented to facilitate the Church's provision of support to adherents in public institutions<sup>190</sup> and the armed forces.<sup>191</sup> Furthermore, the Church has helped preserve Spain's ecclesiastical art and history, as Catholic leaders have signed agreements with each of the country's autonomous communities concerning the protection of Spain's ecclesiastical heritage.<sup>192</sup>

### *C. Agreements with Minority Faiths*

Under the rubric of Article 7 of the General Act on Religious Freedom, minority religions have enjoyed the opportunity to establish Agreements with the state.<sup>193</sup> As indicated above, a federation of Evangelical churches, a conglomerate of Jewish groups, and the Islamic community have signed such agreements, all of which enjoy parliamentary approval.<sup>194</sup> In these agreements, the following points

187. *See id.* at 353.

188. *See* 355–57.

189. *See id.* at 357–61. *See also* José Antonio Souto Paz, *Autonomía procreativa y protección de la vida: La cuestión del aborto [Procreative Autonomy and the Protection of Life]*, 5 DERECHO Y OPINIÓN 413 (1997) for an analysis of the constitutional jurisprudence concerning this issue.

190. *See* SOUTO PAZ, *supra* note 16, at 343–44.

191. *See id.* at 333–38.

192. *See* 4 ANDRÉS C. ÁLVAREZ CORTINA, *FUNCIÓN PRÁCTICA DE LOS ACUERDOS IGLESIA-COMUNIDADES AUTÓNOMAS EN MATERIA DE PATRIMONIO-ARTÍSTICO [THE PRACTICAL FUNCTION OF THE CHURCH-AUTONOMOUS COMMUNITY AGREEMENTS ON ARTISTIC PATRIMONY ISSUES]* 265–85 (1988); PRESAS BARROSA, *supra* note 166, at 117–138 (1994). The following Autonomous Communities have concluded agreements with the Catholic Church: Cataluña, Castilla-León, Aragón, Galicia, Baleares, Extremadura, Murcia, Cantabria, País Vasco, Andalucía, La Rioja, Castilla-La Mancha, Asturias, Navarra, Madrid, and Canarias. *See id.* at 117 n.184.

193. *See* Art. 7, § 1 of the General Act of Religious Liberty, *translated in* SPANISH LEGISLATION, *supra* note 18, at 41, 44.

194. *See* Ley 26/1992, del 10 de noviembre, Aprobando el Acuerdo de Cooperación entre el Estado y la Comisión Islámica de España [Law 26/1992, of Nov. 10, Approving the Agreement of Cooperation Between the State and the Islamic Committee of Spain] (B.O.E. 1992, 272) [hereinafter Islamic Agreement], *translated in* SPANISH LEGISLATION, *supra* note



are noteworthy: legal protection for places of worship<sup>195</sup> and for ministers (including the recognition of confidentiality of facts learned during pastoral activities and permitting ministers to participate in Spain's Social Security program);<sup>196</sup> state recognition of the civil validity of marriages performed according to Evangelical, Islamic, and Jewish rites;<sup>197</sup> and acknowledgment of the right of soldiers to pastoral support within military establishments, and of a similar right for those interred in hospitals or penitentiaries.<sup>198</sup>

In the area of education, the Cooperation Agreements guarantee the three faiths' access to school grounds as well as the availability of classrooms for religious instruction under the direction of ministers from each faith.<sup>199</sup> Moreover, the Agreements also provide the three

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18, at 101; Ley 25/1992, del 10 de noviembre, Aprobando el Acuerdo de Cooperación entre el Estado español y la Federación de Comunidades Israelitas de España [Law 25/1992, of Nov. 10, Approving the Agreement of Cooperation Between the Spanish State and the Federation of Jewish Communities of Spain] (B.O.E. 1992, 272) [hereinafter Jewish Agreement], *translated in* SPANISH LEGISLATION, *supra* note 18, at 87; Ley 24/1992, del 10 de noviembre, Aprobando el Acuerdo de Cooperación entre el Estado español y la Federación de Entidades Religiosas Evangélicas de España [Law 24/1992, of Nov. 10, Approving the Agreement of Cooperation Between the Spanish State and the Federation of Evangelical Religious Entities of Spain] (B.O.E. 1992, 272) [hereinafter Evangelical Agreement], *translated in* SPANISH LEGISLATION, *supra* note 18, at 75; *see also* CONGRESO INTERNACIONAL DE DERECHO ECLESIASTICO DEL ESTADO, ACUERDOS DEL ESTADO ESPAÑOL CON CONFESIONES RELIGIOSAS MINORITARIAS: ACTAS DEL 7 CONGRESO INTERNACIONAL DE DERECHO ECLESIASTICO DEL ESTADO [AGREEMENTS OF THE SPANISH STATE WITH MINORITY RELIGIOUS FAITHS: ACTS OF THE SEVENTH INTERNATIONAL CONGRESS OF STATE ECCLESIASTICAL LAW] (Victor de Reina & Ma. Angeles Félix Ballesta eds., 1996) (outlining and discussing the State agreements with minority faiths).

195. *See* Evangelical Agreement, app., art. 2, *translated in* SPANISH LEGISLATION, *supra* note 18, at 75, 78; Islamic Agreement, app., art. 2, *translated in* SPANISH LEGISLATION, *supra* note 18, at 101, 104–05; Jewish Agreement, app., art. 2, *translated in* SPANISH LEGISLATION, *supra* note 18, at 87, 90–91.

196. *See* Evangelical Agreement, app., arts. 3–5, *translated in* SPANISH LEGISLATION, *supra* note 18, at 75, 78–79; Islamic Agreement, app., arts. 3–5, *translated in* SPANISH LEGISLATION, *supra* note 18, at 101, 105–06; Jewish Agreement, app., arts. 3–5, *translated in* SPANISH LEGISLATION, *supra* note 18, at 87, 91–92.

197. *See* Evangelical Agreement, app., art. 7, *translated in* SPANISH LEGISLATION, *supra* note 18, at 75, 79–80; Islamic Agreement, app., art. 7, *translated in* SPANISH LEGISLATION, *supra* note 18, at 101, 106–07; Jewish Agreement, app., art. 7, *translated in* SPANISH LEGISLATION, *supra* note 18, at 87, 92–93.

198. *See* Evangelical Agreement, app., arts. 8–9, *translated in* SPANISH LEGISLATION, *supra* note 18, at 75, 80–81; Islamic Agreement, app., arts. 8–9, *translated in* SPANISH LEGISLATION, *supra* note 18, at 101, 107–08; Jewish Agreement, app., arts. 3–5, *translated in* SPANISH LEGISLATION, *supra* note 18, at 87, 93–94.

199. *See* Evangelical Agreement, app., art. 10, *translated in* SPANISH LEGISLATION, *supra* note 18, at 75, 81–82; Islamic Agreement, app., art. 10, *translated in* SPANISH LEGISLATION,

faiths with certain exemptions and fiscal benefits. Donations from the faithful, for example, receive special tax treatment, and donors may deduct such monies for personal income tax purposes.<sup>200</sup> Furthermore, the Agreements guarantee the right of a weekly day of rest on the appointed day for each faith, along with the right to participate in other religious holidays.<sup>201</sup> Notably, these rights exist in both the academic setting and the workforce; as to the latter, however, employers and employees must make specific agreements.<sup>202</sup>

The Cooperation Agreements described above either extend or specify the rights already recognized in the General Act. Except in the case of exemptions and tax benefits, however, the agreements do not address questions of government-aided financing; these are left to government agencies.<sup>203</sup> This arrangement constitutes one of the fundamental differences in comparison to the agreements enjoyed by the Catholic Church with the state. Acting unilaterally, however, through either ordinary legislation or lower-level regulation, the government has extended financial aid to the three faiths in various ways, such as religious education and pastoral support. These actions have helped overcome the differences between the minority religions' agreements and those of the Catholic Church.

#### IV. CONCLUSION

One must view the last twenty years of church-state relations as highly positive. The established juridical framework, for example, has allowed three political parties to govern without producing any unusual difficulties. Indeed, the major disagreements from the 1970s to

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*supra* note 18, at 101, 109; Jewish Agreement, app., art. 10, *translated in* SPANISH LEGISLATION, *supra* note 18, at 87, 94–95.

200. See Evangelical Agreement, app., art. 11, *translated in* SPANISH LEGISLATION, *supra* note 18, at 75, 82–84; Islamic Agreement, app., art. 11, *translated in* SPANISH LEGISLATION, *supra* note 18, at 101, 109–11; Jewish Agreement, app., art. 11, *translated in* SPANISH LEGISLATION, *supra* note 18, at 87, 95–97.

201. Evangelical Agreement, app., art. 12, *translated in* SPANISH LEGISLATION, *supra* note 18, at 75, 84; Islamic Agreement, app., art. 12, *translated in* SPANISH LEGISLATION, *supra* note 18, at 101, 111–12; Jewish Agreement, app., art. 12, *translated in* SPANISH LEGISLATION, *supra* note 18, at 87, 97.

202. See Evangelical Agreement, app., art. 12, *translated in* SPANISH LEGISLATION, *supra* note 18, at 75, 84; Islamic Agreement, app., art. 12, *translated in* SPANISH LEGISLATION, *supra* note 18, at 101, 111–12; Jewish Agreement, app., art. 12, *translated in* SPANISH LEGISLATION, *supra* note 18, at 87, 97.

203. See SOUTO PAZ, *supra* note 15, at 614–15.

the present have had nothing to do with the tensions of the Second Republic or the Franco regime.

The legal regime established by the Constitution of 1978 and subsequent legislation has provided a positive framework for the development of religious freedom and church-state relations in Spain. Without falling into hyperbole, one can affirm that the religion question—an issue that confronted the Constitution's drafters and threatened social order—has been satisfactorily overcome. Indeed, the norms regarding religious freedom in the Spanish legal system have earned praise in international forums and serve as a model of relations between the state and religious groups.

Recently, the Spanish Department of Religious Affairs organized in Toledo a conference involving the three religious cultures historically present in Spain—Christianity, Islam, and Judaism. In that convocation, representatives from international organizations (including the United Nations, UNESCO, and others) and religious groups—both Spanish and foreign—praised Spain's juridical framework for developing religious freedom. Constitutional consensus and the unprejudiced recognition of full personal and collective liberty have allowed Spain to overcome a prodigious historical problem. That triumph guarantees peaceful coexistence in a multicultural society where religious pluralism constitutes one of the most significant manifestations of diversity.