

# Religious Freedom and Democratic Change in Spain<sup>1</sup>

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## I. INTRODUCTION

It is probably not pretentious to assert that in the second half of the 1970s Spain experienced one of the most successful democratic transitions in history. The metamorphosis of Spain's political system was achieved very efficiently, quickly, peacefully, and with the consensus of the vast majority of Spanish citizens and political forces. This is certainly unusual considering Spain's political history, during which democracy had neither deep nor long-lasting roots.

Within Spain's turbulent twentieth century, the mid-1970s political reform had been preceded by thirty-six years of General Francisco Franco's dictatorship, which began in 1939 after three years of civil war that put an end to the Second Republic.<sup>2</sup> Shortly

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1. This essay is inspired by the paper presented to the first plenary session of the *12th International Law and Religion Symposium: Religion and the World's Legal Traditions*, Brigham Young University, Provo, Utah, October 2–5, 2005. Parts of its content proceed from the Research Project BJU2002-03813, funded by the Spanish Ministry of Education and Science, under the direction of Professor Rafael Navarro-Valls, Complutense University. When giving my oral presentation, I assumed that the people in the audience were not necessarily familiar with the legal analysis of church-state issues or with the Spanish system of church-state relations (historical and present). In writing this text, I have assumed that the same is probably true with regard to the potential readers of this article. This has moved me to include some clarifications that would normally be unnecessary were I writing for Spanish jurists. In general, I have preferred to restrict bibliographical and legal quotations to a minimum, indicating, in due course, the sources in which further references can be found. For an interesting and complete data base on publications related to the Spanish law on religious issues, see the Internet pages of the *Área de Derecho Eclesiástico del Estado* of the University of Almería (Spain), under the responsibility of Professors José María Vázquez García-Peñuela and María del Mar Martín, <http://www.ual.es/~canonico/inicio1.html> (last visited July 22, 2006).

2. The Second Republic was proclaimed by the provisional government of Spain on April 14, 1931. The military coup d'état of July 18, 1936, is usually considered to be what commenced the Spanish civil war. General Franco's troops took Madrid on March 28, 1939, and he officially announced the end of the war a few days later, on April 1.

after Franco's death in 1975,<sup>3</sup> Spain rapidly transformed into a democracy, fully complying with all international standards both on paper and in practice.<sup>4</sup> The most important instrument of that transformation, and the pillar of the subsequent development of Spain's political system, was the Constitution approved by referendum in late 1978.<sup>5</sup>

In this movement towards democracy, the 1980 Organic Law on Religious Freedom (*Ley Orgánica de Libertad Religiosa*)<sup>6</sup> played an essential role. It was the first enacted "organic law" to implement the fundamental rights recognized by the Constitution. It is important for Spaniards to remember this fact and to analyze its causes so as to not lose sight of the achievements of Spain's recent political evolution and the path Spain followed to reach them. Doing so would risk the possibility that the contemporary political atmosphere would ignore, and therefore undermine, a remarkable part of the basis upon which Spain's still-young democracy was built.

Such an analysis may be interesting beyond Spain's borders as well, especially because Spain's political situation in the 1970s is not at all unique. Although each nation has its peculiar history and circumstances, the existing analogies between some countries are significant and justify looking at what occurred in Spain twenty-five years ago. I have in mind certain analogies that relate to the political situation in the strict sense and also those relating to other issues, such as socio-religious circumstances or prevailing cultural patterns. Naturally, it is not my intention to propose that Spain's political

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3. Franco died on November 20, 1975, after a long hospital stay.

4. Naturally, this does not mean that Spain's democracy does not need to keep evolving, gaining consistency, and rooting in society. It is one thing to view democracy from the perspective of the structure and functioning of the political system, which in Spain was achieved in a few years, and a different thing to establish deep roots of democratic mentality and civic virtues in the people. The latter takes much more time and not only requires a change in the legal and political machinery that constitutes the framework of social life, but also a long and active process of educating society.

5. The Spanish Constitution was promulgated on December 27, 1978, after having been approved in referendum on December 6, 1978, by the immense majority of voters (87.78 percent, which constituted 58.97 percent of the electoral census). A succinct and precise description of the elaboration process followed by the Constitution can be found in the Internet pages of the Congreso de los Diputados (Spanish Congress), <http://www.congreso.es/funciones/constitucion/proceso.htm> (last visited July 22, 2006).

6. *Ley Orgánica 7/1980, July 5, 1980, de Libertad Religiosa* [hereinafter LOLR]. The so-called "organic laws" require an absolute majority in Congress to be approved, modified, or abrogated. The laws governing fundamental rights and public freedoms must be organic. Cf. Constitución art. 81 (Spain) [hereinafter C.E.].

transition or its system of church-state relations are models for all nations to imitate. Transplants are of dubious efficiency in comparative law as well as in politics. However, it is always useful to learn from other countries' experiences, from their mistakes, and from their accomplishments. And perhaps in this sense, Spain's example can be of use to other emerging democracies struggling with issues of religious liberty.

## II. THE HISTORICAL AND POLITICAL CONTEXT OF THE ORGANIC LAW ON RELIGIOUS FREEDOM

An adequate understanding of LOLR and the function it fulfilled as Spain transitioned to democracy requires that it be read in connection with the great document that served as the basis for the entire democratic process: Spain's 1978 Constitution. It is also necessary to situate both norms within the context of Spain's political and religious history, especially during the 20th century.<sup>7</sup>

As is well known, the vast majority of Spain's population, both traditionally and especially in the last five centuries, is Catholic.<sup>8</sup> In

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7. Among the general studies on the LOLR and on the constitutional provisions related to religion, it is worth mentioning two books published a few years after the Constitution was enacted. They contain a detailed analysis of their respective developmental process. See JOSÉ J. AMORÓS AZPILICUETA, *LA LIBERTAD RELIGIOSA EN LA CONSTITUCIÓN ESPAÑOLA DE 1978* (1984); MARÍA J. CIÁURRIZ, *LA LIBERTAD RELIGIOSA EN EL DERECHO ESPAÑOL: LA LEY ORGÁNICA DE LIBERTAD RELIGIOSA* (1984). The former also contains an interesting historical outline of how the preceding Spanish constitutions dealt with religious issues.

8. The following paragraphs contain a succinct description of well-known facts. Therefore, a few general bibliographical references will suffice here (although I will cite some more specific studies in due course). See Pedro Lombardía, *Precedentes del Derecho Eclesiástico Español, in DERECHO ECLESIASTICO DEL ESTADO ESPAÑOL 151-74* (1980) for an attractive summary of church-state relations in Spain in the last centuries. As a larger reference book on the history of the Catholic Church in Spain, see the seven volumes of *HISTORIA DE LA IGLESIA EN ESPAÑA* (Ricardo García Villoslada ed., 1982). For a foreign historian's perspective, see STANLEY G. PAYNE, *SPANISH CATHOLICISM: AN HISTORICAL OVERVIEW* (1984). For information on particular historical periods, see JOSÉ M. CUENCA TORIBIO, *RELACIONES IGLESIA-ESTADO EN LA ESPAÑA CONTEMPORÁNEA: 1833-1985* (2d ed. 1989), and *CHRISTIANS, MUSLIMS, AND JEWS IN MEDIEVAL AND EARLY MODERN SPAIN: INTERACTION AND CULTURAL CHANGE* (Mark D. Meyerson & Edward D. English eds., 1999). For a complete bibliographical reference on the history of church-state relations in Spain since its configuration as a modern state, see MARÍA R. ANDRÉS VERDÚ & ISABEL MENDOZA GARCÍA, *LAS RELACIONES IGLESIA-ESTADO: SS. XV-XX* (1995), which contains almost six hundred references. With regard to the history of Spain from a general perspective, the most complete reference work is the monumental *HISTORIA DE ESPAÑA* by Menéndez Pidal (for issues related to Part II of this paper, see volume 17).

the late fifteenth century, Spain forged its national unity together with its religious unity. The unity of the new nation was shortly followed by an ambitious enterprise: the building of an enormous overseas empire, in which the union between political unity and religious unity would exercise a decisive influence. To be a Spaniard and to be a Catholic were understood as equivalent; they were two sides of a single national identity. As a consequence, adherents of other religions (such as Judaism and Islam) who refused to convert were expelled from the kingdom. Following the same political logic, pseudo-converts and those who abandoned Catholicism to profess a heresy—particularly the doctrines of Luther or Calvin—were persecuted and, if they did not repent, publicly condemned at the hand of the Spanish Inquisition.<sup>9</sup> This explains why, until recently, Protestantism was virtually nonexistent and only a few residual—and concealed—groups of Jews and Muslims remained in Spain.

We should note that during the same historical period, nation-states were constituted all over Europe following analogous interpretations of the principle *cuius regio eius et religio* (the religion of the prince is the religion of the nation). It is thus natural that the Catholic Church exercised a tremendous influence in Spain over the last five hundred years despite the numerous sways of Spain's internal politics, which witnessed some intense episodes of anti-clericalism, and also despite repercussions felt in Spain from events occurring beyond the peninsula's borders: from the dismantling of the American empire to the influx of French-style liberalism and its subsequent withdrawal after Napoleon Bonaparte's Spanish adventure.

From this perspective, the situation was not very different in the twentieth century, the beginning of which was marked by the disappearance of overseas Spain and by the social convulsions provoked by socialist and anarchist movements, which were fueled by circumstances of severe economic shortage. A significant part of twentieth century Spanish politics revolved around church-state relations, which oscillated between two extremes: on the one hand, a

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9. I am not suggesting that the Spanish kings were determined to guarantee the kingdom's religious unity under Catholicism for merely political reasons. The Spanish monarchy—perhaps more than other monarchies of that period—was committed to defend the nation's religion largely for strictly religious reasons, at least throughout the 16th century and probably also into the 17th century. Proof of this intent is found in the policy the monarchs followed for the incorporation of the American Continent into the Kingdom of Spain.

confessional State (i.e., a State officially Catholic that protected, and somehow also controlled, the Catholic Church at the cost of the freedom of other religions or ideologies), and, on the other hand, an anti-religious, and more precisely anti-Catholic, hostility.

We can find a clear and relevant example of the latter approach in the Spanish Second Republic, Spain's last democratic experiment prior to the political transition of the 1970s.<sup>10</sup> It is well-known that the 1931 Republican Constitution, as well as subsequent legislation on religious issues, adopted a resolutely anti-Catholic attitude.<sup>11</sup> Republican legislatures and governments, especially at the beginning and end of the Republic, were determined to reduce the Catholic Church's social influence, which they considered excessive and incompatible with a democratic and secular state. They failed to accept the incontrovertible fact that the Church had an enormous weight in Spain's social structure. Consequently, they refused to enact moderate legislation that could reconcile the ecclesiastical influence with a democratic system and, at the same time, attract the ecclesiastical hierarchy towards the Republican cause. As some scholars have pointed out, "there was something anomalous in the anti-religious policy of the Second Republic," for the clergy was not fascist, although it was largely conservative, and peasants were not anti-clerical, notwithstanding the gradual de-Christianization of the working class.<sup>12</sup>

It is probably true that the construction of a strong and democratic State would have required a readjustment of church-state relations and a new conception (and decrease) of the predominant role played by the Catholic Church in Spain's political, cultural, and social life. But the Republican government went too far when adopting measures to reach an objective that, properly understood, would have been acceptable. Although it is certainly difficult to judge the protagonists of history from a contemporary perspective, it is very significant that neither the Republican Constitution's

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10. For a more detailed description with further bibliographical references, see Javier Martínez-Torrón, *Derecho de Asociación y Confesiones Religiosas en la Constitución de 1931*, in *ESTADO Y RELIGIÓN: PROCESO DE SECULARIZACIÓN Y LAICIDAD 177-204* (Dionisio Llamazares ed., 2001).

11. For a complete and interesting study on the making of the Republican Constitution's provisions on religious issues, see FERNANDO DE MEER, *LA CUESTIÓN RELIGIOSA EN LAS CORTES CONSTITUYENTES DE LA II REPÚBLICA ESPAÑOLA* (1975).

12. See Rafael Navarro-Valls, *La Iglesia y la Guerra Civil Española, in scriptis*, which I read thanks to the author's courtesy.

provisions on religious issues nor the legislation later enacted to implement them would be permitted today in light of international documents for the protection of human rights. The paradox—a cruel paradox for Spaniards—is that Second Republic politicians,<sup>13</sup> in their apparent eagerness to build a democratic state based upon respect for public freedoms (and led more by emotions than by reason), ended up amputating one of the most important liberties: freedom of religion and belief. It seems that those politicians were more interested in freeing the country from religion than in establishing the basis for freedom of religion, resembling the attitude of the French government of the Third Republic, especially from 1880 to 1905.<sup>14</sup> At times, the anti-religious obsession of some politicians became grotesque. This was the case, for instance, in the peculiar attitude shown by some leftist members of congress when the constituent Parliament (*Cortes constituyentes*) discussed equal electoral rights of Spanish citizens without making a distinction between men and women. Some leftist congressmen expressed a sturdy resistance to the granting of equal voting rights to women because they presumed that women could be more easily influenced by the clergy and would therefore constitute a “reactionary and anti-republican” force.<sup>15</sup>

In fact, the Second Republic’s lack of moderation on religious issues was, according to a great part of historians, one of the most decisive factors that triggered the civil war, which in turn led to a dictatorship of more than thirty-six years. During that somber period, Spain remained largely disconnected from the democratic nations of Europe that, after World War II, rebuilt their economies, their political life, and their cultural strength in a gradual process that developed alongside a series of increasingly significant supranational institutions. Only after Franco’s death in 1975 could Spain revive its connection with Europe.

The religious policy of General Franco’s dictatorship produced, as a pendulum reaction against Republican extremism, an

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13. This applies especially to those aligned with left-wing parties.

14. See in this regard, in the context of an interesting comparison between the constitutional principles on religion in France and in the United States, BLANDINE CHÉLINI-PONT & JEREMY GUNN, *DIEU EN FRANCE ET AUX ÉTATS-UNIS: QUAND LES MYTHES FONT LA LOI* 25–33 (2005).

15. See FRANCISCO MARTÍ GILABERT, *POLÍTICA RELIGIOSA DE LA SEGUNDA REPÚBLICA ESPAÑOLA* 107–08 (1998).

unmistakable return to the notion of a Catholic confessional State.<sup>16</sup> The ecclesiastical establishment's general acceptance and support of the anti-Republican forces that won the civil war was more the result than the cause of the violence exercised against the Church during the Republic.<sup>17</sup> In any event, the Catholic Church and Franco's dictatorship worked together for many years. The State declared itself officially Catholic (*Estado confesional*), and its protection of the Catholic Church permeated legislative and administrative praxis at all levels, all at the cost of freedom for other religions. Once again, to be a Catholic was, de facto, requisite to be "fully Spanish." The mutual concession of privileges between the Catholic Church and the Spanish government acquired an international dimension (and reinforcement in domestic law) with the 1953 Concordat between the Holy See and the Spanish State.<sup>18</sup>

This reciprocal support, however, did not prevent rising tensions between the ecclesiastical hierarchy and Franco's regime. Tensions rose especially in the 1960s, partially as a consequence of the Second Vatican Council's changing perspective on the relations between religious and civil society. Significantly, the first Spanish law on religious freedom, which legalized non-Catholic public religious worship, was enacted in 1967 (despite Franco's own reluctance) as a consequence of political pressure exerted by the Holy See and by Spanish bishops. The position adopted by the 1967 law was surely insufficient according to contemporary international human rights standards, but the regulation of religious freedom was less restrictive than the regulation of other public liberties in Spain at the time.<sup>19</sup>

16. See generally Alberto de la Hera, *Actitud del Franquismo ante la Iglesia*, in IGLESIA CATÓLICA Y REGÍMENES AUTORITARIOS Y DEMOCRÁTICOS 43–70 (1987); Pedro Lombardía, *Actitud de la Iglesia ante el Franquismo*, in IGLESIA CATÓLICA Y REGÍMENES AUTORITARIOS Y DEMOCRÁTICOS 81–102 (1987). See also GUSTAVO SUÁREZ PERTIERRA, LIBERTAD RELIGIOSA Y CONFESIONALIDAD EN EL ORDENAMIENTO JURÍDICO ESPAÑOL (1978); Agustín Motilla, *Relaciones Iglesia-Estado en la España Contemporánea*, REVISTA DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD DE ALCALÁ DE HENARES 91 (1991).

17. Cf. Navarro-Valls, *supra* note 12.

18. *Concordato Entre la Santa Sede y el Estado Español*, August 27, 1953 (B.O.E. Oct. 19, 1953).

19. For more on the 1967 Law on Religious Freedom within the historical context of Spanish law and politics, see MARÍA BLANCO, LA PRIMERA LEY ESPAÑOLA DE LIBERTAD RELIGIOSA (1999); see also Javier Tusell, *El Impacto del Concilio Vaticano II en la Política y en la Sociedad Española*, in EL POSCONCILIO EN ESPAÑA 377–90 (1988); Carlos Corral, *Valoración Comparada de la Legislación Española de Libertad Religiosa*, 24 REVISTA ESPAÑOLA DE DERECHO CANÓNICO 315 (1968); José R. Polo, *La Significación Histórica en España del*

### III. THE SYSTEM DESIGNED BY THE CONSTITUTION AND THE ORGANIC LAW OF RELIGIOUS FREEDOM

The system of relations between state and religion designed by the 1978 Constitution contrasted sharply with the record of religious and anti-religious extremism described above. In this, as in other aspects of Spain's political development, the Constitution was aimed at three fundamental objectives: a high degree of freedom, a broad consensus among the Spanish population and political parties, and a reasonable chance of stability, which was entirely absent in Spain's previous constitutional experience.

The new system of church-state relations lacked precedent in Spain's constitutional history and represented a true Copernican revolution in the Spanish State's attitude towards the role of religion in law and in society. This new system's novelty consisted in rejecting a monochrome orientation (religious or secularist), while at the same time setting down a complex plane—the main coordinate of which was the prevailing criterion of religious freedom—and still leaving room for institutional relations between the State and religious denominations. In that way, the 1978 constitutional framework endeavored to neither ignore tradition nor realism and sought for full compatibility with international standards, particularly with the standard that is usually deemed most strict: the European Convention on Human Rights, as interpreted by its own jurisdiction, the European Court of Strasbourg.<sup>20</sup>

Inspired by the experience of other European countries, the axis of the Spanish church-state system was comprised of four fundamental “informing principles” (*principios informadores*), which were developed by the Organic Law on Religious Freedom a year-and-a-half after the 1978 Constitution was completed. A thorough

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*Concilio Vaticano II y el Derecho de Libertad Religiosa*, 89 REVISTA DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD COMPLUTENSE 255 (1997–1998).

20. With regard to religious freedom case law of the European Court of Human Rights, see generally CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2001); MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE (1997); LEONARD M. HAMMER, THE INTERNATIONAL HUMAN RIGHT TO FREEDOM OF CONSCIENCE (2001); Javier Martínez-Torrón & Rafael Navarro-Valls, *The Protection of Religious Freedom in the System of the Council of Europe*, in FACILITATING FREEDOM OF RELIGION AND BELIEF: A DESKBOOK 209–38 (Tore Lindholm, W. Cole Durham Jr. & Bahia G. Tahzib-Lie eds., 2004); and PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE (2005).

analysis of those principles is beyond the limits of this paper, but it is worthwhile here to provide an overview of the principles in order to facilitate a better understanding of their function in the Spanish legal system.<sup>21</sup>

The first principle is *religious freedom*. It means that all State law on religious issues must aim at protecting this fundamental right, which many international documents call “freedom of thought, conscience and religion,”<sup>22</sup> and which article 16 of our Constitution names “freedom of ideology, religion and worship” (*libertad ideológica, religiosa y de culto*).<sup>23</sup> I mention this principle in the first place not because it is necessarily in a position of hierarchical pre-eminence with respect to the other principles, but because religious freedom constitutes the primary objective of the state policy in this realm. It is a sort of lodestar that gives sense to and delineates the true dimension of the other constitutional principles. These other principles, however, cannot be conceived simply as mere developments of the principle of religious freedom. On the contrary, the other three principles clearly define and cement the functional efficiency of religious liberty in Spanish legal order.<sup>24</sup>

The second principle is *equality* and requires that all citizens and groups are equal before the law with respect to the exercise of religion or belief. The equality principle’s immediate consequence is that the same degree of freedom must be recognized for all, but it also acts as a limit to the general rules governing the legal position of churches in Spain. Thus, differences between the legal statuses of various religious

21. There are many sources that refer to the constitutional principles on religious issues in Spanish law. For a more detailed exposition of the ideas mentioned in the following paragraphs, and for further bibliographical references, see JAVIER MARTÍNEZ-TORRÓN, *RELIGIÓN, DERECHO Y SOCIEDAD, ANTIGUOS Y NUEVOS PLANTEAMIENTOS EN EL DERECHO ECLESIASTICO DEL ESTADO* 172–204 (1999).

22. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. at art. 18, U.N. Doc. A/RES/217A (III) (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention on Human Rights art. 9 (1950).

23. We could also add the expression “freedom of religion or belief,” which has been gaining ground since the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, especially within the OSCE environment. With regard to the conceptual questions implied in the use of that diverse terminology, see MARTÍNEZ-TORRÓN, *supra*, note 21, at 126–39.

24. *See* Javier Ferrer Ortíz, *Los Principios Constitucionales del Derecho Eclesiástico como Sistema*, in *LAS RELACIONES ENTRE LA IGLESIA Y EL ESTADO: ESTUDIOS EN MEMORIA DEL PROFESOR PEDRO LOMBARDÍA* 309–22 (1989).

denominations are legitimate only if they are not the result of discrimination. Such differences are allowed only if it is necessary for a specific legal treatment to be adjusted to the particular circumstances of a particular group. In other words, according to the case law of the European Court of Human Rights and of the Spanish Constitutional Court, the differences that are legitimate are those which correspond to a reasonable and objective justification, pursue a legitimate aim, and maintain a correct relationship of proportionality between the aim pursued and the means employed.<sup>25</sup> Equality is perhaps the principle most difficult to apply in practice—in this, as in other areas of constitutional law—for there is not always a clear border marking the end of what is open to the discretion of public authorities and the beginning of what is obliged by law.

The third principle is that of state *neutrality*<sup>26</sup> on religious matters and appears to be the main instrument chosen by the Constitution to protect the religious liberty of all citizens and groups in equal conditions. Neutrality requires that the State and its legal system perceive themselves as incompetent with regard to purely religious questions and therefore unable to make value judgments on them. However, it does not mean that civil authorities declare themselves indifferent towards the results of freedom of religion or belief, or that they withdraw completely from the content of personal choices in this

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25. The case law of the Spanish Constitutional Court is directly inspired by the case law of the Court of Strasbourg. The first decision of the European Court of Human Rights establishing its doctrine on equality was the so-called “linguistic Belgian case”: *Case “relating to certain aspects on the laws on the use of languages in education in Belgium” v. Belgium* (July 23, 1968), especially in “The Law” n.1.B.10. The European Court has subsequently reiterated this doctrine in numerous decisions, including some relating to religious freedom. See Javier Martínez-Torrón, *La Protección Internacional de la Libertad Religiosa*, in *TRATADO DE DERECHO ECLESIASTICO* 229–37 (1994). For an explanation of the principle of equality in the case law of the Constitutional Court of Spain, see JOAQUÍN CALVO ÁLVAREZ, *LOS PRINCIPIOS DEL DERECHO ECLESIASTICO ESPAÑOL EN LAS SENTENCIAS DEL TRIBUNAL CONSTITUCIONAL* 129–64 (1999); see also RAFAEL RODRÍGUEZ CHACÓN, *EL FACTOR RELIGIOSO ANTE EL TRIBUNAL CONSTITUCIONAL* 33–38 (1992).

26. Some scholars prefer the terms ‘laicity’ (*laicidad*, *laïcité*) or “aconfessionality.” The use of one or the other term implies certain differences with regard to how the meaning of this principle is understood. Personally, I prefer the expression “neutrality,” which I deem more appropriate to avoid misunderstandings with respect to its content. See JAVIER MARTÍNEZ-TORRÓN, *supra* note 21. For a discussion on state neutrality and its connections with the notion of religious freedom and with the very notion of person, see the interesting remarks written, in the light of German jurisprudence, by María J. Roca, *La Neutralidad del Estado: Fundamento Doctrinal y Delimitación en la Jurisprudencia*, in *I IL DIRITTO ECLESIASTICO* 405 (1997).

particular area of human rationality. Neutrality means that when the State acts with respect to diverse religions, it may take into account only the social effects of the religious activity, including the cases in which those effects conflict with values that the legal order considers necessary.

Finally, the principle of state *cooperation* with churches or religious communities provides a specific profile to neutrality. State and churches enjoy, of course, reciprocal autonomy.<sup>27</sup> Nevertheless, this autonomy is not understood in terms of strict separation but rather in terms of amicable relations and mutual cooperation (at least, cooperation of the State with religious denominations). This principle poses an interesting and difficult question: to what extent may a concrete measure of State cooperation with churches depend on each church's cooperation with the State (not, of course, with a particular government)? Or, in other words, may State cooperation depend upon a religious community's loyalty to the constitutional values of a democratic State? This issue is closely connected to the relationship between what German scholars have called *Rechtstreue* and *Staatstreue* (fidelity to the law and fidelity to the State).<sup>28</sup> In any event, two aspects of the principle of cooperation seem indisputable: first, the Constitution imposes on the State a general duty to cooperate with religion, according to "the beliefs of Spanish society";<sup>29</sup> and second, State cooperation with

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27. Naturally, not only is the state autonomous with regard to religion—no matter how widespread it is in society—but also religious communities are autonomous with respect to the state. The European Court of Human Rights has often emphasized this idea in recent years, especially in the decisions *Serif v. Greece* (Dec. 14, 1999), *Hasan and Chaush v. Bulgaria*, 511 Eur. Ct. H.R. 26 (Oct. 2000), *Metropolitan Church of Bessarabia v. Moldavia* (Dec. 2001), and *Agga v. Greece* (Oct. 17, 2002). For a further explanation of this doctrine, see Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT'L L. REV. 587 (2005).

28. This issue was analyzed by the German Constitutional Court in a decision made on December 19, 2000, relating to the requirements that Jehovah's Witnesses had to meet to be granted the status of "public law corporation." BverfGE 102, 370 Nr. 17 (F.R.G.). See Christian Hillgruber, *Der Körperschaftsstatus von Religionsgemeinschaften: Objektives Grundverhältnis oder subjektives Grundrecht*, in NVWZ 1347 (2001); Alexander Hollerbach, *Anmerkung*, in JZ 1117 (1997); Stefan Koriath, *Loyalität im Staatskirchenrecht? Geschriebene und ungeschriebene Voraussetzungen des Körperschaftsstatus nach Art. 140 GG i.V.m. Art. 137 Abs. 5 WRV*, in RECHTSTHEORIE UND RECHTSDOGMATIK IM AUSTAUSCH. GEDÄCHTNISSCHRIFT FÜR BERND JEAND'HEUR 221–45 (1999); Gerhard Robbers, *Sinn und Zweck der Körperschaftsstatus im Staatskirchenrecht*, in FESTSCHRIFT FÜR MARTIN HECKEL 411–25 (1999).

29. C.E., *supra* note 6, art. 16(3).

churches probably allows a certain margin of appreciation for public authorities, albeit limited by the principles of equality and neutrality.

#### IV. THREE KEY ASPECTS OF THE SPANISH TRANSITION

I would now like to emphasize three aspects of the reconstruction process of church-state relations during Spain's transition to democracy that should not be forgotten. They are significant not only to duly evaluate the meaning of the political change of the 1970s, but they also can continue to shed light on the possible future development of the Spanish church-state system.

##### *A. The Support of Ecclesiastical Hierarchy*

I have already noted that the renovation of the Spanish model of relations between state and religion was essential for the success of Spain's democratic evolution. A large part of this success was due to the support that the vast majority of Spanish bishops gave to the political change.<sup>30</sup>

The triumph and subsequent consolidation of democracy in Spain required, as an indispensable condition, a situation of "religious peace," which could be reached only by careful avoidance of extreme solutions. Otherwise, there was the risk that fears of a "new Second Republic" would condemn Spain again to a period of political stagnation of one color or other. The representatives of those political positions barred during Franco's regime had a responsibility to keep away from encouraging the same sentiments of requital that so easily emerged in the Republican Constitution and laws. This was well understood by some politicians who had been witnesses—and even protagonists—of the Republican excesses and their tragic results in 1936.<sup>31</sup>

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30. In addition to the reference works cited in note 8, a detailed description of the attitude of the Catholic Church in those years, with numerous references to news in mass media, can be found in AMORÓS AZPILICUETA, *supra* note 7, at 74–87, 99–111.

31. This explains the attitude of Santiago Carrillo, who was the Secretary General of the Spanish Communist Party while the Constitution was being debated in Parliament. He had been directly involved in some serious revolutionary episodes in 1934 and had held the position of "commissary of public order" within the Republic's Committee of Defense during the civil war. Carrillo, during the parliamentary debates, expressed his support of the explicit mention of the Catholic Church in art. 16 of the Constitution (while the Socialist Party argued against it). He considered that mentioning the Church did not confer improperly any privilege nor set the basis for a sort of "sociological confessionality" of the state. It simply recognized the incontestable social fact that the vast majority of the population professed Catholicism,

But above all, the Catholic Church in Spain had the responsibility to understand—and to help a large part of the population and many influential elements of society understand—that the end of the State’s Catholic confessionality would not necessarily provoke a pendulum movement in the opposite direction, which could lead (as it did in the 1930s) to the hostility of public authorities towards the Church. The influence of ecclesiastical hierarchy and institutions was then, even more than now, extraordinarily extensive and intense. Their comprehension and acceptance of the new design of relations between state and religion was indispensable for at least two reasons. On the one hand, it was essential because without the ecclesiastical hierarchy’s collaboration, it would have been impossible to reach the “religious peace” required for the political consensus that Spain’s democratic transition needed. On the other hand, it was similarly essential because the hierarchy and Church institutions supported the democratic process itself and presented it to Catholics as something not merely inevitable, but actually positive, for Spain. This was especially important since a significant part of the vital forces of Spanish society, including a large percentage of high ranking Army officers, were not sympathetic to the political change, and, for several years, the future of Spain’s democracy was not completely secure, as the failed coup d’état of February 23, 1981, demonstrated.

The immense majority of social and political forces accepted almost unconditionally the new legal framework of religious freedom in Spain. This support was aided by the unambiguous assent of the ecclesiastical hierarchy, which had been tranquillized by the negotiation of a new concordat during the parliamentary debates on the Constitution. This assent was of utmost importance for a political transition which was as peaceful as it was natural; indeed, surprisingly natural, in view of Spain’s turbulent political past up to that point.

It is also worth noting that the active cooperation of the Catholic Church in Spain during that decisive time was not the mere product of political convenience nor the result of resigned submission to an inexorable destiny. On the contrary, it had profound roots in the

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while at the same time tranquillizing the ecclesiastical hierarchy and helping to remove the ‘ghosts of the past,’ which had been revived in the course of the constitutional debate in Parliament. See AMORÓS AZPILICUETA, *supra* note 7, at 128–33.

renewal of Catholic doctrine regarding relations between the Church and civil society, which began taking shape during the Second Vatican Council and materialized in the Declaration *Dignitatis Humanae*. This was the same doctrinal renovation that drove the enactment of the first Spanish law on religious freedom during Franco's dictatorship in 1967.<sup>32</sup>

*B. Consideration of Religion as a Positive Social Phenomenon*

As indicated before, our constitutional system of church-state relations understands state neutrality not as a strict separation, but rather as compatible with an affirmative cooperation with religion. This is no anomaly. On the contrary, it is a frequent choice—with various nuances—in the European panorama, with the exceptions of France and Turkey (due to particular historical circumstances of the two countries).<sup>33</sup>

It is not my intention to analyze the consequences of the principle of State cooperation at political and legal levels. But I would like to draw attention to the fact that the principle of cooperation implies two presuppositions with respect to the way that the Constitution conceives public authorities' attitudes towards religion.

First, religion is appreciated as a positive social phenomenon. It is primarily considered a reality that contributes more to the improvement of society than to conflict or social concern (although, sometimes, some religions are conflictive). This perception is based on the fact that institutionalized religions, in addition to expressing the exercise of a fundamental right, actually play a positive role in society, which is visible in different domains.<sup>34</sup> These include some areas that are not easily quantifiable, in particular the development of civic virtues. To be a good citizen requires a high degree of ethical

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32. See *supra* part II.

33. For a succinct and expressive description of the diverse church-state systems in the European Union, see STATE AND CHURCH IN THE EUROPEAN UNION (Gerhard Robbers ed., 2d ed. 2005).

34. See generally, for instance, from diverse perspectives, Rafael Navarro-Valls, *Justicia constitucional y factor religioso*, in LA LIBERTAD RELIGIOSA Y DE CONCIENCIA ANTE LA JUSTICIA CONSTITUCIONAL 25, 25–38 (Javier Martínez-Torrón ed., 1998); SALVATORE BERLINGÒ, ENTI E BENI RELIGIOSI IN ITALIA 21 (1992); ANTONIO VITALE, CORSO DI DIRITTO ECCLESIASTICO ORDINAMENTO GIURIDICO E INERESSI RELIGIOSI 8, 28 (6th ed. 1992); and, within the context of a critical revision of the judicial interpretation of U.S. Establishment Clause, Mary A. Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991).

quality in a wide range of aspects: from the moral individual obligation to abide by the law, to a variety of manifestations of what today is usually called solidarity. Religions normally provide motivations for individual moral development that transcend material reality and that tend to be, in practice, quite efficient (sometimes probably more efficient than the sole fear of an often infrequent legal penalty).

Moreover, the positive social function of religion embraces other more quantifiable aspects. It is sufficient to note that the vast majority of non-governmental organizations are of direct or indirect religious inspiration. This is no surprise; initiatives of social assistance founded upon Christian charity, or upon its equivalent in other religions, attract many more people than mere altruism without a clear spiritual basis, no matter how sophisticated altruism's intellectual elaboration may be.<sup>35</sup>

As a consequence of what I have suggested in the preceding paragraphs, the second presupposition of the principle of State cooperation is that religion is accepted as a "normal" element of public life. To profess either religious or non-religious belief is not merely a private affair of citizens. Institutionalized religions, whose rights are founded on individual rights to religious freedom, are entitled to express and spread their ideas in the public square, in every sphere of human activity—from education, culture, or science, to non-profit activities, mass media, and even politics. This is, of course, compatible with the Spanish Constitutional Court's reasonable doctrine concerning the need to carefully avoid any confusion between state and religious functions.<sup>36</sup> Assuming there is no such confusion, the prevailing criterion will be the right of individual citizens and of religious denominations to manifest their religion or their belief "in public or private."<sup>37</sup> Generally, this is not

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35. This is a theme that has not always drawn the attention it deserves—something which is paradoxical in Western societies, increasingly concerned about fostering solidarity with persons or minority groups in physically, culturally, or socially disadvantageous situations. It is worth noting that this concern for fostering solidarity, in turn, derives from an ethical interest with clear religious roots. The perspective of law and economics would help to illuminate the strictly secular reasons for the principle of State cooperation with religion and the legal application of this principle. It would be extremely interesting to have consistent and detailed studies on the impact of religion on economy (or, to be precise, on the money that religions save the welfare State).

36. Cf. Spanish Constitutional Court, STC, May 13, 1982 (S.T.C., No. 24).

37. Cf. European Convention on Human Rights art. 9(1) (1950). This raises an issue

difficult to accept in the abstract. Many of the occasional interpretive problems in its practical application come from an erroneous identification between the terms “public” and “state,” which leads to an improper attribution to the State of a sort of monopoly over the control of public life.

### *C. Regulation of Specific Instruments for State Cooperation*

When the LOLR developed article 16 of the Constitution in 1980, it went beyond designing a common legal framework for all religions in Spain that included a special registry for recognizing the legal personality of religious groups.<sup>38</sup> The law also created specific instruments to materialize State cooperation with religious denominations in accordance with a prudent interpretation of the equality principle. One such instrument is the Advisory Commission on Religious Freedom (*Comisión Asesora de Libertad Religiosa*),<sup>39</sup> a consultative body within the Ministry of Justice that integrates representatives of religious communities with officials of different State departments and with renowned experts (most often, in practice, university professors). Other, even more significant instruments are the formal cooperation agreements or covenants between the State and churches (*acuerdos o convenios de cooperación*).<sup>40</sup> These agreements constitute an innovation of the utmost importance that is without precedent in Spanish law but was

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that has acquired increasing significance not only in Spain but also in the entire Western world: the use of religious symbols in public spaces. This is an extremely complex issue, as demonstrated by the two decisions of the European Court of Human Rights for the case *Leyla Sabin v. Turkey* on June 29, 2004 (Chamber) and Nov. 10, 2005 (Grand Chamber) (the case relates to the Turkish prohibition to wear the Islamic headscarf at a university). See Natan Lerner, *How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance*, 13 WILLAMETTE J. INT'L L. & DISP. RES. 65 (2005); see also StrasbourgConference.org, <http://www.strasbourgconference.org/papers.php> (containing various papers relating to the use of religious symbols in public places) (last visited July 22, 2006). For a precise and recent analysis of the many aspects of the issue of religious symbols in Spanish and comparative law, see SANTIAGO CAÑAMARES, *LIBERTAD RELIGIOSA, SIMBOLOGÍA Y LAICIDAD DEL ESTADO* (2005).

38. This refers to the Registry of Religious Entities, which was created by LOLR art. 5 and regulated by the Royal Decree 142/1981, Jan. 9, 1981 (*sobre organización y funcionamiento del Registro de Entidades Religiosas*).

39. See LOLR, *supra* note 6, art. 8. The Commission is currently regulated by the Royal Decree 1159/2001, Oct. 26, 2001 (*por el que se regula la Comisión Asesora de Libertad Religiosa*).

40. LOLR, *supra* note 6, art. 7.

instead inspired by German and Italian law and created as a consequence of the maintenance of the Spanish tradition of concordats after the 1978 Constitution.

In Spain, concordats with the Catholic Church have a history that dates back to the eighteenth century. The main milestones were the Concordats of 1753,<sup>41</sup> 1851, and 1953.<sup>42</sup> Initially, they were conceived—in the context of a Catholic monarchy of regalist orientation—as a formal channel for the reciprocal concession of privileges between Church and State, with a particular emphasis on the right of patronage (*ius patronatus*) and on the regulation of ecclesiastical offices and benefices. With the passage of time, concordats evolved toward a bilateral norm, always with the rank of an international treaty and aimed at determining more comprehensively the legal status of the Catholic Church in Spain. This is clearly visible in the Concordat of 1953, in which we can still observe the protectionist attitude of the State and the Church's disposition to grant concessions in ecclesiastical matters.

The Concordat signed under Franco's regime could have been appropriate for a State that was confessional (officially Catholic) and non-democratic, but it could not be maintained in a State toward which Spain's political transition was moving. Both the government and the Church soon felt the need to replace the 1953 Concordat. Thus, an Agreement between the Holy See and the Spanish State was signed on July 28, 1976, hardly a few months after Francisco Franco's death in November of 1975. The Agreement's preamble was very expressive, indicating,

41. As precedents within the 18th century, we could cite the Agreement of 1717 and the Concordat of 1737. Both were soon abandoned for not fully satisfying the interests of the Spanish Crown.

42. See JUAN PÉREZ ALHAMA, *LA IGLESIA Y EL ESTADO ESPAÑOL: ESTUDIO HISTÓRICO A TRAVÉS DEL CONCORDATO DE 1851* (1967); Juan L. Acebal Luján, *El Concordato de 1953*, 21 *SALMANTENSIS* 353 (1974); José Maldonado & Fernández del Torco, *Los primeros años de vigencia del Concordato de 1953*, 12 *REVISTA ESPAÑOLA DE DERECHO CANÓNICO* 7 (1957); Isidoro Martín Martínez, *En el segundo centenario del Concordato español de 1753*, 8 *REVISTA ESPAÑOLA DE DERECHO CANÓNICO* 745 (1953); María E. Buqueras Segura, *Posición del Episcopado español ante la revisión del Concordato de 1953*, 45 *IUS CANONICUM* 367 (1983); Federico Suárez, *Génesis del Concordato de 1851*, III *IUS CANONICUM* 65 (1963). Other interesting works are the collective volumes *EL CONCORDATO DE 1953* (1956) and *LA INSTITUCIÓN CONCORDATARIA EN LA ACTUALIDAD: TRABAJOS DE LA XIII SEMANA DE DERECHO CANÓNICO* (1971).

The Holy See and the Spanish Government, in view of the profound process of transformation that Spanish society has experienced in the last years, also with respect to relationships between the political community and religious denominations as well as between the Catholic Church and the State . . . judge it necessary to regulate, through specific Agreements, the matters of common interest that require a new order according to the new circumstances arisen after the signature of the Concordat of 27 August 1953; and therefore they agree to undertake in common the study of those diverse matters with the purpose of reaching, as soon as possible, the conclusion of Agreements that replace gradually the relevant provisions of the Concordat currently in force.<sup>43</sup>

This text shows that neither the Church nor the State questioned that church-state relations should be governed by a concordat. What they had in mind was the need to design a new juridical bilateral framework, compatible with the constitutional principles that, after their elaboration in Parliament, would constitute the basis for the new Spanish democracy according to the December 1978 Constitution. Indeed, the Agreement of 1976 suppressed the two main privileges that symbolized the church-state relations pervading the Concordat of 1953: the benefit of clergy, on the part of the Church, and the right of presentation of bishops, on the part of the State.<sup>44</sup> Above all, this early and partial Agreement was the opening of negotiations that, carried out in parallel with the drafting of the Constitution in Parliament, would conclude with the signature of four specific Agreements—which together form a concordat—on January 3, 1979, one week after the Constitution was promulgated.<sup>45</sup>

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43. *Acuerdo sobre renuncia a la presentación de obispos y al privilegio del fuero*, July 28, 1976 (*Instrumento de ratificación* of Aug. 19, 1976, B.O.E. Sept. 24, 1976). The transcribed excerpt of the preamble has been translated by the author from the original Spanish version.

44. The benefit of clergy has a very ancient origin and consisted in the exemption of clerics from criminal prosecution in the secular courts without the previous authorization of the relevant bishop. For the history of this institution in English and American law, see GEORGE W. DALZELL, *BENEFIT OF CLERGY IN AMERICA & RELATED MATTERS* (1955) and LEONA C. GABEL, *BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES* (1929). The right of presentation of bishops given to Franco was reminiscent of the old right of patronage of the Spanish monarchy. The Holy See agreed that, when a diocese became vacant, the new bishop had to be appointed out of three names provided by the government. This system obliged negotiation of every appointment of residential bishops in Spain and granted the government the possibility of vetoing certain persons for being politically objectionable.

45. See Beatriz Castillo, *El proceso de revisión del Concordato de 1953*, in *ESCRITOS EN HONOR DE JAVIER HERVADA* 971, 971–85 (special vol. of *IUS CANONICUM* 1999); JUAN

The framework created by the 1979 concordat thus constituted the first juridical materialization of the constitutional principle of State cooperation with religion. This initial experience was closely linked to Spanish political and legal tradition. And the same experience, interpreted from the perspective of the principles of equality and neutrality, would move the legislature a year-and-a-half later to introduce into the LOLR a significant and innovative element in Spain's traditional system of sources of law. An adapted version of the concordats with the Catholic Church was made available to other religious denominations.<sup>46</sup> The 1980 LOLR took, as a point of reference, the analogous pre-existing institutions in German and Italian law (the *Kirchenverträge* and the *intese*, respectively), and added a few nuances. The most important is perhaps the element of "well-known roots" (*notorio arraigo*), which is the key criterion employed to determine the religious denominations that may be entitled to a formal cooperation agreement with the State because of their social rooting.<sup>47</sup>

If we look at the twenty-five years since the enactment of the LOLR, we may perhaps think that cooperation agreements have been an under-utilized institution thus far. Only three agreements have been concluded, with three federations of religious communities: Protestant, Jewish, and Islamic. All of them, each very similar in content, were approved by statute on November 10, 1992.<sup>48</sup> Moreover, neither the history of the negotiation process<sup>49</sup>

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FORNÉS, EL NUEVO SISTEMA CONCORDATARIO ESPAÑOL: LOS ACUERDOS DE 1976 Y 1979 (1980); José M. Vázquez García-Peñuela, *Examen de las relaciones entre la Santa Sede y el Estado Español: desde el Concordato de 1953 a los acuerdos de 1979*, in PLURALISMO RELIGIOSO Y ESTADO DE DERECHO 89, 89–161 (2004); Daniel Tirapu, *Acuerdos Iglesia-Estado en España*, in EUROPA: UNA REALIDAD EN CAMINO 185, 185–208 (1991).

46. See JAVIER MARTÍNEZ-TORRÓN, SEPARATISMO Y COOPERACIÓN EN LOS ACUERDOS DEL ESTADO CON LAS MINORÍAS RELIGIOSAS 20–36 (1994).

47. The expression "well-known roots" is an approximate translation of the Spanish term *notorio arraigo*, which is utilized by LOLR art. 7. For possible meanings of this new and peculiar concept of Spanish law, see MARTÍNEZ-TORRÓN, *supra* note 46, at 88–95; see also María J. Villa Robledo, *Reflexiones en torno al concepto de 'notorio arraigo' en el art. 7 de la Ley Orgánica de libertad religiosa*, 1 ANUARIO DE DERECHO ECLESIASTICO DEL ESTADO 143 (1985).

48. See 24/1992, Nov. 10, 1992 (*Federación de Entidades Religiosas Evangélicas de España*, FEREDE); 25/1992, Nov. 10, 1992 (*Federación de Comunidades Israelitas de España*, FCI); 26/1992, Nov. 10, 1992 (*Comisión Islámica de España*, CIE); see also DAVID GARCÍA-PARDO, EL SISTEMA DE ACUERDOS CON LAS CONFESIONES MINORITARIAS EN ESPAÑA E ITALIA (1999); JOAQUÍN MANTECÓN, LOS ACUERDOS DEL ESTADO CON LAS CONFESIONES ACATÓLICAS: TEXTOS, COMENTARIOS Y BIBLIOGRAFÍA (1995); AGUSTÍN MOTILLA, LOS

nor the criteria for determining the notion of “well-know roots” for legal purposes<sup>50</sup> casts much light on the future of this institution in our legal system. An analogous ambiguity permeates governmental decisions on subsequent applications for recognition of “well-known roots,” which is an indispensable legal requirement to initiate the negotiation of a cooperation agreement with the State. Indeed, apart from the federations that were parties in the 1992 Agreements, only two religious denominations have obtained this recognition, and they have had to wait a long time for it in spite of their large number of followers and of their spreading all over Spanish territory: the Church of Jesus Christ of Latter-day Saints and the Church of the Christian Jehovah's Witnesses.<sup>51</sup>

In spite of these possible deficiencies, the prompt signature of the Concordat with the Holy See after the approval of the 1978 Constitution has had a positive influence on the legal status of religious minorities. This fact, although pointed out by some scholars soon after the LOLR was enacted,<sup>52</sup> has been disregarded in the last years in an atmosphere often inundated by minority religions' spiral of claims alleging inequality. The 1979 Concordat did not imply the continuation of unjustified privileges in favor of the Catholic Church and to the detriment of other churches. On the contrary, it contributed to a broad interpretation of the

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ACUERDOS ENTRE EL ESTADO Y LAS CONFESIONES RELIGIOSAS EN EL DERECHO ESPAÑOL (1985); Jorge Otaduy, *Los Proyectos de acuerdo de cooperación con las Iglesias evangélicas y las comunidades israelitas*, in *QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA* 138 (1991–1992); ANTONIO VIANA, *LOS ACUERDOS CON LAS CONFESIONES RELIGIOSAS Y EL PRINCIPIO DE IGUALDAD* (1985); *ACUERDOS DEL ESTADO ESPAÑOL CON CONFESIONES RELIGIOSAS MINORITARIAS* (V́ctor Reina & Maŕa A. F́elix eds., 1996); *ACUERDOS DEL ESTADO ESPAÑOL CON LOS JUDÍOS, MUSULMANES Y PROTESTANTES* (1994).

49. See ANA FERNÁNDEZ-CORONADO, *ESTADO Y CONFESIONES RELIGIOSAS: UN NUEVO MODELO DE RELACIÓN: (LOS PACTOS CON LAS CONFESIONES: LEYES 24, 25 Y 26 DE 1992)* (1995) (explaining the negotiations surrounding the Agreements of 1992).

50. Significantly, the Council of State (*Consejo de Estado*), in its opinion about the draft agreements delivered to the Ministry of Justice on January 31, 1991 (*consideración jurídica* I), expressed its regret for the fact that the government had not provided any explanation on the criteria utilized for the recognition of “well-known roots” to the three religious federations.

51. The Ministry of Justice's Advisory Commission on Religious Freedom recognized the “well-known roots” of the LDS Church on April 23, 2003. The same commission recognized the “well-know roots” of Jehovah's Witnesses on June 29, 2006, by a very tight decision and after a controverted debate, in part caused by the unclear role that this sort of recognition has to play—and is playing—in Spanish law.

52. See Pedro J. Viladrich, *Los principios informadores del Derecho eclesiástico español*, in *DERECHO ECLESIASTICO DEL ESTADO ESPAÑOL* 292 (1980).

constitutional principle of cooperation that has been beneficial for at least some religious minorities. In other words, the Concordat was the crucial factor that moved LOLR's drafters to extend to other religious communities the possibility of regulating their basic legal status with a bilateral instrument similar to the concordats,<sup>53</sup> which had been for more than two centuries exclusively available to the Catholic Church. Thus, rather than perpetuating inequalities between the major church and minority churches, the post-constitutional continuation of concordats in Spain helped create a specific channel of State cooperation: formal agreements between State and religious denominations, which imply an open process of legislative negotiation. In practice, this channel has produced a great deal of State cooperation with a plurality of religious minorities (an open plurality, not a closed list) that perhaps would have been inconceivable without the precedent of the 1979 Concordat with the Catholic Church.<sup>54</sup>

In effect, the application of LOLR article 7 in 1992 to the federations of Protestant, Jewish, and Islamic communities put various modes of State cooperation at the disposal of religious minorities with particular rooting in Spain, thus making their legal status not very dissimilar to that of the Catholic Church. This is positive considering that State cooperation, in reality, constitutes a way to promote the right to religious freedom of "individuals and communities."<sup>55</sup> This, in turn, fits perfectly within the constitutional mandate given to public authorities by article 9 of the Constitution, which attempts to "promote the necessary conditions to ensure that the liberty and equality of individuals and of the groups in which they integrate may be real and effective," and to "remove the obstacles that prevent or hinder their full exercise."<sup>56</sup>

Among these aspects of State cooperation, it is worth briefly mentioning the following here:

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53. See CIÁURRIZ, *supra* note 7, at 168–70.

54. See Javier Martínez-Torrón, *Concordato, cooperación e igualdad: La cooperación del Estado español con las confesiones religiosas a la luz del vigente sistema de acuerdos con la Iglesia católica*, in LOS CONCORDATOS: PASADO Y FUTURO 471, 471–88 (J.M. Vázquez García-Peñuela ed., 2004).

55. C.E., *supra* note 6, art. 16(1) (author's translation).

56. *Id.* art. 9(2).

*1. Civil effects of religious marriage*

The law recognizes the civil effects of a religious marriage of denominations with a cooperation agreement; there are some differences between Catholic marriage and other types of religious marriage.<sup>57</sup> The main difference is that the decisions of the Catholic ecclesiastical jurisdiction on the nullity or dissolution of marriages are given civil effects, while similar effects are not granted to other religious jurisdictions in Spain. Naturally, the civil effects of the religious regulation of marriage are subject to the limitations derived from public order (which tend to be less and less significant because of the evolution of Spanish law on marriage and family, which has apparently moved toward a gradual privatization of the contract of civil marriage).<sup>58</sup>

*2. Religious education in public schools*

Confessional teaching of religion in public schools also varies when we compare Catholic religious education with Protestant, Jewish, or Islamic education, although there is a trend towards their gradual convergence following the pattern applicable to the Catholic Church (which is itself under reform). Religious education has been one of the most conflictive issues between the ecclesiastical hierarchy and the Spanish government in the last twenty-five years, with different levels of political tension depending on the government. This is due in part to the terms of the 1979 Agreement on Education and Cultural Affairs between the Holy See and the Spanish State. It is also due in part to the attitude of some governments, which have at times emphasized the merely “private” nature of religious education, neither realizing its social contribution from a secular perspective (beyond the obvious interest the churches have in it) nor sufficiently perceiving the implications of this issue

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57. See MARIANO LÓPEZ ALARCÓN & RAFAEL NAVARRO-VALLS, CURSO DE DERECHO MATRIMONIAL CANÓNICO Y CONCORDADO 445-515 (6th ed. 2001) (providing precise and detailed analysis of the civil effects of religious marriage in Spanish law).

58. A particularly significant step in this direction has been taken recently with the enactment of the controversial Law 13/2005, July 1, 2005 (*por la que se modifica el Código Civil en materia de derecho a contraer matrimonio*), which eliminates heterosexuality as a necessary element of marriage. Naturally, this law, and the arguments alleged for its enactment, paves the way for other conceptions or public order in the area of marriage that are still more restrictive; conceptions that, for instance, would suppress the limitations deriving from monogamy or from the traditional prohibition of incestuous marriages.

with regard to parents' constitutional right to ensure that "their children receive a religious and moral formation in accordance with their own beliefs."<sup>59</sup> The discrepancies between the Bishops' Conference and the current socialist government undermine the possibility of reaching a clear and prompt social consensus on this issue. On the other hand, with regard in particular to the religious teaching of Muslim students in public centers, the specter of a potential infiltration of Islamic extremism has recently added an element of distrust and social tension in this area.<sup>60</sup>

*3. Religious assistance in public centers such as military quarters, hospitals, penitentiaries, retirement homes, or asylums*

Once again, we find here a few differences between Catholic religious assistance and other religions' assistance, which are justified by the very unequal percentages of the population that declare themselves believers of certain religions. It does not seem feasible to apply to all religious denominations the same scheme of permanent Catholic Chaplaincies, but, at the same time, the system designed to facilitate the assistance of the faithful of those religions included in the 1992 Agreements' system is certainly underdeveloped. Indeed, for years the Ministry of Justice has been searching for a more adequate solution to serve its purpose more efficiently than the current system of "free access" and "free exit" (whereby religious ministers may freely enter public centers when their spiritual assistance is required, and, when appropriate, people in military

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59. C.E., *supra* note 6, art. 27(3) (author's translation).

60. For a brief but clear description and analysis of the questions raised by religious education in Spain, see Àlex Seglers Gómez-Quintero, *Religious Education in the Spanish School System*, 46 J. CHURCH & ST. 561 (2004) and Javier Martínez-Torrón, *School and Religion in Spain*, 47 J. CHURCH & ST. 133 (2005). The situation became more conflictive after the Spanish Congress approved the Organic Law on Education (*Ley Orgánica de la Educación*) on April 6, 2006, which was proposed by our current government and rejected the amendments introduced by the Senate, which were aimed at restoring the religious education system established by the preceding legislature, contained in the Organic Law 10/2002, Dec. 12, 2002 (*de Calidad de la Educación*), which was never put into practice because the current government suspended its application as soon as it came to power. While the draft law was discussed at the Congress in its first stage, there was a strong popular reaction against it, visibly expressed in a massive demonstration held in Madrid on November 12, 2005. The text approved by the Senate can be found in BOLETÍN OFICIAL DE LAS CORTES GENERALES-SENADO, serie II, núm. 38(f), 513-89 (Mar. 30, 2006). The final discussion by the Congress, and the reasons alleged to reject the Senate's amendments, can be found in DIARIO DE SESIONES DEL CONGRESO DE LOS DIPUTADOS, núm. 169, 8432-46 (Apr. 6, 2006).

centers or in homes are authorized to leave the place to attend religious worship). The solution is expected to include paying religious ministers for their services with state funds, as is done with Catholic chaplains.<sup>61</sup>

#### *4. State economic cooperation with religious denominations*

This type of cooperation is channeled especially through three legal instruments: tax exemptions for religious denominations, tax benefits for donations made to religious entities by individuals or by corporations, and direct economic aid. In the two first categories, there has been a gradual and clear convergence of the scheme designed for the Catholic Church and the one applicable to Protestants, Jews, and Muslims. However, the only beneficiary of direct economic aid from the State has traditionally been the Catholic Church.

The current system is called “tax assignment” (*asignación tributaria*), which gives taxpayers the option of allocating 0.5239 percent of their income tax to the economic maintenance of the Catholic Church; taxpayers express their will in that regard every year when filling out the relevant forms for the Spanish Internal Revenue Service and the money is administered by the Bishops’ Conference. Because of flaws in the effective functioning of the system, the Ministry of Justice is currently studying a possible revision.<sup>62</sup> One of the alternatives under consideration is raising the percentage of the income tax that taxpayers can freely assign, as the Bishops’ Conference insists that the current percentage is insufficient. Another important change under study is the possible extension of tax

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61. The Ministry of Justice is currently studying a possible regulation on Protestant, Jewish, and Islamic religious assistance in penitentiaries (and perhaps in other public centers). See *LOS ACUERDOS CON LAS CONFESIONES MINORITARIAS: DIEZ AÑOS DE VIGENCIA* (Joaquín Mantecón ed., 2003) [hereinafter *DIEZ AÑOS DE VIGENCIA*] (explaining issues related to the practical application of the 1992 Agreements). This volume gathers several papers requested by the previous government’s Ministry of Justice from university professors who were members of the Advisory Commission on Religious Freedom. It had the aim of studying proposals of possible reforms of the provisions contained in the 1992 Agreements with the Evangelical, Jewish, and Islamic federations. Along with those papers, the book also transcribes the comments written by other members of the Advisory Commission. Those addressed by the representatives of the religious federations are particularly interesting, for they provide the perspective of the people to whom the agreements are applied. The materials of that volume constituted, and still constitute under the current government, a source of reflection for the legislative reforms under study.

62. See *id.*

assignment to the religious federations that signed the 1992 Agreements. Those federations initially rejected the system when the government offered it during negotiations but have recently expressed interest in its availability, or at least in receiving some sort of direct economic aid from the State.<sup>63</sup> While the necessary changes in tax laws are affected, the current government has decided to erect a public foundation named “Pluralism and Coexistence” (*Pluralismo y Convivencia*) that aims to provide public financial support to Protestant, Jewish, and Islamic federations through funding activities relating to education, culture, or social integration. Curiously enough, this new way of providing economic aid to major religious minorities in Spain has similarities to the old system of budgetary funding (*dotación presupuestaria*) applied to the Catholic Church. Under this system, part of the State budget was reserved every year for the expenses of “worship and clergy.” Significantly, both the Holy See and the Spanish State, in the 1979 Agreement on Economic Affairs, thought it preferable to abandon the budgetary funding system, understanding that it was less adequate for the new political era that was opening in Spain.<sup>64</sup>

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63. The Islamic federation was always in favor of the tax assignment system. Nevertheless, because they joined the negotiation process of the 1992 Agreements after the Protestants and Jews, they had to accept the refusal expressed by the Protestants and Jews because the government was determined not to distinguish between the three federations in this area. Recently, the Evangelical and Islamic federations have declared that they are in favor of adopting the tax assignment. On the contrary, the Jewish federation has blatantly opposed receiving money from the state via tax assignment and prefers other channels of direct state funding that do not require citizens to provide personal and signed statements. *See id.* at 152–53, 192–94, 213. The alleged reason is the distrust that many Jews have of identifying themselves as such, due to their memory of the perverse historical use of Jewish censuses in many countries in the past. Obviously, recent anti-Semitic movements in various countries will not help to reduce that distrust. These movements are more significant in Spain than one might think at first glance. *See* Eugenia Relaño Pastor, *España contra el antisemitismo, racismo, xenofobia y otras formas de intolerancia: una panorámica general*, 9 REVISTA GENERAL DE DERECHO CANÓNICO Y DERECHO ECLESIASTICO DEL ESTADO 1 (2005), available at [www.iustel.com](http://www.iustel.com).

64. *See Acuerdo sobre Asuntos Económicos*, Jan. 3, 1979, pmbl., art. II (*Instrumento de ratificación* of Dec. 4, 1979, B.O.E. Dec. 15, 1979). The Foundation *Pluralismo y Convivencia* was constituted by the Ministry of Justice on January 25, 2005, and registered via the Order ECI/935/2005, Mar. 8, 2005 (B.O.E. 2005). *See* Carmen Garcimartín Montero, *Direct Financing of Religious Denominations in Spain*, 48 J. CHURCH & ST. 175 (2006) (analyzing this foundation in light of the diverse systems of state aid to religion in Spain).

## V. TWENTY-FIVE YEARS AFTER

What can we say twenty-five years after the enactment of the Organic Law on Religious Freedom? A general judgment would likely lead us to affirm that the system it set up has functioned reasonably well in the context of comparative law. However, no legal system of church-state relations is perfect; perfection in the law is not easily attainable.

As a matter of fact, several religious denominations have raised a series of grievances and claims. It is natural that churches and religious communities—particularly those attentive to manifestations of the principle of state cooperation—tend to defend their legitimate interests and, consequently, put more emphasis on the system's deficiencies than on its achievements. Though it is useful to listen to their voices—for they may point out imperfection in our system, thus facilitating its potential improvement—we must not let them condition our perspective of analysis. Our examination must necessarily be broader, as we move away from realizing only the negative aspects of Spanish law on religion.

For example, the Catholic Church sometimes complains about not receiving enough economic aid from the state, including funds for the preservation of its historic patrimony, which constitutes an essential part of Spanish cultural heritage. It also complains about continuous reforms on the financing schemes for private Catholic schools, as well as the juridical rules governing religious education in public schools (not excepting the controversial issue of religion teachers' legal status, allegedly to the detriment of the provisions of the 1979 Agreement on Education and Cultural Affairs).<sup>65</sup> It also worries about the removal of Christian symbols from public places or ceremonies. Finally, the Catholic Church is concerned about laws that are said to undermine moral values of Christian origin, especially in the areas of family and bioethics, which the Church deems vital for the correct functioning of a secular society.<sup>66</sup>

It is not my intention to judge here the merits of those reproaches, but the facts perhaps reveal a social panorama more

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65. *Acuerdo sobre Enseñanza y Asuntos Culturales*, Jan. 3, 1979 (*Instrumento de ratificación* of Dec. 4, 1979, B.O.E. Dec. 15, 1979). Religious teaching in public schools is regulated in Articles I-VIII of the Agreement.

66. See The Bishops' Conference, <http://www.conferenciaepiscopal.es> (last visited July 22, 2006) (detecting the main concerns of Spanish Catholic hierarchy).

optimistic for the Catholic Church. In an era of de-Christianization in the entire Western world and in Europe in particular, 81% of Spanish citizens declare themselves Catholic.<sup>67</sup> The vast majority of parents demand Catholic religious education in private and public schools.<sup>68</sup> A significant percentage of marriages are celebrated according to the form and rules of canon law,<sup>69</sup> and a high percentage of children born in Spain are baptized in the Catholic Church.<sup>70</sup> We are also witnessing an extraordinary flourishing of non-profit organizations of explicit or implicit Catholic inspiration that carry out numerous and significant works of social assistance, inside and outside Spain. In other words, it appears that the change in the Spanish State's approach from confessionality to neutrality has not had such negative consequences for the Catholic Church in Spain. It is true that the Church's institutional presence in public life has decreased, but its social influence continues to be enormous.

On the other hand, the religious federations that are the beneficiaries of 1992 Agreements—Protestants, Jews, and Muslims—complain about what they deem is unjustified and discriminatory legal treatment in comparison with the Catholic Church. They refer, above all, to some aspects of State economic cooperation, to religious education in public schools, to religious assistance in military establishments, hospitals or penitentiaries, and to the lesser civil effects of their religious marriage (in particular, the irrelevance

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67. See Centro de Investigaciones Sociológicas (Center of Sociological Research), <http://www.embusa.es/religiousfreedomsp2004.html> (last visited July 22, 2006) (affirming the data).

68. During the 2004–2005 academic year, 72.2% of the students in public schools opted for Catholic religious education. The percentage is still higher in private non-religious schools: 81.7%. And, naturally, the percentage is much higher in Catholic schools: 99.5%. From the total number of students in pre-university education, approximately two-thirds attend public schools and one-third attend private schools (the immense majority of which are Catholic). See Episcopal Commission for Teaching and Catechesis within the Spanish Bishops' Conference, [http://www.conferenciaepiscopal.es/actividades/2005/febrero\\_14.htm](http://www.conferenciaepiscopal.es/actividades/2005/febrero_14.htm) (last visited July 22, 2006).

69. The approximate proportion is four to three in favor of civil marriages compared to canonical marriages, according to the data of 2000, obtained from the Instituto Nacional de Estadística (National Institute of Statistics), <http://www.ine.es/inebase/index.html> (last visited July 22, 2006). On January 14, 2003, the Catholic news agency Zenit provided similar data based on information from the Bishops' Conference. See Zenit, [www.zenit.org](http://www.zenit.org) (last visited July 22, 2006).

70. In 2000 there were 283,226 christenings out of 397,632 births. See Instituto Nacional de Estadística (National Institute of Statistics), <http://www.ine.es/inebase/index.html> (last visited July 22, 2006).

of the decisions of Jewish and Islamic courts on the nullity and dissolution of marriages).<sup>71</sup>

Again, this is not the right context to deliver a detailed judgment on the merits of those complaints, but, undoubtedly, Spain's legal order still needs a certain fine-tuning with respect to the application of the equality principle. At the same time, however, it is also true that those major religious minorities never enjoyed, in all of Spain's history, the level of freedom and State cooperation that they enjoy now. This includes, of course, the matters regulated by the 1992 Agreements. Moreover, we should remember that they have specific institutional channels of dialogue and negotiation with the State; namely, the creation of mixed commissions for the development and control of the 1992 agreements<sup>72</sup> and the right to appoint, as representatives of their respective federations, members of the Advisory Commission on Religious Freedom in the Ministry of Justice, which must give an opinion on every government initiative relating to the application of the LOLR.<sup>73</sup> We should not lose sight of the fact that the current Spanish system, notwithstanding all its possible limitations or deficiencies, has placed the Protestant, Jewish, and Islamic religions in the best legal position they have ever had in Spanish history.<sup>74</sup>

Other minority religious denominations registered with the Registry of Religious Entities, and therefore having juridical personality in Spanish law, argue that they do not benefit from the principle of State cooperation, for it is, in practice, reserved to the churches or religious communities that have reached a formal agreement according to LOLR article 7. In other words, they affirm

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71. See generally DIEZ AÑOS DE VIGENCIA, *supra* note 61. See also LÓPEZ ALARCÓN & NAVARRO-VALLS, *supra* note 57. For the rest, any good textbook of "ecclesiastical law of the state" (*derecho eclesiástico del Estado*) should provide an overview of the legal status of religious denominations in Spain. See, e.g., DERECHO ECLESIASTICO DEL ESTADO (Rafael Navarro-Valls & Javier Martínez-Torrón eds.), available at [www.iustel.com](http://www.iustel.com); DERECHO ECLESIASTICO DEL ESTADO ESPAÑOL (Javier Ferrer Ortiz ed., 2004).

72. See Third Additional Disposition of the Agreements with the Protestant, Jewish and Islamic federations.

73. See LOLR, *supra* note 6, art. 8(2).

74. It is significant, perhaps, that Spain has hardly experienced any of the problems concerning the use of religious garments or symbols in schools that have recently emerged in other European countries, especially with regard to Islam. See paragraphs 55 through 65 of *Leyla Sabih v. Turkey*, an important decision made in the Grand Chamber of the European Court of Human Rights on November 10, 2005, for a glimpse into the attitude of diverse European legal systems on the use of the Islamic headscarf in schools.

that their registration as religious denominations does not grant them any specific guarantee or support in comparison with ordinary associations under civil law. In their view, this is discriminatory, especially taking into account the fact that some of them have more members than many of the single churches included in the 1992 Agreements.<sup>75</sup>

I must admit that this is a powerful argument<sup>76</sup> that moves us to face what probably is the most visible deficiency of Spain's system of relations between state and religion: the application of the equality principle to religious denominations. The same argument also suggests the necessity of revising the current configuration of the Registry of Religious Entities. This, because of its scarce relevance, seems to be in a sort of sterile "no man's land," halfway between a system lacking controls and respecting the spontaneity of religious social life (Anglo-American style) and a system of true control conceived as an efficient instrument to select the groups deserving to benefit from State cooperation. In any event, we should bear in mind, once again, that minority religions, whatever their social rooting, have reached a freedom of activity that was unimaginable not many years ago. And they also have—as far as they are recognized as having well-known roots in Spanish society—the possibility of negotiating, under LOLR article 7, a formal cooperation agreement with the State, thus reaching a higher legal status.<sup>77</sup>

Finally, there are still some groups that declare themselves religious and claim that the State has failed to recognize their religious nature and has consequently denied them access to the Registry of Religious Entities. Some cases have attracted the attention of public opinion, especially the ones regarding the

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75. We should bear in mind that the three Agreements of 1992 were concluded with three federations of religious communities and not with single churches. For example, the Church of Jesus Christ of Latter-day Saints and Jehovah's Witnesses each have more members than the entirety of all Jewish communities in Spain.

76. See MARTÍNEZ-TORRÓN, *supra* note 21, at 139–45, 184–95; DIEZ AÑOS DE VIGENCIA, *supra* note 61, at 111–19, 132–38.

77. See *supra* note 51 and accompanying text. Until now, apart from the three federations that signed 1992 Agreements, only the Church of Jesus Christ of Latter-day Saints has been recognized as having well-known roots. However, there are no visible signs revealing that the government is prepared to negotiate a cooperation agreement with the Church of Jesus Christ of Latter-day Saints.

Unification Church and the Church of Scientology, both of which have more or less spread in other countries.

With respect to these claims, groups that have been refused registration as religious entities certainly can obtain legal personality in civil law with virtually the same effects through registration as ordinary associations. However, in a country that has a preference for registries and in which religion continues to have a remarkable influence, it is important for some groups to be recognized as a religion by the State. Such recognition provides them a certain “aura of respectability” that constitutes a distinctive element from common associations. In any event, we should not forget a significant decision of the Spanish Constitutional Court on the issue of registration regarding a claim (*recurso de amparo*) filed by the Unification Church.<sup>78</sup> Despite criticism of that decision because of evident flaws and ambiguity in its rationale, the Court openly held that the Registry of Religious Entities is obliged to follow more flexible criteria of admission and that State officials are not permitted either to exercise a rigorous control on the religious nature of applicant groups or to use for that purpose a concept of religion rooted in Western history.<sup>79</sup> However, the actual influence of this Constitutional Court decision on administrative praxis is questionable; significantly, the Church of Scientology, whose registration raised controversial issues similar to those of the Unification Church, was again recently denied the right to register as a religious denomination.<sup>80</sup>

## VI. SOME REFLECTIONS FOR THE FUTURE

The preceding observations reveal that the Spanish system of church-state relations, though reasonable overall, is certainly

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78. Spanish Constitutional Court, STC, Feb. 15, 2001 (S.T.C., No. 46).

79. See Javier Martínez-Torrón, *Freedom of Religion in the Case Law of the Spanish Constitutional Court*, 2001 BYU L. REV. 711, 742–46.

80. According to the data on file in the Ministry of Justice, the refusal of Scientology’s application for registration was decided by the Permanent Commission of the Advisory Commission on Religious Freedom on February 3, 2005 (the issue was not submitted to the Plenary Commission for decision; this was the third time Scientology applied to be registered; the two first applications date back to March 28, 1983, and December 6, 1983). Spanish courts, however, seem to have been more receptive to the Constitutional Court’s doctrine, as demonstrated by the decision *Audiencia Nacional (Sala de lo Contencioso-Administrativo)* of April 21, 2005, in favor of the Self-Realization Fellowship Church, which had been denied registration for allegedly lacking religious aims.

perfectible. Indeed, the current socialist government has inherited from the previous conservative government an interest in revising, and probably in reforming, diverse aspects of Spanish law on religion, including the Organic Law on Religious Freedom itself, as well as the regulation of the Registry of Religious Entities, which has shown more and more deficiencies over the last decade. Although the perspectives of the two governments differ in many aspects, they seem to coincide on a significant point: the timing of legislative revision. Neither government has shown great impatience to conclude it. This fact may express a certain degree of satisfaction with the status quo, so high and widely spread that only some scholars and some religious minorities, representing a small percentage of the population, actually insist upon those legislative modifications. Or perhaps it is just an expression of conformism in view of the difficulties to effect legislative amendments in this area.

Part of the problem derives from the difficulty of isolating individual issues that can be reformed without reconsidering the entire conception of the system. Probably, as indicated before, the most important concrete questions relate to the application of the equality principle. But to solve these questions adequately would lead to an assessment of how consistent the principle of equality is with a system of church-state relations based upon the notion that the State recognizes diverse levels of religious denominations depending on their social roots, with the consequence that a different legal status—especially with regard to state cooperation—corresponds to each level. In other words, we would need to evaluate whether the Spanish multi-tier system of church-state relations is totally compatible with our constitutional concept of equal justice, taking into account that almost all manifestations of State cooperation (and undoubtedly the main ones) are reserved to those confessions that have been deemed to “deserve” a formal cooperation agreement with the state after being recognized as having “well-known roots” in Spanish society.

This, indeed, poses some conceptual questions from the perspective of equality and State neutrality. On the one hand, it does not seem justifiable that the number of adherents of a religion conditions forms of state cooperation when this cooperation is supposed to be founded, in principle, on the religious nature of a group and not on its size. Tax exemptions and the civil effects of religious marriage ceremonies—both reserved to the religious

denominations that have reached an agreement with the state—are two examples of this anomaly. On the other hand, although differences between tiers of religious denominations only affect, in theory, state cooperation, in practice they often result in diverse degrees of actual freedom and “social respectability.” This can be of significance in a State constitutionally obliged to actively promote public freedoms<sup>81</sup> and in a society accustomed to believing that a higher degree of state recognition entails stronger proof of moral acceptability. We could still add that access to the maximum level of cooperation—formal cooperative agreements with the state—is governed by rules written in ambiguous terms, which grant an excessive margin of discretion to public authorities (in particular to the executive power).

In spite of the foregoing, we must not lose historical perspective when analyzing the Spanish church-state system. An historic understanding is necessary to avoid unjust judgments on the past and to facilitate an accurate assessment of the key elements that may serve as orientation for future legislative reforms. In this respect, it is worth reiterating that in the last twenty-five years, religion has ceased to be, for the first time in our history, a cause of serious social and political conflict. In retrospect, there have been, no doubt, tensions between public authorities and religious denominations, especially the Catholic Church and, more recently, Islamic communities. It is inevitable that political tension emerges occasionally in the context of church-state relations, such as the one prevailing in the Occident, which has been expressively described as a “frontier system”<sup>82</sup> and is characterized by an acceptance of the reciprocal autonomy of civil and religious society. However, the last quarter of a century has witnessed a situation of stable “religious peace” in Spain, together with a protection of freedom of religion or belief we had not known before, because Spain adopted its constitutional principles on religion by a large social and political consensus.<sup>83</sup> This fact deserves

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81. See C.E., *supra* note 6, art. 9(2); see also *supra* text accompanying note 55.

82. See RAFAEL NAVARRO-VALLS & RAFAEL PALOMINO, *ESTADO Y RELIGIÓN: TEXTOS PARA UNA REFLEXIÓN CRÍTICA* 10 (2d ed. 2003).

83. This distinguishes Spain from other countries, such as France and the United States, whose fundamental principles on church-state relations have become a myth with the passage of time, despite the fact that they generated a strong division in society at the time of their adoption and for a long time afterwards. See generally CHÉLINI-PONT & GUNN, *supra* note 14 (commenting on an historical revision of the principles of *laïcité* in France and of religious freedom in the U.S.).

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a positive evaluation, for it has proven essential for the consolidation of democracy in Spain. The benefits are evident: for the state, for the citizens of any faith (or of no faith), and for religious denominations, not excluding the Catholic Church, which has lost certain historical privileges but possesses more authentic autonomy now than in the times of traditional confessional monarchy or under Franco's regime.

I would like to conclude by emphasizing that Spain has not reached this situation through a system of strict separation between Church and State or through the privileged support to the major religion that is typical of a confessional State. Rather, Spain has accomplished this through a system in which State neutrality has been understood as compatible with an active cooperation with religious denominations. This compatibility has been perhaps the most crucial factor in the success of the Spanish system of relations between state and religion. The success of the system is manifested not only in the creation of a correct formal framework for the protection of religious freedom, but also in the transformation—in just a few years—of the way that Spaniards approach religious diversity, intellectually as well as emotionally. It is important to bear this in mind with a view to the future. If Spain follows the right policy, its society, which is gradually becoming more pluri-religious and pluri-cultural, is not necessarily destined to become more conflictive.

