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## Freedom of Religion in the Case Law of the Spanish Constitutional Court

Javier Martinez-Torron

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## Freedom of Religion in the Case Law of the Spanish Constitutional Court

*Javier Martínez-Torrón\**

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## I. INTRODUCTION

This article briefly examines the case law of the Spanish Constitutional Court in the field of freedom of religion with respect to the legal status of churches and religious groups as well as the protection of individual freedom of conscience. Due to the limited space available, this study focuses only on the Court's most significant decisions.<sup>1</sup>

My goal is to provide an overview of the main issues concerning religious liberty that have come to the jurisdiction of the Spanish Constitutional Court and analyze the way in which the Court has applied constitutional principles. This analysis will reveal some deficiencies that can be—and must be—corrected, especially with regard to the individual aspects of freedom of conscience. As we will see, on the whole, the Court's approach to these issues does not differ much from the one taken by the European Court of Human Rights, which acts as a sort of Constitutional Court, interpreting the freedoms included in the European Convention on Human Rights of 1950.

Part II of this article describes briefly the historical antecedents of the current Spanish constitutional treatment of religious freedom. Part III outlines the fundamental principles that undergird Spanish law regarding religious issues, i.e., the "ecclesiastical law of the State."<sup>2</sup> Part IV subsequently examines the Court's case law regard-

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1. For an analysis of the Spanish Constitutional Court's decisions through 1991, see RAFAEL RODRÍGUEZ CHACÓN, *EL FACTOR RELIGIOSO ANTE EL TRIBUNAL CONSTITUCIONAL* [THE RELIGIOUS FACTOR BEFORE THE CONSTITUTIONAL COURT] (1992), and ANDRÉS ÁLVAREZ CORTINA, *EL DERECHO ECLESIASTICO ESPAÑOL EN LA JURISPRUDENCIA POSTCONSTITUCIONAL, 1978-1990* [SPANISH ECCLESIASTICAL LAW IN POSTCONSTITUTIONAL JURISPRUDENCE] (1991). Interesting materials on specific aspects of Spanish constitutional jurisprudence can be found in *LA LIBERTAD RELIGIOSA Y DE CONCIENCIA ANTE LA JUSTICIA CONSTITUCIONAL: ACTAS DEL VIII CONGRESO INTERNACIONAL DE DERECHO ECLESIASTICO DEL ESTADO* [FREEDOM OF RELIGION AND CONSCIENCE BEFORE CONSTITUTIONAL LAW: ACTS OF THE VIII INTERNATIONAL CONGRESS OF STATE ECCLESIASTICAL LAW] (Javier Martínez-Torrón ed., 1998) [hereinafter *FREEDOM OF RELIGION AND CONSCIENCE*].

2. The term "ecclesiastical law of the State" ("*derecho eclesiástico del Estado*") was derived from the Italian *diritto ecclesiastico*, which in turn comes from the German *Staatskirchenrecht*. Most Spanish scholars share the idea that the term's meaning currently lacks precision, as the legal and scholarly approach to these issues has evolved from church-state relations to the regulation of freedom of religion and conscience. For an extensive treatment of this issue, see generally JAVIER MARTÍNEZ-TORRÓN, *RELIGIÓN, DERECHO Y SOCIEDAD: ANTIGUOS Y NUEVOS PLANTEAMIENTOS EN EL DERECHO ECLESIASTICO DEL ESTADO* [RELIGION, LAW AND SOCIETY: ANCIENT AND NEW APPROACHES IN STATE ECCLESIASTICAL LAW] (1999), and the

ing the basic legal position of churches, including the Catholic Church, non-Catholic churches, and new religious movements. Part IV focuses on the manner in which the Court's decisions affect the protection of the individual's freedom of conscience. Finally, Part V provides several conclusory observations.

As an introductory remark, it may be useful to note that the Spanish Constitutional Court's structure and function is very different from the U.S. Supreme Court. Indeed, the Spanish Court most closely resembles the German and Italian Constitutional Courts, which served as models and sources of guidance for the Spanish Court.<sup>3</sup>

In Spain, the Constitutional Court is the only court entitled to declare a law unconstitutional.<sup>4</sup> The Court can do this by deciding a motion of unconstitutionality (*recurso de inconstitucionalidad*) or a question of unconstitutionality (*cuestión de inconstitucionalidad*). The former involves an examination of the constitutionality of a statute *in abstracto*, i.e., independently from its application to a particular case, and can be filed by the government, the Spanish Ombudsman (*Defensor del Pueblo*), fifty congressmen or senators, and some collegial bodies of Spain's autonomous regional communities. The latter can be submitted by any Spanish court that considers that a statute applicable to a particular controversy may be unconstitutional. An ordinary court cannot itself declare a statute unconstitutional, but can propose its opinion on the issue in the form of a "question" and ask the Constitutional Court to decide the issue.

In addition, the Constitutional Court decides motions of protection (*recursos de amparo*), i.e., petitions filed by individual or legal persons that believe that their constitutional rights and freedoms have been violated. Aggrieved parties may file such petitions after

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bibliography cited therein. In the last years there have been some attempts to change the term "*derecho eclesiástico del Estado*", and the notion itself of this legal discipline. See especially DIONISIO LLAMAZARES, DERECHO DE LA LIBERTAD DE CONCIENCIA [THE LAW OF FREEDOM OF CONSCIENCE], vol. I, 11–24 (1997); and JOSÉ A. SOUTO, COMUNIDAD POLÍTICA Y LIBERTAD DE CREENCIAS [POLITICAL COMMUNITY AND FREEDOM OF BELIEF] 11–34 (1999).

3. See EDGAR CORZO SOZA, LA CUESTIÓN DE INCONSTITUCIONALIDAD [THE QUESTION OF UNCONSTITUTIONALITY] 157–208 (1998).

4. See C.E. arts. 161–63 (Spain), translated in SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 25, 39–40 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998) [hereinafter SPANISH LEGISLATION]. This legislation, and other relevant information, is available on the web page of the General Directorate of Religious Affairs of the Ministry of Justice: <<http://www.mju.es/mreligiosos.htm>> (visited Mar. 24, 2001).

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having exhausted the judicial remedies available before the ordinary courts. The majority of Constitutional Court decisions resolve *recursos de amparo*. This is true also with regard to the general issue of religious freedom, although some interesting issues on religion have been decided through the other two channels.

Finally, those readers who belong to common law systems should bear in mind that case law is only a part of the law—and not the most important part—in a civil law system like Spain. This fact applies to the case law of the Constitutional Court as well, notwithstanding the Court's significance as the supreme oracle of the Spanish Constitution. Church-state relations and religious freedom are matters that are strongly regulated by statutory law and by-laws, as well as by formal agreements between the state and the most influential religious communities.

## II. SOME HISTORICAL REMARKS

Spain's current Constitution was enacted in 1978, three years after General Franco died and Spain's political transition to democracy began.<sup>5</sup> This is the first Spanish Constitution that has provided an adequate solution to the social and political conflicts that religious ideas have traditionally caused in Spain.

The reason for its success is that the Constitution of 1978 effectuated a gradual transformation of the Spanish confessional state into a regime based on religious freedom without breaking abruptly with the nation's historical tradition. Spain had been a confessional state since it became a unified kingdom in the late fifteenth century; the state officially professed Catholicism, and there existed an inseparable nexus between Catholicism and Spain's national identity.<sup>6</sup> The state's

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5. See generally Gloria M. Morán, *The Spanish System of Church and State*, 1995 BYU L. REV. 535, 537 (discussing the "period of political transition from 1975 to 1978 [that] culminated in the 1978 Constitution").

6. It is usually assumed that the Spanish kingdom began in 1492 when Queen Isabel of Castille and King Ferdinand of Aragon, who married in 1469, conquered the Moorish kingdom of Granada. Significantly, Ferdinand and Isabel are known as the "Catholic Kings" ("*Reyes Católicos*") because the spreading and strengthening of Catholicism allegedly formed one of their main goals in politics, both within the territory of the Spanish peninsula as well as in the subsequent colonization of America. In any event, the adjective "Catholic" is actually better applied to Queen Elizabeth; King Ferdinand has been often presented as one of the archetypal examples of Machiavellian Renaissance princes. Ferdinand and Isabel's two most dramatic decisions involving religious issues involved the expulsion of Jews and Muslims in 1492 and 1502, respectively. Faithful members of these two religions had to either convert to Ca-

public endorsement of the Catholic faith was usually accompanied by intolerance of other religions with an intensity that varied according to the political and religious circumstances.

For almost five hundred years, the Catholic confessionality of the Spanish state experienced only two ephemeral interruptions: the Constitution of 1869 (derogated in 1876) and the Republican Constitution of 1931.<sup>7</sup> Indeed, the gravest mistake of the Constitution of 1931—Spain’s last democratic Constitution prior to 1978—was its hostile attitude towards the Catholic Church. The Republican Constitution proclaimed the general principle of freedom of religion and conscience, but, in an attempt to diminish the Catholic Church’s extensive influence on the country’s national political and cultural life, it imposed severe restrictions on the actual freedom of ecclesiastical institutions.<sup>8</sup> These restrictive provisions, together with their devel-

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tholicism, the “true religion,” or leave the kingdom. This religious policy was continued by succeeding kings. Philip II, for instance, promulgated in 1564, as “laws of the kingdom,” the decrees of the Council of Trent, historically known as the Counter-Reformation Council. Even the Constitution that introduced the spirit and doctrines of liberalism into Spain, the 1812 Constitution of Cádiz, began with an invocation to “Almighty God, Father, Son and Holy Spirit” (author’s translation), and enshrined the Catholic religion as part of the political structure of the Spanish state with the following words: “The religion of the Spanish Nation is, and will perpetually be, the Catholic, Apostolic, Roman religion, which is the only true one. The Nation protects it by wise and just laws, and prohibits the exercise of any other religion” (art. 12, author’s translation). For a succinct and interesting synopsis of the history of church-state relationships in Spain during the last three centuries, with abundant bibliographical references, see Pedro Lombardía, *Precedentes del derecho eclesiástico español* [*Precedents of Spanish Ecclesiastical Law*], in *DERECHO ECLESIASTICO DEL ESTADO ESPAÑOL* [ECCLESIASTICAL LAW OF THE SPANISH STATE] 111 (2d ed. 1983); see also JOSÉ M. CUENCA TORIBIO, *RELACIONES IGLESIA-ESTADO EN LA ESPAÑA CONTEMPORÁNEA: 1833–1985* [CHURCH-STATE RELATIONS IN CONTEMPORARY SPAIN: 1833–1985] (1985) (regarding the nineteenth and twentieth centuries).

7. The Constitution of 1869, Article 21, recognized the state’s obligation to support the Catholic Church without establishing Catholicism as the state religion. Article 3 of the Constitution of 1931 provided that “[t]he Spanish state has no official religion” (author’s translation).

8. Article 27 of the Republican Constitution provided: “Freedom of conscience and the right to freely profess and practice any religion are guaranteed within the Spanish territory, with the exceptions derived from the due respect to public morals” (author’s translation). However, the same Article subjected all cemeteries to the state’s authority and forbade the establishment of separate religious sections within state cemeteries; only private worship was permitted (public acts of worship were subject to a specific authorization by government). In any event, the very heart of the problem was Article 26. According to the different provisions of this Article, all financial aid to the Catholic Church was suppressed, including tax benefits for religious corporations (it should be noted that the state’s economic support was a sort of compensation for the massive confiscation of ecclesiastical property in 19th century). All religions were considered as “associations subjected to a special law.” The Order of Jesuits was dis-

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opment by statutory law and the strongly anti-clerical attitude of some of the Republican governments, largely provoked the social and political convulsions that ended tragically in the Spanish Civil War (1936–1939) and led to General Franco’s dictatorship (1939–1975).<sup>9</sup>

As previously indicated, the Constitution of 1978 renounced Catholic confessionality and explicitly declared that the Spanish state has no official religion.<sup>10</sup> State neutrality does not mean that religion must be ignored or that the state adopts a sort of “secular confessionality.”<sup>11</sup> On the contrary, Article 14 prohibits discrimination based on religious grounds. Freedom of religion and belief, as well as cooperation with churches, defines state policy on religious affairs. Significantly, Article 16(3) specifically requires the state to cooperate

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solved, and all other religious orders and congregations were subjected to different legal controls and restrictions, in particular with regard to their capacity to acquire and administer property. In addition, they were prohibited from engaging in teaching activities; this provision was particularly severe and certainly unrealistic, considering that most schools in Spain were in the hands of the Catholic Church.

9. On the religious policy of the Second Republic, see generally Javier Martínez-Torrón, *Derecho de asociación y confesiones religiosas en la Constitución de 1931* [*The Right of Association and Religious Faiths in the Constitution of 1931*], 3 CUESTIONES CONSTITUCIONALES [CONSTITUTIONAL ISSUES] 91 (2000), and the bibliography cited therein. For an analysis of the religious policy of General Franco’s regime, see Alberto de la Hera, *Las relaciones entre la Iglesia y el Estado en España (1953–1974)* [*Church-State Relationships in Spain: 1953–1974*], 211 REVISTA DE ESTUDIOS POLÍTICOS 5 (1977).

10. The Constitution primarily deals with religion in Articles 16 (freedom of ideology, religion and worship) and 14 (principle of equality). Article 16 states:

1. Freedom of ideology, religion and worship of individual and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.
2. Nobody may be compelled to make statements regarding his religion, beliefs or ideology.
3. There shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and shall in consequence maintain appropriate co-operation with the Catholic Church and the other confessions.

Similarly, Article 14 provides that “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance.” (Both Articles are translated in SPANISH LEGISLATION, *supra* note 4.) Other provisions of the Constitution that directly or indirectly relate to freedom of religion and belief include Article 30 (conscientious objection to military service), Article 27 (right to education and freedom of teaching), Article 20 (freedom of expression), and Article 22 (freedom of association).

11. See generally María J. Roca, *La neutralidad del Estado: fundamento doctrinal y delimitación en la jurisprudencia* [*State Neutrality: Doctrinal Foundations and Definition in Jurisprudence*], in *IL DIRITTO ECCLESIASTICO* [ECCLESIASTICAL LAW] 405 (1997).

with the Catholic Church<sup>12</sup> and other religious denominations according to their relevance in the Spanish society. Although statutes and by-laws enacted after the Constitution have created different channels for state cooperation with churches, the main instruments of this cooperation are the Concordat with the Catholic Church and parallel agreements with other religious denominations of particular social significance.<sup>13</sup>

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12. In the years after the Constitution was enacted, Spanish scholars widely discussed the potential legal effects of the specific mention of the Catholic Church by Article 16(3). See, e.g., Pedro-Juan Viladrich, *Los principios informadores del derecho eclesiástico español* [*Informative Principles of Spanish Ecclesiastical Law*], in *ECCLESIASTICAL LAW OF THE SPANISH STATE*, *supra* note 6, 231–36. However, the passage of time has demonstrated that the *mens legislatoris* in that Article did not seem to go beyond what could be described as a “tranquilizing effect.” In brief, the new regime of relationships between the state and religion implied a deep change in Spanish tradition. The drafters of the Constitution did not want the Catholic hierarchy to think that they were following the example of the Constitution of 1931, in which, as indicated above, a sort of vendetta against ecclesiastical institutions replaced the Catholic confessionality of the state. Including the name of the Catholic Church in Article 16(3) helped to avoid the risk of a negative reaction on the part of the most conservative religious circles in Spain, and contributed to eliminate possible attacks against the extraordinary political change that was taking place in Spain, which some influent social forces of Catholic pedigree regarded with diffidence. It explains an apparent paradox stemming from the support of the Communist Party—which traditionally had been, and was in 1978, an anticlerical party—for Article 16(3)’s reference to the Catholic Church. For a description of the parliamentary debates on Article 16, see J. JAVIER AMORÓS, *LA LIBERTAD RELIGIOSA EN LA CONSTITUCIÓN ESPAÑOLA DE 1978* [RELIGIOUS FREEDOM IN THE SPANISH CONSTITUTION OF 1978] 120–53 (1984).

13. The establishment of cooperative agreements between the state and non-Catholic religious denominations constituted an innovative addition to the Spanish legal tradition, and was inspired by the Italian Constitution, which in turn was inspired by German law. In Spain, these agreements were created *in abstracto* by Article 7 of the Organic Law of Religious Freedom (Ley Orgánica 7/1980, July 5, 1980, *translated in* SPANISH LEGISLATION, *supra* note 4), which allows the government to negotiate cooperative agreements with religious denominations of particular social significance and requires that such agreements be approved by a specific act of Parliament. The new institution was put into practice for the first time (and, at the moment, also for the last time) in 1992, when Parliament approved three agreements with the Evangelical Churches, the Jewish communities, and the Islamic communities, all of which are very similar in content. In the following years, the Jehovah’s Witnesses and the Church of Jesus Christ of Latter-day Saints (“LDS Church”) have endeavored to reach an agreement with the state; however, it presently does not appear that negotiations between these groups and the government will successfully conclude in the near future. For an analysis of the 1992 agreements in the context of Spanish constitutional principles and in light of comparative law, see generally JAVIER MARTÍNEZ-TORRÓN, *SEPARATISMO Y COOPERACIÓN EN LOS ACUERDOS DEL ESTADO CON LAS MINORÍAS RELIGIOSAS* [SEPARATISM AND COOPERATION IN STATE AGREEMENTS WITH MINORITY RELIGIONS] (1994). See also David García-Pardo, *El contenido de los acuerdos previstos en el artículo 7.1 de la ley orgánica de libertad religiosa* [*The Content of the Agreements Provided for in Article 7(1) of the Organic Law of Religious Liberty*], in 16 ANUARIO DE DERECHO ECLESIASTICO DEL ESTADO [A.D.E.E.] 223 (2000).

III. THE FUNDAMENTAL PRINCIPLES OF SPANISH LAW ON  
RELIGIOUS ISSUES*A. Four Fundamental Principles*

Spanish scholars agree that four constitutional principles constitute the fundamentals of Spanish law on religious affairs.<sup>14</sup> These informing principles (*principios informadores*) are religious freedom, equality, neutrality, and cooperation. While no strict hierarchical order governs the relationship between these principles, they collectively establish a system of coordinates that define the plane of constitutional legitimacy to which legislator and government must limit their activity.<sup>15</sup>

The principle of religious freedom gives coherence to the other three, for it defines the objective to be attained by the state. This principle means that the state must guarantee adequate protection of all individuals' and groups' right to freedom of religion and conscience. The equality of citizens before the law demands that no one can be subjected to discrimination on the basis of religion or beliefs. Equality, in turn, stems from the principle of neutrality, which forbids the state from evaluating the different religions according to their doctrines or tenets—the state may only judge their social effects. The Spanish Constitution of 1978 has enshrined the principle of state neutrality, instead of the prior principle of confessionality, for it is viewed as essential to guarantee the equal protection of religious

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14. See generally JOAQUÍN CALVO ÁLVAREZ, *LOS PRINCIPIOS DEL DERECHO ECLESIASTICO ESPAÑOL EN LAS SENTENCIAS DEL TRIBUNAL CONSTITUCIONAL* [PRINCIPLES OF SPANISH ECCLESIASTICAL LAW IN THE CASE LAW OF THE CONSTITUTIONAL COURT] (1999). The initial and most influential analysis of these principles was written by Pedro J. Viladrich, *Los principios informadores del Derecho eclesiástico español* [*Informative Principles of Spanish Ecclesiastical Law*], in *DERECHO ECLESIASTICO DEL ESTADO ESPAÑOL* [ECCLESIASTICAL LAW OF THE SPANISH STATE] 245 (1st ed. 1980). For an English-language overview of the Spanish law on religious affairs, see Iván C. Ibán, *State and Church in Spain*, in *STATE AND CHURCH IN THE EUROPEAN UNION* 93 (Gerhard Robbers ed., 1996), and Morán, *supra* note 5, at 535–53. Until now, the most extensive treatise on the subject, written in Spanish, is the collective volume *TRATADO DE DERECHO ECLESIASTICO* [TREATISE OF ECCLESIASTICAL LAW OF THE STATE] (1994).

15. See Javier Ferrer Ortiz, *Los principios constitucionales del derecho eclesiástico como sistema* [*Constitutional Principles of Ecclesiastical Law as a System*], in *LAS RELACIONES ENTRE LA IGLESIA Y EL ESTADO: ESTUDIOS EN MEMORIA DE PEDRO LOMBARDÍA* [RELATIONS BETWEEN CHURCH AND STATE: STUDIES IN MEMORY OF PEDRO LOMBARDÍA] 309 (1989) [hereinafter *RELATIONS BETWEEN CHURCH AND STATE*].

freedom of all citizens. Finally, the principle of cooperation prevents neutrality from imposing a separation between church and state. Cooperation thus provides the basis for diversified state collaboration with religious denominations on condition that the other principles—especially neutrality and equality—are duly respected. State cooperation with churches, which is required by the Constitution, implies that religion is considered a positive reality in Spain as far as it is a natural effect of the exercise of a fundamental freedom.

*B. The Constitutional Court and the Four Fundamental Principles*

Since its establishment, the Spanish Constitutional Court substantially accepted the prior description of the principles that govern state law on religious affairs.<sup>16</sup>

In 1982, the Court affirmed:

[T]here are two basic principles in our political system which determine the state's attitude towards religious phenomena and the entire order of relationships between state and churches or religious denominations: the first is religious freedom, understood as a fundamental right which consists in the acknowledgment of an environment of freedom and a sphere of *agere licere* of individuals; the second is equality, . . . according to which it is not possible to establish any kind of discrimination or diverse legal treatment of citizens on account of their ideology or beliefs, and there must exist an equal enjoyment of religious freedom by all citizens.<sup>17</sup>

The same decision also endorsed the principle of state neutrality with the following words: “[the neutrality principle] prevents . . . religious values or interests from standing as parameters to measure the

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16. See Javier Ferrer Ortiz, *Los principios informadores del derecho eclesiástico del Estado* [Informative Principles of State Ecclesiastical Law], in FREEDOM OF RELIGION AND CONSCIENCE, *supra* note 1, at 107; José A. Souto, *Libertad ideológica y religiosa en la jurisprudencia constitucional* [Freedom of Ideology and Religion in Constitutional Jurisprudence], in RELATIONS BETWEEN CHURCH AND STATE, *supra* note 15, at 511, 520–27.

17. STC 24/1982, May 13, 1982, FJ 1 [“*fundamento jurídico*,” i.e., statement as to the law] (author's translation). The case considered the constitutional legitimacy of the Spanish system of Catholic religious assistance to the military. For scholarly commentary on this decision, see JOSÉ M. CONTRERAS, EL RÉGIMEN JURÍDICO DE LA ASISTENCIA RELIGIOSA EN LAS FUERZAS ARMADAS EN EL SISTEMA ESPAÑOL [THE LEGAL REGIME OF RELIGIOUS ASSISTANCE IN THE ARMED FORCES UNDER THE SPANISH SYSTEM] 518–40 (1989), and Lourdes Babé, *La asistencia religiosa a las Fuerzas Armadas ante la jurisprudencia del Tribunal Constitucional español* [Religious Assistance to the Armed Forces Before the Case Law of the Spanish Constitutional Court], in FREEDOM OF RELIGION AND CONSCIENCE, *supra* note 1, at 351.

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legitimacy or justice of the laws and of the activity of public authorities. At the same time, [it] bans any sort of confusion between state and religious functions.”<sup>18</sup> Later that same year, the Court emphasized the significance of state cooperation with churches.<sup>19</sup>

Naturally, the Court’s application of these four fundamental principles to actual cases has been sometimes problematic. While some of these problems involve the compatibility of the principles of equality and cooperation with the legal position of the Catholic Church,<sup>20</sup> others relate to the Court’s interpretation of the neutrality principle. Consider the following three Constitutional Court cases.

*1. Religious symbolism in a public university*

The first decision,<sup>21</sup> issued by the Court in 1991, concerned the use of religious symbols by public institutions. The Constitutional Court declared that a state university could legitimately remove the image of the Virgin Mary from its official coat of arms if the governing bodies of the university considered such action to be appropriate in light of the state neutrality in religious matters. However, the Court noted that the constitutional principle of neutrality did not obligate the university to remove the image, because respect of history and tradition might have persuaded the university authorities to maintain those religious symbols traditionally included in the university’s heraldic emblem.

More specifically, the facts of the case were the following. The Senate of the University of Valencia had decided to remove the image of the Virgin Mary from its official coat of arms. A group of professors and students challenged the resolution and obtained an affirmative judgment from the ordinary courts. The Constitutional Court reversed the lower court’s judgment and held that the univer-

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18. STC 24/1982, May 13, 1982, FJ 1 (author’s translation). The Court had previously discussed state neutrality, together with religious freedom, in a 1981 decision, stating: “[I]n a legal and political system founded on pluralism, the individuals’ freedom of religion and ideology, and the aconfessionality of the state, all public institutions, and in particular education centers, have to be indeed ideologically neutral.” STC 5/1981, Feb. 13, 1981, FJ 9 (author’s translation).

19. See STC 66/1982, Nov. 12, 1982 (involving the recognition of civil effect to an ecclesiastical court’s decision declaring the nullity of a canonical marriage). Other Constitutional Court cases that emphasize the significance of church-state cooperation include STC 93/1983, Nov. 8, 1983, FJ 5 and STC 265/1988, Dec. 22, 1988, FJ 4-5.

20. See *infra* Part IV.A.

21. STC 130/1991, June 6, 1991.

sity's governing bodies were free to modify the emblems representing the university. The Court affirmed that while respect for history certainly formed an important and legitimate criterion for decision in this matter, it was not the only one. Indeed, the Court acknowledged that the university's senate had implicitly followed a different and equally legitimate criterion, namely, the idea "that a University emblem without elements of religious significance is more adequate to the logic of a non-confessional State that an emblem with them."<sup>22</sup> The Court held that, in any event, the university, as a public corporation endowed with autonomy, was free to decide the issue. Moreover, the Court indicated that, when engaged in such inquiries, the courts must limit their examination to verifying that decisions made by public institutions are both legal and not irrational, arbitrary, or absurd.

Although the Court did not provide more specific criteria on this particular point, in my view, the reference to history is important. In a religiously neutral state, the legitimate use of religious symbols in public institutions must occur in connection with the history of the institution—or the history of the country—which often has ancient religious roots. The religious symbol thus becomes "secularized" as a way to preserve a link with tradition. If this type of historical justification does not exist, the use of religious signs in public institutions should be considered unconstitutional because such use would publicly transmit a religious message. A religiously neutral state would thereby create a new tradition of a religious nature, resulting in a "confusion between state and religious functions."<sup>23</sup>

## 2. *Religious ceremony in the armed forces*

This sort of confusion seems to be present in a 1996 case concerning the participation of the armed forces in a religious ceremony.<sup>24</sup> Following an old tradition, the military garrison of Valencia had organized a solemn military parade in honor of the Virgin Mary to celebrate the fifth centennial of the local patron saint, the *Virgen*

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22. *Id.* at FJ 5 (author's translation).

23. STC, May 13, 1982, FJ 1. *See supra* note 18 and accompanying text.

24. STC 177/1996, Nov. 11, 1996. For a critical analysis of this decision, see Isidoro Martín Sánchez, *Celebración por las Fuerzas Armadas de festividades religiosas y principio de laicidad* [The Celebration of Religious Festivities by the Armed Forces and the Principle of Laicity], in FREEDOM OF RELIGION AND CONSCIENCE, *supra* note 1, at 657.

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*de los Desamparados*, who had received the honorific title of Supreme General of the Army in 1810. A sergeant in the garrison refused to participate in the ceremony for reasons of conscience and, following regular procedures, requested permission to not attend the event. Although his superiors did not grant his request, the officer left the parade at the moment when the Virgin was honored. His commanders subsequently punished him with thirty days of home arrest and initiated disciplinary proceedings against him with the aim of imposing further sanctions.

In deciding the case, the Constitutional Court reaffirmed that participation in religious ceremonies is voluntary,<sup>25</sup> a principle recognized implicitly in Article 16(2) of the Constitution<sup>26</sup> and explicitly in Article 2 of the 1980 Organic Law of Religious Freedom.<sup>27</sup> However, the Court did not object to the fact that the army organized an official religious ceremony. On the contrary, after recalling its previous doctrine on state neutrality, the Court justified the army's conduct with enigmatic and contradictory reasoning. Thus, after having referred to the military parades as "acts of unequivocal religious content, convoked and organized by the military authorities," the Court added: "therefore [such parades] were not acts of religious nature in which the military participated, but military acts aimed to the celebration of a religious festivity by military personnel." Most surprisingly, the Court further stated that "Article 16(3) of the Spanish Constitution does not prevent the armed forces from celebrating religious festivities or from participating in ceremonies of that nature."<sup>28</sup>

The Court's interpretation of the neutrality principle in the above case suffers from more than one significant flaw. It is true that

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25. Nevertheless, it must be noted that the Court did not rule in favor of the plaintiff due to some procedural complexities of the case that are not worth explaining here. In short, the Court did not consider that the unjust sanctions applied to the officer by his superiors could be qualified as criminal behavior.

26. Freedom of worship enshrined in Article 16(1) naturally implies freedom not to worship. See art. 16, *supra* note 10 (reprinting the provision in full).

27. Article 2(1)(b) of the Organic Law of Religious Freedom provides: "1. The freedom of worship and religion guaranteed by the Constitution secures the right, which may therefore be exercised by all without duress, to: . . . b) . . . be free from any obligation to receive spiritual support or participate in religious services that are contrary to their personal convictions." (*translated in SPANISH LEGISLATION, supra* note 4, at 41).

28. All the literal quotations in this paragraph are taken from STC 177/1996, Nov. 11, 1996, FJ 10 (author's translation).

the Court recognized the sergeant's freedom of worship—which obviously includes the freedom not to worship—but failed to realize the fact that, particularly with respect to principles, historical traditions cannot justify every state action. Constitutional principles, of course, permit, and even require, state practices aimed at facilitating the exercise of religious freedom by military personnel.<sup>29</sup> Such state action, however, differs significantly from the army's conduct in becoming involved institutionally in the organization of religious ceremonies or services. Though this latter practice may be a matter of tradition, it seems less compatible with the principle of state neutrality than does, for example, a university's simple maintenance of an aesthetically significant religious symbol that evokes the institution's ancient origin in a period when most European universities were founded by the Catholic Church.

### 3. *Land use privileges for churches*

The Constitutional Court proposed a more accurate interpretation of the neutrality principle in a 1993 case<sup>30</sup> that struck down a provision of a 1964 statute granting the Catholic Church a privileged position with regard to the renting of city houses. Historically, the renting of city houses was tightly regulated in Spain, as in many other European countries.<sup>31</sup> Under the statute (*Ley de Arrendamientos Urbanos*), in cases of “mandatory prorogation,” a tenant had the right to extend its lease unless the landlord could prove that he or she needed the house for his personal use or for the use of a close and dependent relative. However, the law conferred special privileges on certain institutions in their capacity as landlords. In particular, the law exempted the Catholic Church, along with public institutions and agencies, from having to prove that they needed “to occupy their own property to establish their offices or services.”<sup>32</sup> It must be noted that the statute at issue was enacted when Catholicism was still

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29. Thus, Article 2(3) of the 1980 Organic Law of Religious Freedom provides: “To ensure true and effective application of these rights, public authorities shall adopt the necessary measures to facilitate assistance at religious services in public, military, hospital, community and penitentiary establishments and any others under its aegis, as well as religious training in public schools.”

30. STC 340/1993, Nov. 16, 1993.

31. The matter continues to be subject to strict state regulation, though such regulation has been increasingly liberalized.

32. Art. 76(1) of the 1964 *Ley de Arrendamientos Urbanos* (author's translation).

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the official religion of the Spanish state and the Concordat of 1953 was in force.

The Court declared unconstitutional the section of the 1964 statute that granted a special privilege to the Catholic Church and put the ecclesiastical institutions on equal terms with so-called “public law corporations.” The Court based its decision on the fact that the privileged legal status of the Catholic Church differed substantially from the legal treatment granted to other physical and legal persons, including non-Catholic religious organizations. The Court concluded that such favorable treatment was not grounded on a reasonable and proportionate justification. The ecclesiastical privilege was logical in the context of a confessional state, but not in a state which had specifically rejected the establishment of an official religion and adopted neutrality towards religion as one of its basic principles.<sup>33</sup>

Significantly, a new statute enacted in 1994 replaced the 1964 law, reducing the time of “mandatory prorogation” of the contract<sup>34</sup> and abolishing the privileges previously bestowed upon public institutions. This latter aspect had been proposed in a dissenting opinion in the 1993 case.<sup>35</sup>

#### IV. THE LEGAL STATUS OF CHURCHES

The constitutional principle of cooperation naturally plays a significant role in the definition of the legal status of churches in Spain. The fundamental provisions determining the legal position of churches and religious communities are found in the Organic Law of Religious Freedom.<sup>36</sup> Article 7 of the Organic Law created a specific channel through which state cooperation could materialize: formal agreements between the state and churches.<sup>37</sup> Introduced into Span-

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33. See STC 340/1993, Nov. 16, 1993, FJ 4.

34. The mandatory prorogation has been now reduced to the first five years of the contract (under the preceding law its time was unlimited).

35. See the dissenting opinion of Justice José Gabaldón.

36. See Organic Law, arts. 4–8, *translated in* SPANISH LEGISLATION, *supra* note 4, at 41, 43–48. These four Articles comprise the second half of the statute. The first half is centered on the individual dimension of religious freedom.

37. Article 7(1) provides: “The State, taking account of the religious beliefs existing in Spanish society, shall establish, as appropriate, Co-operation Agreements or Conventions with the Churches, Faiths or religious Communities enrolled in the Registry where warranted by their notorious influence in Spanish society, due to their domain or number of followers. Such Agreements shall, in any case, be subject to approval [by] an Act of Parliament” (*translated in*

ish law with the aim of establishing a non-Catholic equivalent of the concordats with the Catholic Church, these cooperation agreements have extended some of the traditional benefits granted to the Catholic Church to other religions of social significance.

When Spain's political transition to democracy began, it did not seem desirable—or even possible—to eliminate the bilateral relationships between the Catholic Church and the Spanish state that were traditionally developed through concordats with the Holy See. Hence, the principles of equality and neutrality recommended the development of an analogous institution available to those non-Catholic religious confessions that had acquired “well-known roots” in Spanish society.<sup>38</sup> The nature of these cooperation agreements has been largely discussed by scholars who hold opposing views in some aspects but have the same opinion (almost unanimously) on two points.<sup>39</sup> First, the cooperation agreements created by the Organic Law differ from concordats in that they are not considered equivalent to international treaties. Second, these agreements do not constitute by themselves a new source of law in the Spanish system, for they only acquire binding force if approved by a specific act of Parliament (*Cortes*).<sup>40</sup>

Until now, as stated above,<sup>41</sup> the Spanish state concluded three cooperation agreements with three federations of Evangelical churches, Jewish communities, and Islamic communities, respectively, in 1992. The consequence is that these three federations, along with the Catholic Church, have been granted a specific legal status, which is substantially more favorable than the legal situation of the other religions regulated by ordinary state laws and by-laws. This fact raises diverse questions with regard to the interpretation of the equality principle. At the moment, the Constitutional Court has not decided any case related to the privileges of those non-Catholic religions included in the current system of cooperation agreements. On the contrary, the Court has decided a number of cases in which the special status of the Catholic Church was at issue. In the follow-

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SPANISH LEGISLATION, *supra* note 4, at 41, 44). The word “notorious” is a literal translation of the Spanish “*notorio*.” It must be noted that this word in Spanish does not have the pejorative meaning that it usually has in English.

38. See MARTÍNEZ-TORRÓN, *supra* note 13, at 20–30.

39. See *id.* at 95–116.

40. See Organic Law of Religious Freedom, art. 7(1), *supra* note 37.

41. See *supra* note 13.

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ing sections, I will mention the most significant ones (section A) together with some other recent decisions referring to the legal position of new religious movements (section B).

*A. The Catholic Church and the Equality Principle*

Concordats with the Holy See have a long history in Spain<sup>42</sup> and have been recognized as having a nature similar to international treaties.<sup>43</sup> During General Franco's regime, a concordat signed in 1953 governed the state's relationship with the Catholic Church.<sup>44</sup> In 1979, a set of four agreements—which, in fact, collectively constitute a concordat—replaced the Concordat of 1953.<sup>45</sup> The declared purpose of the new concordat was to preserve, in harmony with the principle of cooperation, the Catholic Church's legal privileges that were deemed compatible with the rest of the principles enshrined in the newly promulgated Constitution.

However, this theoretical purpose encountered some obvious

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42. For a summary of the history of bilateral relationships between the Spanish State and the Catholic Church, see Lombardía, *supra* note 6, at 111–28, and the bibliography cited therein.

43. On the equal nature of concordats and international treaties, see the classic book by HENRY WAGNON, *CONCORDATS ET DROIT INTERNATIONAL* [CONCORDATS AND INTERNATIONAL LAW] (1935). See also Rafael Navarro-Valls, *Convergencia concordataria e internacionalista en el 'accord-normatif'* [Convergence of Concordat Law and International Law in the 'accord-normatif'], 5 *IUS CANONICUM* 141 (1965).

44. The Concordat of 1953 replaced the Concordat of 1851, which was considered not in force from the beginning of the Second Republic, because its provisions were repeatedly infringed by the Constitution of 1931 and subsequent legislation and political praxis on religious affairs. A previous concordat had been signed in 1753. There were some attempts to negotiate a new concordat during the years of the Second Republic, but inflexibility on both sides made it impossible. See generally JOSÉ M. VÁZQUEZ GARCÍA-PENUELA, *EL INTENTO CONCORDATARIO DE LA SEGUNDA REPÚBLICA* [THE ATTEMPT TO NEGOTIATE A CONCORDAT DURING THE SECOND REPUBLIC] (1999).

45. See generally JUAN FORNÉS, *EL NUEVO SISTEMA CONCORDATARIO ESPAÑOL* [THE NEW SPANISH CONCORDAT] (1980). The four agreements signed in 1979 are: the Agreement on Legal Affairs (*Agreement of January 3, 1979, between the Spanish State and the Holy See concerning legal affairs*), the Agreement on Economic Affairs (*Agreement of January 3, 1979, between the Spanish State and the Holy See, concerning economic affairs*), the Agreement on Education and Cultural Affairs (*Agreement of January 3, 1979, between the Spanish State and the Holy See, concerning educational and cultural affairs*), and the Agreement on Religious Assistance to the Armed Forces, and on the Military Service of Clergymen and Members of Religious Orders (*Agreement of January 3, 1979, between the Spanish State and the Holy See, concerning religious assistance of the Armed Forces and the military service of clergymen and members of religious orders*). The text of the four agreements is translated in *SPANISH LEGISLATION*, *supra* note 4, at 51–69.

problems. The Concordat of 1979 had been negotiated before the definitive text of the Constitution was completed, and was signed just a few days after the Constitution was enacted.<sup>46</sup> Spain did not yet have any tradition of religious freedom (nor of most civil liberties), and neither the courts nor scholars had begun to develop an interpretation of the new principles governing church-state relations. As the signing of the Concordat of 1979 occurred so close in time to the promulgation of the Constitution, it remained very difficult—perhaps impossible—to appreciate the exact magnitude of the constitutional principles concerning religious freedom and the deep change that they were bound to produce in Spanish law.<sup>47</sup> This fact may explain why some of the provisions of the Concordat have been a source of continued political tension.<sup>48</sup>

### *1. Civil effect of canonical marriage*

One of the most typical and traditional expressions of state cooperation with the Catholic Church involves the granting of civil effect to the canon law on marriage. Under the Concordat of 1979<sup>49</sup> and the Civil Code as modified in 1981,<sup>50</sup> marriages celebrated according to canon law have full civil effect once they are duly recorded in the civil registry.

In general, however, the Church enjoys fewer marriage-related privileges than in the past.<sup>51</sup> Contrary to previous practices, Church

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46. The Spanish Constitution was promulgated on December 27, 1978, and the agreements with the Holy See were signed on January 3, 1979.

47. See Pedro Lombardía, *El concepto actual de Derecho eclesiástico y su marco constitucional* [*The Present Concept of Ecclesiastical Law and its Constitutional Framework*], 1 A.D.E.E. 623, 648 (1985).

48. For instance, the provisions regarding the teaching of Catholic religion in public schools, civil effects of canonical marriage, Catholic religious assistance to the army, or state's financial support to the Catholic Church.

49. See *Agreement on Legal Affairs*, art. VI, translated in SPANISH LEGISLATION, *supra* note 4, at 51.

50. See C.C. [*Código Civil*], arts. 59–60.

51. Prior to 1978, the marriage of Catholics was left completely in the hands of the Church. Under the Civil Code and the Concordat of 1953, canonical marriage not only was granted civil effect, but it was the only valid form of marriage that people baptized in the Catholic Church could celebrate. Civil marriage was available only to non-Catholics and Catholics who had declared, in a formal statement, that they did not profess the Catholic religion anymore. Divorce was not available for either canonical or civil marriages. Only the Church courts had jurisdiction to judge the nullity of a marriage celebrated according to canon law, and their decisions were immediately executable by the civil courts. For a description of the historical evolution of the Spanish matrimonial system, see MARIANO LÓPEZ ALARCÓN &

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courts no longer have exclusive jurisdiction over canonical marriages. However, these courts' decisions pronouncing the nullity of a marriage, as well as the pontifical dissolution of unconsummated marriages, do have civil effect once they have been declared executable by the state courts, which enjoy a certain amount of discretion on the issue and follow a procedure analogous to that governing the *ex-equatur* of foreign judicial decisions.<sup>52</sup> In any event, as in the Italian system, the precise features of the Spanish matrimonial system are complex and have caused frequent jurisdictional conflicts between civil and ecclesiastical courts.<sup>53</sup>

The Constitutional Court has decided a number of claims concerning canonical marriage, most of which have related to technicalities of the Spanish matrimonial system outside the scope of this article.<sup>54</sup> It is significant that the Constitutional Court has never questioned the constitutionality of the privileged treatment enjoyed by canonical marriage under Spanish law, even though such privileged treatment leaves non-Catholic religious marriages in a markedly inferior legal position. Since 1992, the form of celebration of Jewish, Evangelical, and Islamic marriages has been given civil effect, but the marital decisions of Jewish and Islamic religious courts have not received any civil effect at all.<sup>55</sup> Moreover, Spanish law presently

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RAFAEL NAVARRO-VALLS, CURSO DE DERECHO MATRIMONIAL CANÓNICO Y CONCORDADO [COURSE OF MARRIAGE LAW ACCORDING TO CANON LAW AND THE CONCORDAT BETWEEN SPAIN AND THE HOLY SEE] 37-41 (5th ed. 1994).

52. Article 778 of the new Code of Civil Procedure (*Ley de Enjuiciamiento Civil*), which went into effect on January 8, 2001, increased judges' discretion granting or denying the recognition of civil effect to ecclesiastical decisions dissolving an unconsummated marriage or declaring a marriage null and void. Under the preceding law, according to the interpretation of the Constitutional Court, recognition of civil effect in such cases had to be dismissed if one of the parties of the marriage filed a formal and non-arbitrary objection against the execution of the ecclesiastical decision. *See* STC 328/1993, Nov. 8, 1993.

53. For a clear and precise synthesis of the Spanish matrimonial system, see Rafael Navarro-Valls, *El matrimonio religioso* [*Religious Marriage*], in DERECHO ECLESIASTICO DEL ESTADO ESPAÑOL [ECCLESIASTICAL LAW OF THE SPANISH STATE] 351 (Javier Ferrer Ortiz cord., 4th ed. 1996).

54. Some of these claims involved the transitory provisions of the Concordat of 1979 regulating judicial proceedings that had been initiated before ecclesiastical courts under the provisions of the Concordat of 1953 and were still pending at that moment. The pre-1991 decisions of the Constitutional Court regarding canonical marriage are analyzed by RODRÍGUEZ CHACÓN, *supra* note 1, at 77-85. The most relevant decisions since 1991 are: STC 328/1993, 8 Nov. 1993 and STC 6/1997, 13 Jan. 1997.

55. See art. 7 of the agreements with the Evangelical, Jewish, and Islamic federations (*translated in* SPANISH LEGISLATION, *supra* note 4).

does not recognize the civil validity of any other religious celebration of marriage. Legal scholars generally have justified this difference in legal treatment by arguing that an overwhelming majority of the Spanish population is Catholic and by remarking that in the Catholic canon law the coherence of the legislation and jurisprudence in the area of marriage is much higher than in the other religions.<sup>56</sup> To date, the Constitutional Court has not resolved the issue and has assumed that the granting of civil effect to canonical marriages is governed by the Concordat of 1979, an international treaty that has never been challenged as unconstitutional.

### 2. *Religious assistance to the armed forces*

The current system regulating the provision of Catholic religious assistance to the armed forces has also raised some questions with regard to constitutional principles, but in this case the Constitutional Court was asked to decide the issue. Such assistance is provided by an ecclesiastical corps whose members are integrated into the hierarchical structure of the army. The Concordat of 1979 and some state laws govern this matter.<sup>57</sup>

In 1982, a group of sixty-nine congressmen challenged the system's constitutionality in a motion of unconstitutionality (*recurso de inconstitucionalidad*),<sup>58</sup> arguing that the system violated the neutrality principle of the Spanish Constitution.<sup>59</sup> According to their reasoning, there is no room in a neutral state for a system of religious assistance in which ministers of worship are classified as civil servants.

For reasons of procedural coherence, the Constitutional Court resolved not to rule on the substantive issue of whether the system established by the Concordat of 1979 was constitutional.<sup>60</sup> Never-

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56. See MARTÍNEZ-TORRÓN, *supra* note 13, at 166–69.

57. See *Agreement on Religious Assistance to the Armed Forces, translated in SPANISH LEGISLATION*, *supra* note 4, at 69. For a more precise description of the legal regulation of Catholic religious assistance to the army, see CONTRERAS, *supra* note 17, at 398–500.

58. A brief explanation of the concept of *recurso de inconstitucionalidad* is provided *supra* Part I.

59. Their motion was decided by STC 24/1982, May 13, 1982. (The *antecedente* [statement of facts] 2 contains a detailed explanation of the plaintiff's arguments.)

60. The Court stated that there must be a coherence between the plaintiff's claim and the content of the challenged law. *See id.* This coherence did not exist in this case, the Court declared, because the specific objective of the plaintiffs' claim was a rule determining the years required for promotion in the different degrees of members of the army—Law 48/1981, Dec. 24, 1981, art. 9(4)—which included a reference to members of the ecclesiastical corps. *See id.*

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theless, the Court seemed to accept the reasoning of the state attorney, who maintained that the system was constitutional because Parliament possessed the authority to determine the specific structure of the service of religious assistance to the armed forces. In this regard, the existing system of organic integration (*integración orgánica*) of Catholic clergymen into the armed forces was one of the legitimate choices that the legislature could make.

In addition, the Court declared that providing Catholic religious assistance to the military was a way of facilitating the individual soldier's exercise of religious freedom, and the present system did not violate the equality principle as long as followers of other religions had the opportunity to receive their own religious assistance through appropriate channels:

The fact that the State provides Catholic religious assistance to the members of the Armed Forces not only does not constitute any violation of the Constitution but, on the contrary, offers the possibility to render actual the right to worship of individuals and communities. The right to freedom of religion and worship does not undergo any pressure, for members of the Armed Forces are free to accept or refuse the assistance they are offered. The right to equality is not violated either, as the religious service in favor of Catholics does not exclude religious assistance for the faithful of other religions, performed in due proportion and measure, which they can demand.<sup>61</sup>

### 3. *Religious education in public schools*

The teaching of the Catholic religion in public schools is another traditional example of state cooperation with the Catholic Church that originated during the era of state confessionality.<sup>62</sup> The Concordat of 1979 preserved the state's obligation to provide religious instruction in all pre-university educational centers and university

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The Court held that the plaintiffs could not challenge the constitutionality of the entire system of religious assistance on that basis. In the words of the Court, "the motion of unconstitutionality [is not] a remedy that can be directed indiscriminately against a block of laws or against an entire part of the legal order; the motion of unconstitutionality must be aimed at judging the constitutionality of specific legal texts and formulas." *See id.* at FJ 2 (author's translation).

61. *See id.* at FJ 4 (author's translation).

62. *See* Javier Escrivá Ivars, *La enseñanza de la 'religión y de la moral católicas' en el sistema educativo español* [*The Teaching of 'Catholic Religion and Morals' in the Spanish Educational System*], 4 A.D.E.E. 205, 210–16 (1988).

schools for teacher training.<sup>63</sup> Student attendance at classes providing Catholic religious instruction is voluntary, but schools must include this type of instruction in their curricula “under the same conditions as the other basic disciplines.”<sup>64</sup> Catholic religion teachers are appointed by ecclesiastical authorities, but they are paid by the state.

Some scholars have contended that this system is not the most appropriate to implement the constitutional principles of equality and neutrality.<sup>65</sup> They argue that it should be replaced by a system equal to that provided for the teaching of other religions—i.e., a system that, as part of its normal curriculum, allows students to voluntarily receive religious education in any of several religions and that does not classify religious education as a “basic discipline.”<sup>66</sup> The Constitutional Court, however, has never found the existing system to be unconstitutional. In any event, the issue of religious education has been a source of political tension between the state and ecclesiastical authorities over the years. For its part, the Catholic Church has been inflexible in demanding the enforcement of the Concordat of

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63. *See Agreement on Education and Cultural Affairs*, arts. I–VII, translated in SPANISH LEGISLATION, *supra* note 4.

64. *Id.* art. IV.

65. For a detailed description of the different positions of Spanish scholars and the case law of the Spanish Supreme Court with regard to the system of Catholic religious teaching in public schools, see DAVID GARCÍA-PARDO, LA LIBERTAD DE ENSEÑANZA EN LA JURISPRUDENCIA DEL TRIBUNAL SUPREMO [FREEDOM OF TEACHING IN THE CASE LAW OF THE SPANISH SUPREME COURT] 260–92 (1998).

66. Spanish post-constitutional legislation gradually introduced, since 1980, the teaching of non-Catholic religious doctrines in public schools. However, a law enacted in 1990 provided that this aspect of the state cooperation had to be governed by agreements between the state and religious denominations (Organic Law 1/1990, Oct. 3, 1990, of General Organization of the Education System, second additional provision). The immediate effect of this stipulation was to deprive non-Catholic religions of their right to provide religious teaching in public schools, which some of them had enjoyed for ten years, because, apart from the 1979 Concordat with the Catholic Church, no other agreement had yet been concluded between the Spanish state and a religious community. In 1992, the agreements with the Evangelical, Jewish, and Islamic federations (Article 10) guaranteed that the religious instruction of those religions could be provided in public schools and in private schools funded by the government. Nevertheless, these cooperative agreements have not provided a satisfactory solution for all religious denominations. For example, as the LDS Church was not included in the Evangelical federation—and was consequently left out of the 1992 set of agreements—its religious doctrine is no longer taught in Spanish public schools. The paradox is that the doctrine of the LDS Church had been the first non-Catholic religious doctrine included in the curricula of public schools, by virtue of some by-laws of the Ministry of Education. *See* Joaquín Mantecón, *L'enseignement de la religion dans l'école publique espagnole* [*The Teaching of Religion in Spanish Public Schools*], 30 REVUE GENERALE DE DROIT 277, 284–85, 294–95 (1999/2000).

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1979, seeking recourse from the courts when necessary.<sup>67</sup>

Two important education-related cases adjudicated by the Constitutional Court concerned the teaching of “Theology and Pedagogy of Catholic Religion and Morals” in the school for teacher training at the Autonomous University of Madrid (*Universidad Autónoma de Madrid*). The two cases involved the refusal of the governing bodies of the university to comply with the provisions of the 1979 Concordat.

In the first decision, in 1991,<sup>68</sup> the Court sustained the enforceability of the Concordat of 1979’s provisions regarding Catholic education. University authorities had rejected to include Catholic instruction as an optional subject in the school’s curriculum. Specifically, the Court held that the stipulations of the Concordat, an international treaty legitimately signed by the government and approved by the legislature, limited the university’s autonomy. University authorities therefore were obligated to include the teaching of Catholic doctrine as a voluntary curricular subject. Moreover, the Court declared that Article 27(3) of the Constitution supported this policy by recognizing the right of parents to ensure that their children receive religious and moral instruction according to their beliefs.<sup>69</sup> Consequently, the Court concluded, it was reasonable for future teachers interested in teaching Catholicism to have the chance to receive the appropriate education from the school responsible for training them.

In the other case, decided in 1997,<sup>70</sup> the Court again ruled in favor of the Church. After being compelled by the Constitutional Court to comply with the ecclesiastical demands to offer the relevant classes, the university had assigned a very reduced number of credits to that subject. The ecclesiastical authorities went to court for a second time, obtaining a favorable judgment. The Constitutional Court accepted the reasoning of the lower courts. It held that, while the

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67. For a recent analysis of the different problems arising from the relationship between freedom of religion and freedom of teaching in Spain, see José M. Martí, *Factor religioso y enseñanza en España* [*The Religious Factor and Education in Spain*], 16 A.D.E.E. 399 (2000).

68. STC 187/1991, Oct. 3, 1991.

69. Article 27(3) of the Constitution specifically states: “The public authorities guarantee the right of parents to ensure that their children receive religious and moral instruction that is in accordance with [the parents’] own convictions” (*translated in SPANISH LEGISLATION, supra* note 4, at 25–40).

70. STC 155/1987, Sept. 29, 1997.

university could autonomously specify the number of credits awarded for its Catholic religious courses, the Concordat of 1979 necessarily bound the institution to keeping the credits awarded in fair proportion with other “basic disciplines.” In this regard, the Court found that the university’s assignment of only four credits to its Catholic religion courses was clearly disproportionate in relation to the number of credits assigned to other basic disciplines such as plastic arts and music, which were worth eighteen and twenty-four credits, respectively.

It should be noted that the rule that public schools must offer courses on Catholic religion “under the same conditions as the other basic disciplines” does not mean that religion teachers must be treated the same as teachers of other subjects. In fact, religion teachers receive different legal treatment in two ways. First, they are paid the same salary as interim teachers, which is lower than the salary paid to ordinary permanent teachers. Second, they are not eligible to become school directors. Both differences have been declared legitimate by Spain’s Constitutional Court on the grounds that the appointment of religion teachers is not permanent but has to be done every year by ecclesiastical authorities. This fact justifies both placing them on the same economic level as interim teachers and disqualifying them from serving as school directors who are elected for a three-year term.<sup>71</sup>

#### 4. *Financial support*

The Catholic Church has received economic aid from the Spanish state since the state’s massive confiscation of Church properties that took place in the mid-nineteenth century, especially between 1836 and 1854 (this is the process historically known as *desamortización*, or confiscation of mortmain property).<sup>72</sup> Indeed, the state’s aid was conceived as a sort of compensation for that deprivation of

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71. See ATC 1155/1987, Oct. 26, 1987 (concerning the salaries of religion teachers) and STC 47/1990, Mar. 20, 1990 (concerning religion teachers’ disqualification for serving as school directors).

72. On the subject of *desamortización*, see generally FRANCISCO TOMÁS Y VALIENTE, *EL MARCO POLÍTICO DE LA DESAMORTIZACIÓN EN ESPAÑA* [THE POLITICAL FRAMEWORK OF THE 19TH CENTURY CONFISCATION OF MORTMAIN ECCLESIASTICAL PROPERTY BY THE STATE IN SPAIN] (2d ed. 1972).

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property. The forms of this economic cooperation have varied over the last century and a half.<sup>73</sup>

According to the Concordat of 1979 and subsequent legislation, the Church may receive three types of financial aid from the state.<sup>74</sup> First, under the tax assignment (*asignación tributaria*) system, Spanish citizens are allowed to assign a small percentage of their income tax—slightly more than 0.5 percent—to the Catholic Church. Second, ecclesiastical institutions are exempt from the payment of a number of taxes. Third, donations made by individuals and corporations to the Catholic Church are tax deductible up to a certain percentage.

Under current Spanish law, the state economic cooperation with non-Catholic religions is different. Tax assignment remains an exclusive privilege of the Catholic Church. The deductibility of donations, on the contrary, has become widely available, first through the 1992 Agreements with the Evangelical, Jewish, and Islamic communities,<sup>75</sup> and then more generally through the 1994 Law of Foundations, which extended the privilege to donations made to any—religious or non-religious—charitable organization.<sup>76</sup> The non-Catholic religious communities included in the 1992 Agreements have also been granted tax exemptions that are very similar to those enjoyed by the Catholic Church.<sup>77</sup>

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73. See generally JOSÉ R. GONZÁLEZ ARMENDIA, *SISTEMAS HISTÓRICOS DE DOTACIÓN DEL ESTADO ESPAÑOL A LA IGLESIA ESPAÑOLA: SIGLOS XIX–XX* [HISTORICAL SYSTEMS OF SPANISH STATE'S FINANCIAL AID TO THE SPANISH CHURCH: NINETEENTH AND TWENTIETH CENTURIES] (1990).

74. See generally María Blanco, *Cooperación del estado con las confesiones religiosas en materia económica* [Economic State Cooperation with Religious Denominations], in *TRATADO DE DERECHO ECLESIAÍSTICO*, *supra* note 14, at 631; JOSÉ CAMARASA, *RÉGIMEN TRIBUTARIO DE ENTIDADES RELIGIOSAS Y ENTIDADES SIN FINES DE LUCRO* [TAX REGIME OF CHARITABLE AND RELIGIOUS ORGANIZATIONS] (1998).

75. See Article 11(6) of both the Agreement with the Evangelical Federation (*Agreement of cooperation between the State and the Federation of Evangelical Religious Entities in Spain*) and the Agreement with the Jewish Federation (*Agreement of cooperation between the State and the Federation of Israelite communities in Spain*) and Article 11(5) of the Agreement with the Islamic Federation (*Agreement of cooperation between the State and the Islamic Commission of Spain*), all three of which are translated in *SPANISH LEGISLATION*, *supra* note 4, at 75–113.

76. See Law 30/1994, Nov. 24, 1994, sixth additional provision, *translated in SPANISH LEGISLATION*, *supra* note 4, at 157–63.

77. See generally Zoila Combalá, *Financiación de las confesiones no católicas en el Derecho español* [The Financing of Non-Catholic Religions under Spanish Law], in 10 *A.D.E.E.* 431 (1994); MARIANO LÓPEZ ALARCÓN, *LAS FUNDACIONES ECLESIAÍSTICAS BAJO EL NUEVO*

However, prior to the state's first efforts to extend limited economic privileges to certain non-Catholic religions in the 1992 Agreements, a small Evangelical community filed a motion of protection (*recurso de amparo*)<sup>78</sup> before the Constitutional Court, invoking the equality principle and claiming the right to receive the same tax exemptions as the Catholic Church. The Court dismissed the claim in a poorly reasoned decision,<sup>79</sup> affirming that the two churches' very different circumstances justified disparate treatment on the part of the state. With respect to the churches' dissimilar circumstances, the Court specifically referred to history (the nineteenth century *desamortización*), existing agreements between the Catholic Church and the state (the Concordat of 1979), and the large disparity in social support enjoyed by the two churches (the Evangelical Community of German Language of the Balearic Islands possessed a very small number of members in comparison to the Spanish Catholic Church).

Though all of the factual differences cited by the Court were indisputable and could justify different degrees of state cooperation—even of strictly economic cooperation—there are some flaws in the Court's reasoning. The justification for granting tax exemptions to churches should pertain primarily to the non-profit character of religious activities, rather than to history, bilateral institutional relationships, or social influence. Therefore, the Court should have examined whether both churches' religious activities were equivalent in nature. If the answer to that inquiry had been affirmative—as it appears it should have been—it would have been difficult for the Court to conclude that churches' unequal tax status had an “objective and reasonable justification.”<sup>80</sup>

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RÉGIMEN DE LA LEY 30/1994, DE FUNDACIONES E INCENTIVOS FISCALES [ECCLESIASTICAL FOUNDATIONS UNDER THE NEW REGIME OF THE LAW OF FOUNDATIONS AND TAX INCENTIVES] (1997); MARÍA M. MARTÍN GARCÍA, LAS FUNDACIONES RELIGIOSAS EN EL DERECHO ESPAÑOL: ESPECIAL REFERENCIA AL DERECHO AUTÓNOMICO [RELIGIOUS FOUNDATIONS IN SPANISH LAW: SPECIAL REFERENCE TO AUTONOMOUS LAW] (1995).

78. For a succinct explanation of this concept, see *supra* Part I.

79. ATC 480/1989, Oct. 2, 1989. The decision is criticized, with consistent arguments, in RODRÍGUEZ CHACÓN, *supra* note 1, at 99–101. A similar claim submitted to the European Commission of Human Rights was declared inadmissible as “manifestly ill-founded.” *Iglesia Bautista “El Salvador” v. Spain*, Dec. Adm.17522/90, available in <<http://www.echr.coe.int>> (visited Mar. 24, 2001).

80. As it is well known, this is the key concept employed to interpret the equality principle in the doctrine of the European Court of Human Rights as well as the Spanish Constitutional Court. According to this doctrine, differences in legal treatment are acceptable if they are grounded on an objective and reasonable justification and pursue a legitimate aim through

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5. *The protection of religion in the Criminal Code*

In Spain, as in many European countries, there exists an old tradition of protecting religion through the Criminal Code.<sup>81</sup> Part of this protection consists in penalizing blasphemy as well as public abuse or derision of a religion and its tenets or rites. During Spain's history as a confessional state, Spanish criminal law specifically protected Catholicism. In 1983, the Criminal Code was amended to extend its protection of the population's religious sentiments to all religious denominations. Significantly, the title of the relevant section of the Code was changed to "Crimes Against Freedom of Conscience."

On two occasions, the Constitutional Court has affirmed the constitutionality of this type of protection of religious freedom. In 1984, with regard to a challenge based on the equality principle, the Court affirmed that penalizing blasphemy "does not imply that a determined church or religious denomination is granted a privileged treatment, for the idea of God or the notion of the sacred are not the exclusive patrimony of any of them in particular."<sup>82</sup> Similarly in 1986, the Court held that the crime of offense to religion—public abuse or derision—did not violate the constitutional principle of neutrality, since Article 209 of the Criminal Code had been amended in 1983 to eliminate the reference to "the Catholic Church or other confessions legally recognized." Consequently, the protection offered by the Criminal Code covered every religion and not only a particular church. This latter situation certainly would be unconstitutional. Moreover, the Court declared that a religiously neutral state may use criminal laws to protect the population's religious sentiments because such state action pursues the legitimate aim of safe-

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proportionate means. See Javier Martínez-Torrón, *El derecho de libertad religiosa en la jurisprudencia en torno al Convenio Europeo de Derechos Humanos* [Right to Religious Freedom in the Case Law derived from the European Convention on Human Rights], in 2 A.D.E.E. 403, 466–74 (1986); Daniel Tirapu & Antonio C. Pereira, *Observaciones sobre la jurisprudencia constitucional en materia de igualdad y carácter social del Estado de Derecho* [Some Observations on the Constitutional Jurisprudence Related to the Equality Principle and the Social Character of a Democratic State], in 1 EL PRINCIPIO DE IGUALDAD EN LA CONSTITUCIÓN ESPAÑOLA [THE EQUALITY PRINCIPLE IN THE SPANISH CONSTITUTION] 961 (1991).

81. See generally JUAN FERREIRO, *PROTECCIÓN JURÍDICO PENAL DE LA RELIGIÓN* [PROTECTION OF RELIGION THROUGH CRIMINAL LAW] (1998); FRANCISCA PÉREZ-MADRID, *LA TUTELA PENAL DEL FACTOR RELIGIOSO EN EL DERECHO ESPAÑOL* [PROTECTION OF THE RELIGIOUS FACTOR IN SPANISH CRIMINAL LAW] (1995).

82. ATC 271/1984, May 9, 1984, FJ 2.

guarding its citizens' rights and freedoms, particularly their freedom of religion.<sup>83</sup>

Significantly, Spain's new Criminal Code, enacted in 1995, has continued the practice of criminalizing abuse or derision of religion, at the same time providing that the same punishment must be imposed for public offenses against non-believers.<sup>84</sup>

*6. The teaching of canon law in state universities*

In 1985, the Constitutional Court decided an atypical case, focused not on the equality principle, but on the principle of neutrality and its relationship with the historical influence of Catholicism on Spanish history.<sup>85</sup>

Up through the 1980s, the official curriculum of legal studies, established by the Spanish Ministry of Education in 1953, required all law schools—both private and public—to offer mandatory second-year courses on Catholic canon law.<sup>86</sup> At the time, the study of law comprised a five-year-long program with twenty five subjects, all of which were mandatory. In 1983, a student of a state law school asked university authorities to be exempted from the study of canon law, alleging that it was against her religious and ideological convictions protected by Article 16 of the Constitution. Her petition was denied both by the university administration and by the courts that decided the lawsuits she subsequently initiated. The student finally filed a claim (*recurso de amparo*) before the Constitutional Court, challenging the constitutionality of the curriculum upon two grounds: she argued that mandatory study of canon law violated her freedom of ideology and religion as well as the constitutional principle of state neutrality in religious matters.

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83. See ATC 180/1986, Feb. 21, 1986, FJ 2.

84. See C.P. ["*Código Penal*"], art. 525. For additional discussion of this topic, see ISIDORO MARTÍN SÁNCHEZ, EL DERECHO A LA FORMACIÓN DE LA CONCIENCIA Y SU TUTELA PENAL [THE RIGHT TO FORM ONE'S OWN CONSCIENCE AND ITS PROTECTION BY CRIMINAL LAW] 247–319 (2000); Ana Fernández-Coronado, *El contenido de la tutela de la libertad de conciencia en el Código Penal de 1995* [The Content of the Protection of Freedom of Conscience in the Criminal Code of 1995], 52 REVISTA DEL PODER JUDICIAL 135 (1998).

85. ATC 359/1085, May 29, 1985.

86. The decision commented here, and the entire issue of the teaching of canon law in the Spanish law schools, has been analyzed in Rafael Navarro-Valls, *La enseñanza del derecho canónico en la jurisprudencia española* [Teaching of Canon Law in the Case Law of Spanish Courts], 1 A.D.E.E. 49 (1985).

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In dismissing the claim, the Constitutional Court essentially reproduced the reasoning of the ordinary courts that had previously ruled for the state. The Court posited that an issue of unconstitutionality might arise if the study of canon law were imposed “with an aim of indoctrination.” The Court then found that the mandatory study of canon law failed to meet this requirement, stating that:

Canon law, as a subject based upon the explanation and interpretation of a *corpus iuris*, the Code of Canon Law, is not a subject of ideological content by its nature, although it is grounded on a dogmatic or confessional substratum as the doctrine of the Catholic Church. Indeed many juridical disciplines are centered on the study of legal texts and theories whose ideological substratum is perceptible.<sup>87</sup>

The Court then concluded that:

[I]n the end, it might be alleged, as the plaintiff does, that the compulsory study of canon law in State universities is a reminiscence of the confessional State, and that . . . its maintenance nowadays has no other reason or cause than the indirect apologia of a religious faith. However the ordinary experience of any lawyer demonstrates that this is not true.<sup>88</sup>

In sum, the Constitutional Court recognized that canon law was taught in state universities for a secular purpose, namely, as a subject useful for legal practice—canonical marriage is granted extensive civil effects in Spain, as stated above<sup>89</sup>—and also as an essential part of Spanish legal tradition (and, in general, of the entire Western legal culture).<sup>90</sup> In other words, Spanish law students learned canon law as a *cultural* and not *confessional* factor, much for the same reasons that they study Roman law or legal history. Naturally, whether the study of canon law is a necessary element of legal education remains an open question.<sup>91</sup> In fact, in the late 1980s, the Ministry of Education gave all Spanish law schools more curricular freedom in general and removed canon law in particular from the list of required subjects.

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87. ATC 359/1085, FJ 3. (author’s translation).

88. *Id.* (author’s translation).

89. *See supra* Part IV.A.1.

90. *See generally* JAVIER MARTÍNEZ-TORRÓN, *ANGLO-AMERICAN LAW AND CANON LAW: CANONICAL ROOTS OF THE COMMON LAW TRADITION* (1998).

91. We should bear in mind that at that time all subjects were mandatory in the curricula of Spanish law schools.

However, this latter option pertains to the realm of academic choices that the Ministry of Education can legitimately make when designing the law schools curricula and is something very different from deeming that obligatory study of canon law is unconstitutional in a neutral state.<sup>92</sup>

### *B. New Religious Movements*

As stated in the preceding section, the Spanish Constitutional Court, in deciding cases related to the legal position of the Catholic Church, has dealt, directly and indirectly, with the legal status of non-Catholic religious denominations, especially in regard to financial issues, the provision of religious assistance to the military, and the protection of religion through criminal law. When ruling on these issues, the Court often made use of the principle of equality as its main criterion for decision and had in mind all religions in general and no one in particular.

In this section, I will comment on three recent cases specifically related to the legal position of the so-called new religious movements (“NRMs”), i.e., religious groups that are usually distinguished by these two characteristics: they have a more recent history than major Western religions—they were born in the nineteenth or twentieth century—and often preach tenets and practice moral values that contrast with the beliefs and values normally accepted within Western societies.

#### *1. Spanish attitudes towards NRMs*

The first case, decided in June 2000,<sup>93</sup> stemmed from the 1988 arrest of the president of the Church of Scientology International following a four-year police investigation. Prosecutors accused him of several crimes—including illegal association, fiscal offenses, inducement to commit suicide, and crimes against public health—and initiated criminal proceedings against him. The defendant sought redress from the Constitutional Court, arguing that various procedural irregularities in the case violated his right to due process of law under Article 24 of the Constitution. The Court dismissed the claim in a

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92. Indeed, a number of public law schools presently offer optional or even mandatory courses on canon law.

93. STC 155/2000, June 12, 2000.

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short decision, finding that the defendant had failed to exhaust the non-constitutional remedies available before the ordinary courts. Specifically, the Court labeled the claim as premature because the criminal proceedings against the defendant had not yet concluded.<sup>94</sup>

Neither the defendant's arguments nor the Court's reasoning are significant to the Constitutional Court's case law on religious freedom. However, the facts underlying the case may reveal a certain governmental policy of discrimination against some new religious movements that are atypical in the Spanish social milieu. Spanish society and authorities sometimes treat NRMs with diffidence and follow a pattern that seems inconsistent with the Constitution.<sup>95</sup> This restrictive approach towards NRMs is apparently not official policy. Rather, it stems from a conservative notion of religion that still pervades Spanish society and government, i.e., a notion derived from the religions traditionally existing in Spain: Judaism, Catholicism, Islam, and conventional Protestantism. Some NRMs, especially those that appear to be wealthy or foreign in origin, are considered extravagant, even dangerous, and often not at all religious in nature.<sup>96</sup>

It is interesting to note that the Spanish government had not accepted the Church of Scientology into the Registry of Religious Entities. The consequence was that this church could not obtain legal personality as a religious group, although this fact does not impair its constitutional right to religious freedom.<sup>97</sup> Spanish authorities had

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94. *Id.* at FJ 3. The criminal trial against Scientology leaders in Spain is taking place at the time this article went to print.

95. The facts of the case *Riera Blume v. Spain*, decided by the European Court of Human Rights, Oct. 14, 1999, are also revealing in this regard. The applicants were members of the Esoteric Center of Investigations (*Centro Esotérico de Investigaciones*). Following the issuance of a judicial order, the applicants' homes were searched, and the applicants themselves, all of whom were adults, were subsequently confined in a nearby hotel against their will for "deprogramming." The confinement of the applicants, however, was not supported by any judicial order; rather, it was carried out by a private "anti-sect" association with the consent of the applicants' families and the limited cooperation of the Catalan police. The Court avoided pronouncing any opinion under Article 9 of the European Convention of Human Rights (freedom of religion), but decided in favor of the applicants under Article 5.1 of the European Convention (right to liberty and security).

96. For a broad discussion of this subject, see generally AGUSTÍN MOTILLA, *SECTAS Y DERECHO EN ESPAÑA: UN ESTUDIO EN TORNO A LA POSICIÓN DE LOS NUEVOS MOVIMIENTOS RELIGIOSOS EN EL ORDENAMIENTO JURÍDICO* [SECTS AND LAW IN SPAIN: A STUDY REGARDING THE POSITION OF NEW RELIGIOUS MOVEMENTS IN THE LEGAL ORDER] (1990).

97. Created by Article 5 of the Organic Law of Religious Freedom, the Registry of Religious Entities keeps a record of the religious denominations operating in Spain, as well as the internal institutions created by churches and religious communities. Therefore, the Registry

determined that the Scientology Church had not provided sufficient evidence to prove its religious character, according to the administrative and judicial interpretation of the legal concept of religion, which is a central concept in the Organic Law of Religious Freedom.<sup>98</sup>

## 2. NRMs and the notion of religion in Spanish law

The Church of Unification was in a situation similar to the Church of Scientology. Spanish administrative authorities had not allowed it to register as a religious group, arguing: (i) that it was not a religious organization, and (ii) that it developed activities that were contrary to the public order and morals, and, therefore, should be considered a “dangerous sect.” In subsequent lawsuits brought by this church, the courts decided in favor of the Spanish government. Finally, five years ago, the Church of Unification filed a complaint with the Constitutional Court, alleging that its right to religious freedom (Article 16 C.E.) as well as its right to presumption of innocence (Article 24(2) C.E.) had been violated. The Court’s decision was delivered in February 2001, together with a dissenting opinion signed by four justices.<sup>99</sup>

Naturally, the main issue was the notion of religion in Spanish law. Until now, the General Directorate of Religious Affairs as well as the courts had adopted a legal concept of religion rooted in the

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constitutes the filter through which the Spanish government controls which organizations are granted legal personality as religious denominations. Registration with the Registry is voluntary, but religious groups desiring to register must supply evidence demonstrating that they have a “religious purpose.” If a group is not allowed to register as a religious entity, it can obtain legal personality in Spain through registration in the general Registry of Associations. In any event, legal personality, acquired through any of those two ways, does not constitute a condition for the exercise of religious freedom in Spain, which is guaranteed by Article 16 of the Constitution “with no other restriction on their expression than may be necessary to maintain public order as protected by law.” See Dolores García Hervás & Carmen Garcimartín, *La interpretación del concepto ‘fines religiosos’ en la práctica administrativa y judicial española* [The Interpretation of the Concept of “Religious Purpose” in Spanish Administrative and Judicial Practice], in FREEDOM OF RELIGION AND CONSCIENCE, *supra* note 1, at 497; María J. Roca, *Aproximación al concepto de fines religiosos* [Some Observations on the Concept of Religious Purpose], 132 REVISTA DE ADMINISTRACIÓN PÚBLICA 445 (1993).

98. Article 3(2) of the Organic Law provides that the law will not be applied to entities with non-religious aims, such as “the study of and experimentation with psychic or parapsychological phenomena or the dissemination of humanistic or spiritualistic values” (translated in SPANISH LEGISLATION, *supra* note 4, at 42–43).

99. STC 46/2001, Feb. 15, 2001. The *antecedentes* [statement of facts] of this decision describe in detail the administrative and judicial itinerary of the Church of Unification’s complaint.

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traditional monotheistic heritage of Western culture. Accordingly, the Spanish legal notion of a religious denomination was characterized by three elements: the belief in a Supreme Being developed into tenets and moral commands, an external worship, and a certain institutional organization.<sup>100</sup>

The Constitutional Court decided in favor of the plaintiff and ruled that the Church of Unification must be given the right to be recorded in the Registry of Religious Entities. Anticipated for a long time,<sup>101</sup> this decision was supposed to be important in order to clarify the legal notion of religion, but is rather disappointing in this regard, for the Court's reasoning contains a few significant flaws and is sometimes contradictory. The decision on the Church of Unification's right to register deserves an extensive comment, but for the purposes of this article, it will be sufficient to emphasize only two aspects of the Court's reasoning.

First, the Court does not shed any light at all on the questions raised by the legal concept of religion in Spain but rather seems to render this concept inoperative. According to the decision, the authorities in charge of the Registry do not have any discretion, or margin of appreciation, to examine the religious nature of any group that has applied to register; they must limit themselves to confirm that this group is not excluded from registration by Article 3(2) of the Organic Law of Religious Freedom.<sup>102</sup> Nevertheless, this provision indeed states that “[a]ctivities, purposes and entities relating to or engaging in the study of and experimentation with psychic or parapsychological phenomena or the dissemination of humanistic or spiritualistic values or other similar non-religious aims do not qualify for the protection provided in this Act.”<sup>103</sup> In consequence, administrative authorities do of necessity have to issue a judgment—implicit or explicit—on the religious nature and purposes of the applicant group.

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100. See MARTÍNEZ-TORRÓN, *supra* note 13, at 74–88.

101. The *recurso de amparo* was filed on July 1996, and a decision was expected, at least, since the second half of 1999. Apparently, the delay was due to the strongly opposite views of the subject held by different justices of the Court. This fact might also explain why the reasoning of the decision is so inconsistent.

102. See STC 46/2001, FJ 8.

103. Organic Law of Religious Freedom, art. 3(2), *translated in* SPANISH LEGISLATION, *supra* note 4, at 42–43.

In the future, however, because the Court held that authorities do not enjoy any discretion in the matter but at the same time did not provide any criteria for the interpretation of Article 3(2) of the Organic Law, the Registry will probably have to accept every application without further inquiries (except in the unlikely hypothesis that the applicant group explicitly recognizes, in the documents supplied for registration, that it is a non-religious organization). The immediate effect of this is that Article 3(2) of the Organic Law, which in practice is applied through the activity of the Registry of Religious Entities, has become void. In other words, with this 2001 decision, the Court has virtually eliminated the power of control given by the Organic Law to the Registry and has thus modified, almost surreptitiously, one of the foundations of the Spanish law on religious denominations.<sup>104</sup>

There is another aspect of this decision of the Constitutional Court that is worth commenting on here: the Court's reference to public order as a limit to the exercise of religious freedom, which is mentioned by Article 16 of the Constitution.<sup>105</sup> In this regard, the Court remarked, "[T]he exceptional character of public order as the only limit to the exercise" of religious liberty. Consequently, the Court held that

public order can not be interpreted as a clause preventive of hypothetical risks, for in that case the clause itself would become the largest sure danger for the exercise of that freedom . . . . [A]s a general rule, only when the courts have certified the existence of a definite danger for "public safety, health and morals" according to the rules of a democratic society, it is appropriate to invoke public order as a limit to the exercise of the right to freedom of religion and worship.<sup>106</sup>

In my view, the prior statements are very positive. However, the Court restricted their significance when it immediately added that there are "certain sects or groups" that use illegal "recruitment methods that may impair the free development of their followers' personality," and therefore "the exceptional preventive use of[] the public order clause" is not unconstitutional, as far as the danger is "duly ascertained" and the restrictive measures against a group are

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104. See MARTÍNEZ-TORRÓN, *supra* note 2, 195–204.

105. See C.E. art. 16, *supra* note 10 (reprinting the provision in full).

106. STC 46/2001, FJ 11.

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“proportionate and adequate to the aims pursued.”<sup>107</sup> The main flaw of this reasoning is, of course, that the Court does not indicate more precisely which elements can justify the exceptional recourse to the public order clause without the courts’ intervention, and it does not explain either how the dangerous character of a ‘sect’ can be “duly ascertained” without a judicial procedure and a public hearing of those under suspicion. This fact leaves the door open to possible surveillance of some groups by police activities that are not backed by a judicial order or by any evidence other than mere suspicion.<sup>108</sup>

In any event, in the case at issue, the Court held that the evidence provided by the government with respect to the alleged dangerous activities of the Church of Unification was inconsistent and even, sometimes, contradictory.<sup>109</sup> Consequently, the church—whose religious character, as stated above, could not be scrutinized by Spanish authorities—had the right to be registered in the Registry of Religious Entities.

Beyond the effects directly related to the registration of the Unification Church as a religious organization, this 2001 decision of the Constitutional Court will probably produce two other effects with a wider scope. First, other groups not considered until now religious by the government will be also allowed to register in the Registry of Religious Entities; the Church of Scientology will likely be one of them, as it has been applying for registration unsuccessfully for many years. The second effect is that the government will have to study the opportunity—or even the necessity—of modifying some aspects of the law regulating the Registry of Religious Entities<sup>110</sup> and perhaps

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107. All the literal quotation included in this and the previous paragraph are taken from STC 46/2001, FJ 11.

108. Activities of this type were indeed at issue in a recent case decided by the European Court of Human Rights: *Tsayachidis v. Greece*, Jan. 21, 1999. The case related to the surveillance of Jehovah’s Witnesses by the National Intelligence Service. It ended in a friendly settlement in which the Greek government agreed to pay a sum of money for the costs and submitted a formal statement declaring that “the Jehovah’s Witnesses are not, and will not in the future be, subject to any surveillance on account of their religious beliefs.” By then the European Commission had already elaborated its report on the merits of the case, and expressed the opinion that there had been a violation of Article 8 of the European Convention (by a vote of 13 to 4) and there had been no violation of Article 9 (by a vote of 9 to 8).

109. See 46/2001, FJ 12-13.

110. The main law governing the Registry of Religious Entities is the *Royal Decree concerning the organization and functioning of the Registry of Religious Entities*, 142/1981, Jan. 9, 1981 (translated in SPANISH LEGISLATION, *supra* note 4, at 123–26).

also the Organic Law of Religious Freedom.<sup>111</sup>

### 3. NRMs and family law disputes

In May 2000, the Constitutional Court decided another case involving a new religious movement in the context of marital dissolution.<sup>112</sup> In that case, a convert to the *Movimiento Gnóstico Cristiano Universal de España* (“Universal Christian Gnostic Movement of Spain”)<sup>113</sup> had separated from his wife. She blamed his new religion for the failure of their marriage, a view that he did not share. Their two children, ages five and twelve, remained in the mother’s custody. In the custodial proceedings, the judge granted the father the usual visitation rights—the children would stay with him every other weekend and for half of the Christmas, Easter, and summer vacation periods—but explicitly prohibited him from proselytizing his children or taking them to any religious meeting.

The wife appealed the decision. She argued that, according to a psychological report, her husband showed some abnormal emotional alterations and a diminished perception of reality. In addition, she observed that the report stated that all available information on the husband’s new religion suggested that it might constitute a “destructive sect.” All these circumstances constituted, in the wife’s opinion, a serious risk to the children’s psychological health and education, which required a single religious and moral orientation. The court of appeals substantially accepted the mother’s reasoning and severely restricted the father’s visitation rights: he could see his children in alternate weekends, but only during the daytime, and the vacation periods were suppressed.<sup>114</sup>

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111. Indeed the General Directorate of Religious Affairs has been studying, in recent years, the possibility of modifying the 1980 Organic Law of Religious Freedom. However, the early drafts produced by the Directorate were aimed at making registration of groups more difficult and not easier as the 2001 decision of the Constitutional Court has ordered.

112. STC 141/2000, May 29, 2000.

113. The movement had been registered in the ordinary Registry of Associations in 1991 but not in the Registry of Religious Entities. This fact suggests that the movement could not, or would not, register as a religious organization. *See supra* note 97.

114. This case presented many similarities—and some significant differences—with the facts of *Hoffmann v. Austria*, decided by the European Court of Human Rights on June 23, 1993. (Notably, the *Hoffman* decision was cited repeatedly by the Spanish Constitutional Court in FJ 3-5 of the decision.) In *Hoffman*, a housewife who had converted to the Jehovah’s Witnesses had taken her children with her when divorce proceedings with the children’s father were still pending. The European Court of Human Rights reversed the decisions of Austrian national courts, which had granted custody of the children to the father, under Article 14 of

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The Spanish Constitutional Court reversed the court of appeals decision, holding that the noncustodial parent's visitation rights could not be arbitrarily reduced by the courts on account of his religious beliefs, regardless of how strange those ideas might appear in a certain social milieu, without proof that the children's health or education were endangered.

In reaching this holding, the Court first noted that the right to religious freedom implied a sphere of legitimate behavior (*agere licere*) protected by the Constitution and emphasized that restrictions to that right must be narrowly construed. The extreme reduction of the father's visitation rights and the judicial prohibition of proselytizing his children seriously restricted his freedom of belief.<sup>115</sup> Consequently, the Court proceeded to examine whether that restriction was justified. It concluded that the judicial reduction of the plaintiff's visitation rights pursued a legitimate aim, namely, the protection of the best interest of his children. Furthermore, it affirmed that the judicial order banning the father's proselytism was justified to safeguard the "moral integrity" of the children.<sup>116</sup>

However, the Constitutional Court found that the drastic reduction in his visitation rights decreed by the court of appeals was a measure clearly disproportionate in relation to the aim pursued because there was no evidence that the father had tried to convert his children, or take them to any religious meeting, or that the children had been negatively affected in any way by their father's belief.<sup>117</sup> These factors led the Court to conclude that the decision of the court of appeals rested only on the factually unsupported assumption that the Gnostic Movement was a dangerous sect. Hence, the plaintiff had been the victim of discriminatory treatment on account of his beliefs, and Article 16 of the Constitution had been violated.<sup>118</sup>

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the European Convention (principle of equality) in conjunction with Article 8 (right to respect for private and family life).

In my opinion, although the principles stated by the European Court are correct, the decision was erroneous. According to the couple's marital agreement, their children had to be educated in the spouses' common religion, which at the time was Catholicism. The wife unilaterally violated that agreement. It is very significant that the decision was adopted by a vote of five to four. The decision of the court was accompanied by several dissenting opinions; the one written by Judge Mifsud Bonnici is particularly interesting.

115. See STC 141/2000, May 29, 2000, FJ 4.

116. See *id.* at FJ 5.

117. See *id.* at FJ 6.

118. See *id.* at FJ 7.

## V. THE INDIVIDUAL'S FREEDOM OF CONSCIENCE

As stated above, the Spanish Constitutional Court has not articulated any legal concept of religion to guide ordinary courts and administrative authorities. However, the Court has emphasized in numerous decisions that religious freedom demands an expansive interpretation of its content and a narrow construction of its limits. Individuals' freedom of religion and conscience preserves an environment of legitimate behavior (*agere licere*) that the state cannot invade and must protect against other individuals or groups. This freedom confers upon individuals the right to express their beliefs, which includes the right to accommodate their behavior to their conscience and the right not to face discrimination on account of that behavior. Naturally, religious liberty is not an absolute freedom. Thus, Article 16 of the Constitution provides that it can be restricted "to maintain public order as protected by law." The courts are entitled, even obliged, to judge when and how the external expression of religious freedom may have breached the "public order," and they must do it following restrictive criteria.<sup>119</sup>

The foregoing general ideas seem very reasonable, but they have not always been reasonably applied. It has occurred especially in some cases involving conscientious objection, i.e., when an individual requests exemption from a legal obligation that collides with a moral command. The doctrine of the Constitutional Court is somewhat muddled on this subject.<sup>120</sup>

Through the mid-1980s, the Court based its decisions in the matter upon an expansive interpretation of freedom of conscience. Thus, in 1982, in one of its first decisions on conscientious objection to military service, the Court declared that there existed a direct connection between conscientious objection and freedom of conscience, which is a particular aspect of the freedom of ideology enshrined in Article 16 of the Constitution. Conscientious objection

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119. See STC 24/1982, May 13, 1982; STC 20/1990, Feb. 15, 1990; STC 120/1990, June 27, 1990; STC 137/1990, July 19, 1990; STC 141/2000, May 29, 2000; STC of Feb. 15, 2001, deciding the "*recurso de amparo*" 3083/96; see also ATC 617/1984, Oct. 31, 1984; and ATC 551/1985, July 24, 1985.

120. See RAFAEL NAVARRO-VALLS & JAVIER MARTÍNEZ-TORRÓN, LAS OBJECIONES DE CONCIENCIA EN EL DERECHO ESPAÑOL Y COMPARADO [CONSCIENTIOUS OBJECTIONS IN SPANISH AND COMPARATIVE LAW] 20–25 (1997).

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was therefore “a right recognized explicitly and implicitly in the Spanish constitutional order.”<sup>121</sup>

The Court applied a similarly expansive view of religious freedom in a large and complex decision of 1985 that resolved a motion of unconstitutionality (*recurso de inconstitucionalidad*)<sup>122</sup> filed by a group of congressmen against the first statute in Spanish recent history that decriminalized abortion in certain circumstances. One of the plaintiffs’ arguments was that the challenged statute did not contain any provision aimed to protect the conscientious objection that doctors, nurses, or other hospital staff might formulate.<sup>123</sup> The Court dismissed that argument, affirming that, even when a particular case of objection did not have specific statutory support, freedom of conscience could be alleged:

The right to conscientious objection . . . exists and can be exercised independently from the fact that it has been regulated by a statute or not. Conscientious objection is an integral part of the fundamental right to freedom of ideology and religion, recognized in Article 16(1) of the Constitution; and, as this Court has repeatedly indicated, the Constitution can be directly applied, especially when fundamental rights are concerned.<sup>124</sup>

However, beginning with a series of cases decided in the mid-to late-1980s, the Constitutional Court has taken an overly restrictive approach to the rights of individual conscience. Most surprisingly, it has done so without overruling its previous decisions, which employed an expansive interpretation of religious freedom.

The most significant cases adopting this restrictive view are two 1987 decisions, delivered the same day, concerning conscientious objection to military service.<sup>125</sup> This right is explicitly recognized by the Constitution, although its precise regulation is left in the hands of the legislature.<sup>126</sup> Until 1984, no statute was enacted to develop

121. See STC 15/1982, Apr. 23, 1982, FJ 6 (author’s translation).

122. For a brief explanation of this concept, see *supra* Part I.

123. See Rafael Navarro-Valls, *La objeción de conciencia al aborto: derecho comparado y derecho español* [*Conscientious Objection to Abortion: Comparative Law and Spanish Law*], 2 A.D.E.E. 257, 298–303 (1986).

124. STC 53/1985, Apr. 11, 1985, FJ 14 (author’s translation).

125. STC 160/1987, Oct. 27, 1987 and STC 161/1987, Oct. 27, 1987.

126. Article 30(2) of the Constitution provides: “The law shall determine the military obligations of Spaniards and shall regulate, with the proper safeguards, conscientious objection as well as other grounds of exemption from compulsory military service; it may also, when ap-

this constitutional provision. In that year, the legislature (*Cortes Generales*) passed two statutes to regulate the procedure that a citizen should follow to be legally recognized as a conscientious objector and the conditions for performing alternative civil service instead.<sup>127</sup> The Constitutional Court has ruled on this controversial subject several times prior to and since the 1984 statutes.<sup>128</sup>

The two decisions of 1987 responded, respectively, to a motion of unconstitutionality presented by the Spanish Ombudsman (*Defensor del Pueblo*)<sup>129</sup> and four questions of unconstitutionality posed by a central court (*Audiencia Nacional*) against different provisions of the 1984 statutes.<sup>130</sup> In both cases, the Constitutional Court rejected all the claims and sustained the entire content of the two statutes as constitutional.<sup>131</sup>

Beyond the holdings directly related to the 1984 statutes on objection to military service,<sup>132</sup> the most significant aspect of the 1987

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appropriate, impose a form of social service in lieu thereof" (*translated in SPANISH LEGISLATION, supra* note 4, at 31).

127. The legislation enacted in 1984 experienced subsequent modifications. *See* NAVARRO-VALLS & MARTÍNEZ-TORRÓN, *supra* note 120, at 65–79. The most significant change in recent years has been the enactment of a new statute on conscientious objection to military service and substitutive civil service: Law 22/1998, July 6, 1998.

128. Cases decided through 1991 are cited and studied by RODRÍGUEZ CHACÓN, *supra* note 1, at 116–26. In post-1991 decisions in which the plaintiffs refused to perform substitutive civil service upon grounds of conscience, the Court consistently has refused to recognize the plaintiff's right to be exempted from such service. *See* STC 321/1994, Nov. 28, 1994; STC 55/1996, Mar. 28, 1996; STC 88/1996, May 23, 1996.

129. *See* STC 160/1987, Oct. 27, 1987. On the role played by the Spanish Ombudsman with respect to the protection of religious freedom, see Beatriz González Moreno, *El defensor del pueblo y la defensa constitucional del derecho de libertad religiosa, ideológica y de culto* [*The Ombudsman and the Constitutional Defense of the Right to Freedom of Religion, Ideology and Worship*], in *FREEDOM OF RELIGION AND CONSCIENCE, supra* note 1, at 509.

130. *See* STC 161/1987, Oct. 27, 1987.

131. The main issues were: 1) the fact that the sincerity of the beliefs alleged by an objector could be investigated (which never happened in practice); 2) the fact that the right to conscientious objection could not be exercised after a person had been summoned; 3) some differences between the conditions in which the military service and the civil service were performed, including the fact that the civil service lasted a longer time (these differences have been eliminated in the most recent legislation).

132. I will not go into the details of these decisions for two reasons. First, the lax application of the 1984 laws has determined that conscientious objection to military service is not a real issue of freedom of conscience anymore in Spain; what happens in practice is that Spanish male citizens must perform a State service, and they freely choose, through a simple administrative procedure, whether they prefer a military service or a civil service. Second, the Spanish government has opted for a professional army, and the compulsory military service will be extinct in 2001.

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decisions is the restrictive concept of freedom of conscience employed by the Court in contradiction with applicable precedent.<sup>133</sup> Specifically, the Constitutional Court affirmed drastically that to recognize a general right to conscientious objection was unthinkable, for it “would imply denying the very idea of State.” “What can occur,” the Court continued, “is that [conscientious objection] is exceptionally admitted with regard to a particular duty.”<sup>134</sup> Without specific statutory support, the Court stated that the right to be exempted from a legal obligation on account of one’s beliefs cannot be exercised even under the umbrella of freedom of conscience.<sup>135</sup> In sum, the Court tried to break the obvious link existing between conscientious objection to military service and freedom of religion and belief, probably for fear of opening the way to an uncontrolled spread of conscientious objection to legal duties—a sort of “legal big bang.”<sup>136</sup>

The obvious contradiction between this restrictive view of freedom of conscience and the expansive view of the same right in its 1982 and 1985 decisions moved the Court to make some perplexing theoretical distinctions in an effort to validate its newly adopted view. For example, the Court classified conscientious objection to military service as “a constitutional right which is autonomous but not fundamental.”<sup>137</sup> As evidence of the confusion and different views reigning in the Court, the same justice who wrote the decision for the Court also asserted, in a dissenting opinion, that conscientious objection was a “fundamental right” derived from freedom of ideology and included in freedom of conscience or at least “in close and necessary in connection with” it.<sup>138</sup>

In any event, the Court’s restrictive approach to rights of conscience has arisen in other decisions and seems to have become the dominant approach to such issues.

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133. See NAVARRO-VALLS & MARTÍNEZ-TORRÓN, *supra* note 120, at 20–24.

134. STC 161/1987, Oct. 27, 1987, FJ 3 (author’s translation).

135. See STC 160/1987, Oct. 27, 1987, FJ 3. It must be noted that the strong wording of the Court was likely caused by the fact that it was dealing with conscientious objection against a constitutional obligation—military service is mentioned in Article 30(1) of the Constitution as a “right and duty” of citizens—and not just against an obligation derived from an ordinary statute.

136. See NAVARRO-VALLS & MARTÍNEZ-TORRÓN, *supra* note 120, at 243.

137. STC 160/1987, FJ 3.

138. See *id.* at FJ 3 n.1 (de la Vega Benayas, J., dissenting).

As early as 1985 this limited view of freedom of conscience can be found in a judgment on a case regarding Sabbath observance.<sup>139</sup> A woman who had converted to the Seventh-Day Adventist Church was dismissed from her job when she refused to continue working on Saturdays. She proposed to the company different ways to resolve her conflict, but the company accepted none of her suggestions. The Court decided in favor of the employer, focusing its reasoning exclusively on the fact that Sundays currently have the secular character of a holiday in Western societies. The Court did not even discuss the possibility that the employer should search for a reasonable accommodation of employees' religious duties.

A similar view dominates the Court's reasoning in other two cases. In 1990, the Court rejected an alleged right to fiscal conscientious objection where the plaintiff demanded to be exempted from the payment of a percentage of his income tax in proportion to the part of the state budget destined to military expenses.<sup>140</sup> Similarly, in 1996, the Court denied that a Jehovah's Witness possessed the right to receive reimbursement from the state for medical expenses derived from his conscientious objection to blood transfusions—the plaintiff needed abdominal surgery and went to a private clinic because the surgeons of the public hospital refused to operate without performing a transfusion.<sup>141</sup>

The Court's continued adherence to such a restrictive interpretation of religious freedom suffers from two significant flaws. First, the Court's reasoning has been very inconsistent. Second, as indicated above, the Court has ignored its own precedents on conscientious objection cases as well as its previously established general doctrine of an expansive interpretation of freedom of religion and conscience. It would have been more logical for the Court to recognize the right to act according to one's conscience and then to examine whether that right may—or must—be restricted by the presence of a prevalent legal interest.

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139. STC 19/1985, Feb. 13, 1985. For a critical analysis of this decision in the light of the Constitutional Court's case law on freedom of conscience, see Adoración Castro Jover, *La libertad de conciencia y la objeción de conciencia individual en la jurisprudencia constitucional española* [*Freedom of Conscience and Individual Objection of Conscience in Spanish Constitutional Jurisprudence*], in *FREEDOM OF RELIGION AND CONSCIENCE*, *supra* note 1, at 133, 167–72.

140. See *Providencia* of June 28, 1990 (unpublished).

141. See STC 166/1996, Oct. 28, 1996. Note the interesting dissenting opinion by Justice Julio González Campos.

## VI. CONCLUSION

This article has outlined the most significant case law of the Spanish Constitutional Court on religion issues. It has approached this case law from two perspectives: the basic legal status of churches and the level of protection that individual freedom of conscience enjoys in Spain.

It would be beyond the scope of this article to discuss the policy of the Spanish government and legislature towards the principles of equality and neutrality, though some expressions of that policy are troubling. One example is the government's apparent intention not to reach—in the near future—new formal agreements with other churches of wide implantation in Spain, like the Jehovah's Witnesses or the Church of Jesus Christ of Latter-day Saints. Another example is that duly registered religious denominations are far from obtaining the same legal privileges granted to those churches which have reached an agreement with the state (e.g., tax exemptions for religious property and activities, or civil effects to the religious ceremony of marriage).

These two examples show that the application of the principles of equality and neutrality in Spanish law could be improved with regard to the legal treatment of minority religious groups. The same can be said regarding the doctrine of the Constitutional Court, especially in connection with the legal position of the Catholic Church. There are some historical privileges that are not strictly unconstitutional but seem more appropriate for a confessional state than for a neutral state. The clearest example is probably the system of teaching Catholic religion in public schools as it is established in the 1979 Concordat.

By and large, the attitude of the Spanish Constitutional Court does not differ much from the one adopted by the European Court of Human Rights. Both courts tend to respect the traditional privileges of majority churches so long as there are no flagrant violations of the individuals' freedom of conscience nor of the principle of equality (nor also, in the case of the Spanish Constitutional Court, of state neutrality).

The concordance with the European Court extends likewise to something that, in my view, constitutes the most negative aspect of the case law of our Constitutional Court: the fact that a theoretical expansive interpretation of freedom of conscience is often impaired in practice by a quasi-automatic predominance of "neutral" laws.

When these laws, which do not have a religious (or anti-religious) content or purpose, collide with the moral tenets of some citizens or religious groups, the state is under no obligation to accommodate the particular beliefs of these individuals or groups. Nor has it any obligation to provide evidence that restriction of religious freedom is necessary to attain the aim pursued by the neutral law.<sup>142</sup>

There is apparently an implicit fear of conscience in the attitude of the Spanish and European courts, as if they were afraid that an atomization, or—a pulverization, of the established legal order would occur if every single claim of conscience were taken seriously. They lose sight of the fact that every human being has the right to live according to his or her conscience, as long as other superior interests are not in danger. I am not arguing that individual conscience must be entrenched as an absolute value. Conscience is not, and cannot be, an absolute. It may be and must be constrained when conflicts with overriding legal interests arise. However, restrictions on freedom are legitimate only when they are necessary. Hence, the crucial issue is recognizing that the state has the burden of proving that, in a particular case, there is a predominant interest to which freedom of conscience must yield. This is a way to avoid possible abuses or veiled discriminations.

To deny, or severely reduce, the rights of individual conscience is a grave mistake. A secular state should not be afraid of freedom of conscience, nor of free individual consciences that take morals seriously. They should fear fundamentalism: religious fundamentalism as well as secular fundamentalism.<sup>143</sup> Both are expressions of intolerance, which is incompatible with pluralism. And pluralism—the opportunity to express plural ideas in speech, writing, or behavior—is not only the essence of democracy; it is, above all, the natural result of freedom, which is the essence of human nature.

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142. For an analysis of this aspect of the case law of the European Court and further bibliographical references on the topic, see Javier Martínez-Torrón & Rafael Navarro-Valls, *The Protection of Religious Freedom in the System of the European Convention on Human Rights*, 9:3 HELSINKI MONITOR 25, 30–34 (1998).

143. The Parliamentary Assembly of the Council of Europe has approved two significant recommendations in this regard: Recommendation 1202 (1993) on religious tolerance in a democratic society and Recommendation 1396 (1999) on religion and democracy. In them, the Assembly warns against extremism, which is defined as a “perversion of religion.”