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Religious Pluralism in Spain: Striking the Balance Between Religious Freedom and Constitutional Rights

Augustín Motilla *

I. INTRODUCTION

The words “religious pluralism” and “Spain” are not heard together all too often. An overwhelming majority of Spanish citizens belong to the Catholic Church—over ninety percent of the population is baptized Catholic.¹ Different options in religious matters are therefore quite limited. Nevertheless, in recent years more and more religions have entered Spain and sought official recognition.² Religions such as the Buddhist Association of Spain, the Jehovah’s Witnesses, and the Church of Jesus Christ of Latter-day Saints have all only recently achieved official recognition.³

With this growing number of religious movements in Spain, state treatment of these bodies becomes increasingly important. With new denominations that often advocate values or beliefs foreign to those held by most Spanish citizens entering the country, Spain must decide when to give such movements legitimacy and support through official recognition. While tolerance and religious pluralism are positive values in any government, if left unchecked, these values could potentially jeopardize the State’s underlying institutions. On the other hand, repression of religious movements could potentially

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1. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003: SPAIN (2003), <http://www.state.gov/g/drl/rls/irf/2003/24434.htm> (Dec. 18, 2003) [hereinafter Spain (2003)] (“According to 1998 statistics collected by the Roman Catholic Church, 93.63 percent of citizens are Roman Catholic.”). Spanish society, has, however, undergone a significant secularization in recent years. The U.S. State Department notes that a survey published in February 2002 by the Center of Sociological investigations “found that . . . of citizens [who] consider themselves Catholic . . . [only] 19 percent attend Mass regularly.” *Id.*

2. *See infra* Part VI.A (discussion of the influx of New Religious Movements into Spain).

3. *See infra* Part V.A.

lead to tyranny and the denial of basic human rights. This Article seeks to find the balance between these sometimes conflicting norms of tolerance and institutional stability. Ultimately, it argues that the only way to achieve this balance is to impose limits on religious practice only when such a practice violates clear state constitutional principles or universal values.

This Article will address the landscape of religious pluralism in Spain and the unique challenges Spain faces in balancing between protecting religious minorities and remaining true to its constitutional framework and core values. The Article argues that this balance can only occur by recognizing the need for tolerance institutionally while requiring that any restrictions on religious liberty be based on clear universal principles and core principles of Spanish law. Part II of this Article provides a brief introduction to the religious landscape in Spain, particularly focusing on historical development, demography, and legal recognition of religions. Part III briefly summarizes the vitality of religious pluralism. Part IV examines how the Spanish legal system has evolved to accept and tolerate religions. Part V discusses several government practices that may hinder this advancement of religious pluralism. Part VI provides two case studies that illustrate the difficulties presented by alternative belief systems. In order to accommodate these different religions, Spain must approach all religions with tolerance while preserving the integrity of its constitutional principles and fundamental rights. Part VII offers a brief conclusion.

II. A HISTORICAL INTRODUCTION TO RELIGION IN SPAIN

In order to understand the legal and cultural norms influencing Spanish treatment of religious denominations, it is first necessary to trace the history of religious development in Spain. Such a discussion begins in the Middle Ages, where religious pluralism existed to some degree. During this period in Spain, three predominant religions existed in relative harmony: Christianity, Islam, and Judaism.⁴ Although each religion generally tolerated the personal beliefs of the members of the other religions such that each religion was able to regulate its customs and its own laws, this tolerance did not translate into equality. In both the Christian and Islamic kingdoms,

4. *See generally* CHARLES E. CHAPMAN, A HISTORY OF SPAIN (1966).

nonbelievers were subjected to certain restrictions (payment of special taxes, exclusion from public office, imposition of special clothing, etc.) not faced by members of their own religious community. As these restrictions became more and more harsh, mutual tolerance among the three religions began to erode.⁵

In the Christian kingdoms of Spain, the era of the Catholic monarchs eventually brought an end to this limited religious pluralism.⁶ In 1492, the Monarchs reconquered Granada, the last Arab kingdom.⁷ The Monarchs then required that conquered Jews either be baptized or expelled and later imposed those same requirements on conquered Muslims.⁸ Indeed, by the beginning of the sixteenth century, most Muslims had been expelled from the country.⁹ Many Jews and Muslims who secretly practiced their former religion were branded as “false converts” and faced trials in the courts of the Inquisition.¹⁰ Furthermore, the Inquisition sought to eradicate deviations from official Catholicism and, in particular, outbreaks of Protestantism in Spain.¹¹ During this period—in Spain and elsewhere in Europe—citizenship and religion seemed to go hand in hand. This principle governed under the maxim *cuius regio eius religio*¹² and thus led to the formation of a religious state intolerant of religious minorities.

Fortunately, this intolerance and persecution of non-Catholic minorities diminished during the nineteenth century.¹³ After the Inquisition, Spain enacted various constitutions, which, despite maintaining the Catholic confessionalism of the State, recognized the need for tolerance of religious minorities and religious freedom generally.¹⁴

5. *Id.* at 143.

6. *Id.* at 202–09.

7. RICHARD FLETCHER, *MOORISH SPAIN* 128–30, 165 (1992).

8. CHAPMAN, *supra* note 4, at 205.

9. *Id.* at 202, 210–11.

10. *Id.* at 202.

11. *Id.* at 205–06.

12. See FORUM ROMANUM, *LATIN PHRASES: MISCELLANEOUS*, at <http://www.forumromanum.org/latin/phrases2.html> (last visited May 12, 2004). This Latin phrase means “whose the region, his the religion.”

13. See CHAPMAN, *supra* note 4, at 455–57.

14. See Constitución [C.E.] of 1876 art. 11 (Spain); C.E. of 1869 arts. 21 & 27 (Spain); C.E. of 1856 art. 14 (Spain) (“The State is obligated to maintain and protect the worship and ministry of the Catholic religion that the Spanish people profess. But no citizen or

This protection of religious freedom grew during the twentieth century even as Spain's government underwent radical upheaval. Between 1931 and 1936, Spain became a nonconfessional state that recognized and supported religious freedom.¹⁵ The Constitution of 1931, and subsequent laws, sharply limited the activity and autonomy of the Catholic Church's associations.¹⁶ In response to this perceived hostile persecution of the Church by Spain's republican government, forces rose to defend the prominent position of the Church and the underlying values it represented. This conflict was a significant factor in the Civil War of 1936.¹⁷ After this Civil War, the victorious Nationalists restored Catholic state confessionalism.¹⁸ Under this Nationalist regime, non-Catholic beliefs and practices could only be carried out through private worship.¹⁹

Ironically, it was the Catholic Church itself, and not the State, that eventually levelled the playing field and called for increased tolerance of other religions. In 1965, the Church proclaimed in the Declaration of the Second Vatican Council, called *Dignitatis Humanae*, that religious freedom was a personal right that the states should recognize.²⁰ In response to this declaration, the Francoist State, in 1967, enacted the Law of Religious Liberty.²¹ Although religious rights of non-Catholics were still limited by the Catholic

foreigner can be persecuted for his opinions or religious beliefs, as long as they are not manifested by public acts contrary to the [Catholic] religion.") (editor's translation); cf. C.E. of 1812 art. 12 (Spain) ("The religion of the Spanish State is and always will be the Roman Apostolic Catholic, the only true church. The State is to protect the Church through wise and just laws and prohibits the exercise of all others.") (editor's translation). *But see* C.E. of 1845 art. 11 (Spain); C.E. of 1837 art. 11 (Spain).

15. See MARY VINCENT, CATHOLICISM IN THE SECOND SPANISH REPUBLIC: RELIGION AND POLITICS IN SALAMANCA, 1930-36 (1996). This marked the first time in the history of the regime of the Second Republic that a nonconfessional state was established. *Id.*

16. See C.E. of 1931 arts. 3, 25-27 (Spain); see also VINCENT, *supra* note 15, at 176-78, 184-85.

17. See generally VINCENT, *supra* note 15 (describing the "crucial role" of religion in the Civil War).

18. José Antonio Souto Paz, *Perspectives on Religious Freedom in Spain*, 2001 B.Y.U. L. Rev. 669, 685-86 (2001).

19. C.E. of 1931 arts. 26-27 (Spain).

20. Second Vatican Council, Catholic Church, *Declaration on Religious Freedom (Dignitatis Humanae)* § 2 (Dec. 7, 1965), in THE DOCUMENTS OF VATICAN II 675, 678-79 (Walter M. Abbott ed., Joseph Gallagher trans., 1966).

21. See Alberto de la Hera, *Relations with Religious Minorities: The Spanish Model*, 1998 BYU L. REV. 387, 387.

confessionalism of the State, the Law of Religious Liberty at least gave non-Catholics greater rights of public worship than they had previously enjoyed.²² The emphasis on religious freedom in Spanish society and government continued to expand after the death of General Franco in 1975,²³ as Spain transitioned toward a pluralistic democracy founded on the protection of human rights. This era, at least from a legal point of view, culminated in the enactment of the current Constitution of 1978.²⁴

III. THE CASE FOR RELIGIOUS PLURALISM

Despite these democratic reforms, in a state so dominated by one religion there may be a tendency for an intransigent social majority to impose its values onto religious minorities through the public sphere. This kind of religious hegemony and intolerance can cause several significant problems. First, a policy of cultural uniformity can work to increase social tension, eventually favoring the proliferation of cultural ghettos hostile to the dominant society. Thus, it is likely that religious minorities will rebel against the dominant religion. Also, such a policy will tend to reinforce a sense of superiority among members of the dominant religion.

Second, cultural uniformity, especially from the Western standpoint, is inherently hypocritical. One of the postulates of existing liberal democratic institutions in European society is the notion that diversity is a value which enriches individual freedom and social coexistence. Therefore, any attempt by the State to impose its values on religious minorities would contradict one of the fundamental principles of liberalism. Thus, pluralism as a social value promotes respect and intercultural peace, despite the discrepancies and differences in the various values and belief systems.

22. See *Ley de Libertad Religiosa* [Law of Religious Freedom], (June 28, 1967), arts. 1–2, reprinted in Joaquin Mantecón Sancho, *EL DERECHO FUNDAMENTAL DE LA LIBERTAD RELIGIOSA: TEXTOS, COMENTARIOS Y BIBLIOGRAFÍA* 288–89 (1996):

1. El Estado español reconoce el derecho de libertad religiosa fundado en la dignidad de la persona humana y asegura a esta, con la protección necesaria, la inmunidad de toda coacción en el ejercicio legítimo de tal derecho.
2. La profesión y práctica privada y pública de cualquier religión será garantizada por el Estado sin otras limitaciones que las establecidas en artículo 2 de esta Ley.

23. See BUREAU OF EUROPEAN AND EURASIAN AFFAIRS, U.S. DEP'T OF STATE, *BACKGROUND NOTE: SPAIN* (2003), <http://www.state.gov/r/pa/ei/bgn/2878.htm> (last visited May 12, 2004).

24. Constitución [C.E.] (Spain).

IV. THE INSTITUTIONALIZATION OF RELIGIOUS PLURALISM IN SPANISH GOVERNMENT

It is one thing to recognize pluralism as a value that the State should promote; it is quite another to actually institutionalize the concepts of religious pluralism and freedom in the government itself. This section will explore how Spain has moved toward increased institutionalization of religious pluralism by providing a basic summary of the Spanish legal system's handling of issues of religious pluralism and freedom.

A. *The Spanish Constitution's Treatment of Religion*

Today's Spanish Constitution attempts to go beyond the Catholic confessionalism and the system of anticlerical secularism of the Second Republic by proclaiming that religious freedom is a right of individuals and communities.²⁵ Thus, discrimination based on religious belief is constitutionally prohibited.²⁶ Similarly, the constitutional democratic framework rejects both the confessionalism of the State and the notion of a state church.²⁷ This does not mean, however, that Spain is absolutely neutral in religious matters. Instead of promoting religious freedom through a separation of church and state, as the First Amendment of the United States Constitution does, the Spanish Constitution promotes the religious freedom of its citizens and communities by requiring that the State cooperate with the Catholic Church and other denominations.²⁸ This

25. *Id.* art. 16 ("Freedom of ideology, religion, and worship for individuals and communities is guaranteed without any limitation in their demonstrations other than that which is necessary for the maintenance of public order protected by law . . . one may be obliged to make a declaration on his ideology, religion, or beliefs.") (editor's translation).

26. *Id.* art. 14 ("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 personal or social condition or circumstance.") (editor's translation).

27. *Id.* art. 16.3 ("No religion shall have a state character.") (editor's translation).

28. *Id.* ("The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperative relations with the Catholic Church and other confessions.") (editor's translation). This system thus differs not only from the models of Denmark and England, which both adopted state religions, but also from the model of the French lay state, which is characterized by absolute separation of church and state. *See* DEN. CONST. art 4 (1953) ("The Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State."); *see generally* Peter Cumper, *Religious Human Rights in the United Kingdom*, 10 EMORY INT'L L. REV. 115 (1996) (discussing the establishment of the Church of England and its effects on England). For a discussion of French separation of church and state, see Michel Troper,

constitutionally mandated cooperation has been put into practice by the State through the creation of Agreements and Concordants which regulate the State's interactions with the Catholic Church and other religions.²⁹ Utilization of these agreements has become so frequent that some commentators have suggested that "Spanish Ecclesiastical Law is mostly bilateral."³⁰ This constitutional system, which provides for the protection of rights of worship and mandates government cooperation with religion, establishes a framework which allows for greater religious pluralism and tolerance.

B. Spanish Statutory Treatment of Religion

Following the Constitution's lead, Spanish statutes have also made progress toward protection of religious liberty and the advancement of religious pluralism. In 1980, a little over a year after adoption of the Constitution, Parliament passed the General Act of Religious Liberty ("the Act").³¹ Because the State's relationship with the Catholic Church had already been largely defined by agreements negotiated shortly before and after the adoption of the Constitution,³² the Act focused on non-Catholic denominations.

Religion and Constitutional Rights: French Secularism, or Laicite, 21 CARDOZO L. REV. 1267 (2000). The commitment of public powers to facilitate the exercise of religious freedom of citizens is most similar to the Constitutional model in countries like Germany and Italy. See Javier Martínez-Torrón, *Freedom of Religion in the Case of the Spanish Constitutional Court*, 2001 BYU L. REV. 711, 714.

29. Although the Spanish Constitution does not specifically mention these agreements, Spanish history suggests that these kinds of agreements were contemplated when the Constitution was adopted. First, before the enactment of the Constitution, an agreement had already been reached with the Holy See. See Agreement Between the Holy See and the Spanish State (B.O.E., 1976, 230). A week after approval of the Constitution, four agreements were signed. Today, these agreements provide the basic policies for regulation of the Catholic Church in Spain. See Agreement of January 3, 1979 Between the Holy See and the Spanish State Concerning Legal Affairs (B.O.E., 1979, 300); Agreement of January 3, 1979 Between the Holy See and the Spanish State Concerning Education and Cultural Affairs (B.O.E., 1979, 300); Agreement of January 3, 1979 Between the Holy See and the Spanish State Concerning Economic Affairs (B.O.E., 1979, 300); Agreement of January 3, 1979 Between the Holy See and the Spanish State Concerning Religious Attendance of the Armed Forces and Military Service of Clergymen, and Members of Religious Orders (B.O.E., 1979, 300).

30. González del Valle, *Constitutional Status of Religious Confessions in Spain*, in THE CONSTITUTIONAL STATUS OF CHURCHES IN THE EUROPEAN UNION COUNTRIES 103 (A. Giuffrè ed., 1995).

31. General Act on Religious Liberty (B.O.E., 1980, 177), available at <http://www.religlaw.org/interdocs/docs/religliblawsp1980.htm> (last visited May 12, 2004).

32. See *supra* note 29.

The Act made several important moves in advancing religious pluralism in Spain. First, it established the possibility of special protection for entities with religious ends³³ by granting them legal recognition. In order to receive this recognition, the Act required only that the organization submit to a process of inscription in the Register of Religious Entities.³⁴ Once registered, the denomination can enjoy autonomy and freedom of internal organization, can create associations for achieving its ends, and can gain special protection of its beliefs and rites.³⁵

The Act has laid the groundwork for opening the channels of church-state relations, traditionally maintained only with the Catholic Church, to non-Catholic denominations. Article 7 of the Act allows for the State to make agreements with minority religions similar to those already entered into with the Catholic Church.³⁶ These agreements are treated as ordinary positive law emanating from the Parliament.³⁷ In 1992, the State exercised this authority by signing agreements with the Federation of Evangelical Religious Entities of Spain,³⁸ the Federation of Israelite Communities of

33. *See* General Act on Religious Liberty, art. 3.2 (“Activities, 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 nonreligious aims do not qualify for the protection provided in this Act.”).

34. *Id.* art. 5.1 (“Churches, Faiths and religious Communities and their Federations shall acquire legal personality once registered in the corresponding public Registry created for this purpose and kept in the Ministry of Justice.”).

35. *Id.* art. 6:

1. Registered Churches, Faiths, and Religious Communities shall be fully independent and may lay down their own organizational rules, internal and staff bylaws. Such rules, as well as those governing the institutions they create to accomplish their purposes, may include clauses on the safeguard of their religious identity and own personality, as well as the due respect for their beliefs, without prejudice to the rights and freedoms recognized by the Constitution and in particular those of freedom, equality and nondiscrimination.

2. Churches, Faiths and Religious Communities may create and promote, for the accomplishment of their purposes, Associations, Foundations and Institutions pursuant to the provision of ordinary legislation.

36. *Id.* art. 7:

The State, taking account of the religious beliefs existing in Spanish society, shall establish, as appropriate, Cooperation Agreements or Conventions with the Churches, Faiths or religious Communities enrolled in the Registry where warranted by their . . . 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.

37. *Id.*

38. Agreement of Cooperation Between the State and the Federation of Evangelical Religious Entities of Spain (B.O.E., 1992, 272).

Spain,³⁹ and the Islamic Commission of Spain.⁴⁰ For the first time in Spanish history, minority denominations, which had been pushed into the background and persecuted throughout the centuries, acquired special status under the law.

V. INSTITUTIONAL LIMITS ON RELIGIOUS PLURALISM IN SPAIN

Despite the progress Spain has made in institutionalizing norms of tolerance and religious pluralism through the formation of agreements with different religions, government practices in several areas have not only failed to promote religious pluralism, but have hindered its development. Regardless of whether these practices stem from traces of Catholic confessionalism or simply from a fear of the outsider, these practices should be reevaluated and, to the extent that they unreasonably impede the growth of religious tolerance, remedied.

A. *The “Deeply Rooted in Spain” Problem*

One limit on the advancement of religious pluralism in Spain is the requirement that a religion be recognized as deeply rooted in Spain in order to enjoy active participation with the State.⁴¹ Once a religion is recognized as deeply rooted, the denomination can sign an agreement of cooperation with the State entitling it to certain legal and economic advantages such as tax benefits and protection of its ministers and locations of worship.⁴² While this policy has been used to benefit certain religious minorities,⁴³ it is still a problem for those religions that are not “deeply rooted in Spain.” Thus, the ability of the Spanish government to deny this status to groups, even where they are officially recognized in the country, is a potential step backwards in terms of religious pluralism and tolerance.

This is compounded by the fact that there are no objective criteria to determine whether a denomination has recognized roots

39. Agreement of Cooperation Between the State and the Federation of Israelite Communities of Spain (B.O.E., 1992, 272).

40. Agreement of Cooperation Between the Spanish State and the Islamic Commission of Spain (B.O.E., 1992, 272) [hereinafter Islamic Commission].

41. General Act on Religious Liberty, art. 7 (B.O.E., 1980, 177).

42. See DAVID GARCÍA-PARDO, *EL SISTEMA DE ACUERDOS CON LAS CONFESIONES MINORITARIAS EN ESPAÑA E ITALIA*, 111–19 (1999).

43. See *supra* Part IV.

in Spain. For example, the Bureau of Religious Affairs ruled that Protestantism, Judaism, and Islam were historically rooted in Spain without looking at any data regarding the number of church members or churches in the country.⁴⁴ Today, the administration continues to show great discretion in the concession or denial of such status. Until recently, the status has been denied to the Buddhist Association of Spain as well as Jehovah's Witnesses.⁴⁵ In June of 2002, the Bureau of Religious Affairs exercised its discretion and recognized the Church of Jesus Christ of Latter-day Saints (the Mormons) as well-known and rooted in Spain.⁴⁶

B. The Pressure to Form Agreements with Federations and Not Denominations

Another institutional limitation on religious pluralism in Spain is the fact that the State pressures denominations to organize as federations. Because of Spain's desire to limit the number of agreements it makes in general and thus decrease bureaucracy, there is institutional pressure to create fewer agreements with broader federations of denominations as opposed to more agreements with individual denominations.⁴⁷ This focus on federations, as opposed to smaller denominations, has several drawbacks. First, an agreement with a federation instead of an agreement with a specific denomination minimizes possibilities for agreements that satisfy particular interests of individual beliefs. This is especially true considering the fact that these federations often unite diverse beliefs and churches. For example, the Evangelical Federation includes Lutherans, Anglicans, Baptists, Methodists, Seventh Day Adventists, and the Greek Orthodox Church.⁴⁸ As more and more

44. The State Council—the highest consultative agency of state administration—criticizes the absence of these numbers, especially the absence of quantitative estimates of the number of members that could have been used to establish a precedent for future applications. See CONSEJO DE ESTADO, RECOPIACIÓN DE DOCTRINA LEGAL 832–44 (1991).

45. See generally MINISTERIO DE JUSTICIA, GUIA DE ENTIDADES RELIGIOSAS DE ESPAÑA (IGLESIAS, CONFESIONES, Y COMUNIDADES MINORITARIAS) 209 (1998). Jehovah's Witnesses have more than 100,000 members in Spain and are the second largest Christian denomination in the country. *Id.*

46. *Id.* at 206.

47. See Rosa María Martínez de Codes, *The Contemporary Form of Registering Religious Entities in Spain*, 1998 BYU L. REV. 369, 375 (giving the number of religious organizations belonging to each Agreement).

48. See MINISTERIO DE JUSTICIA, *supra* note 45, at 219.

denominations are united into federations, it becomes increasingly difficult to create an agreement that satisfies all the denominations in the federation.

Second, because the interests of individual denominations within federations are not always aligned, misunderstandings and tensions may develop between the individual denominations. For example, the Islamic Commission of Spain is made up of two federations of Muslim communities, both of which have fifty percent representation.⁴⁹ Because the Islamic Commission is the organ that interacts with the State, the lack of understanding between the two federations has resulted in significant obstacles to the creation and implementation of their agreements.⁵⁰

C. Other Problems with State Agreements with Religious Bodies

In addition to the institutional pressure to form agreements with federations and the requirement that denominations be rooted in Spain, state agreements can also create other obstacles to religious pluralism. First, the contents of these agreements suggest that they do not represent true bilateral negotiations. For the most part, their contents, even across different religions, are surprisingly repetitious.⁵¹ Even though all beliefs do not face the same problems or require the same solutions, the repetitive nature of these agreements often suggests that they do. One commentator stated: "One is left with the impression that these treaties were not actually the result of negotiations but rather represent a text offered by the administration which it judges appropriate and which must be accepted almost to the letter."⁵² If the contention that minority religions are on an uneven playing field is true, these agreements may not mean much at all.

Finally, the three agreements signed with non-Catholic denominations do not allow as much church-state cooperation as the agreements with the Catholic Church. It seems that the

49. See Islamic Commission, *supra* note 40.

50. For a report of the difficulties in reaching agreement in the Islamic Commission of Spain, see Augustín Motilla, *L'accordo di Cooperazione tra la Spagna e la Commissione Islamica: Bilancio e Prospettive*, in *MUSULMANI IN ITALIA: LA CONDIZIONE GIURIDICA DELLE COMUNITÀ ISLAMICHE* 245, 249–52 (Silvio Ferrari ed., 2000).

51. See *supra* notes 38–40.

52. Ivan C. Ibán, *State and Church in Spain*, in *STATE AND CHURCH IN THE EUROPEAN UNION* 100 (Gerhard Robbers ed., 1995).

administration has collaborated with these non-Catholic religions mainly on those matters that require a minimal financial commitment. Thus, the relatively small number of agreements that have been signed (only three have been signed in twenty-three years)⁵³ and the disparity in treatment between state treatment of the Catholic Church and other denominations recognized as rooted in Spain⁵⁴ highlight the problems of religious inequality and intolerance that may remain in Spain. While Spain has made inroads in terms of cooperating with other religious denominations, such advances have not gone far enough in narrowing the differences between state treatment of the Catholic Church and other denominations.

VI. CASE STUDIES: APPLYING SPANISH RELIGIOUS PLURALISM TO MODERN CHALLENGES

The increased religious tolerance institutionalized in the Spanish Constitution and statutes may theoretically be adequate. However, it is necessary to look at how Spanish law practically handles matters of religious pluralism and tolerance. This is especially true where Spain is faced with questions regarding the incorporation of belief systems and ways of life foreign to its cultural foundations. This section addresses two areas in which Spanish religious pluralism has been called into question: the integration of cults into Spain and the corresponding problems they present and the introduction of Islam into the country. In both cases, essential human rights respecting religious freedom can only be preserved if the legal system fosters tolerance and pluralism, with limitations only where fundamental constitutional principles or universal values are at stake.

53. *Id.*

54. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002: SPAIN (2002), <http://www.state.gov/g/drl/rls/irf/2002/13982.htm> (last visited May 12, 2004) [hereinafter SPAIN (2002)]:

[T]he Government treats religions in different ways. Catholicism is the dominant religion, and enjoys the closest official relationship with the Government as well as financial support. . . . Leaders of the Protestant, Muslim, and Jewish communities . . . continue to press the Government for comparable privileges . . . includ[ing] public financing, expanded tax exemptions, improved media access, removal of Catholic symbols from some official military acts, and fewer restrictions on opening new places of worship.

Id.

A. Regulation of New Religious Movements (NRMs)

The problem of New Religious Movements (“NRMs”)⁵⁵ in Spain asks an important question: what happens when Spain’s desire to promote religious pluralism and tolerance confronts ways of life and belief systems entirely foreign to Spain’s Rationalist and Christian roots? As more religions have entered Spain, Spain has been forced to confront the question of what to do when a group is organized whose teachings and practices may disrupt public order. This section outlines Spain’s treatment of NRMs, explains Spain’s advances toward greater tolerance in regulating NRMs, and addresses the limitations the government continues to impose on these movements.

1. Spanish regulations of NRMs

The limits of religious freedom in Spain have been pushed as cults and other minority religions have entered the country and sought official recognition.⁵⁶ These groups are characterized in Spain as New Religious Movements. Official recognition of NRMs, whose practices tend to be either illegal or violative of basic traditional norms of Spanish society, may lend credibility to these organizations. In an effort to deal with these problems, in 1988, the Parliament established the Commission for the Study of Sects in Spain and their Repercussions.⁵⁷ The Commission, charged with a global reevaluation of the Spanish legal system’s treatment of NRMs, rejected the idea of special anticult legislation, arguing that such legislation could potentially modify the fundamental religious rights

55. There is no legal definition of NRMs; the term NRM serves to categorize those religious movements that are treated differently in practice or under Spanish law. Sometimes, these groups are also referred to as “destructive sects.” See *infra* note 56.

56. See Gloria M. Moran, *The Spanish System of Church and State*, 1995 BYU L. REV. 535, 547. Moran explains that

[e]very day Spanish society faces an increasing number of groups that cannot prove a religious purpose. Some of these groups, those identified as “destructive sects,” encourage delictual behaviors . . . that cause public alarm and social awareness because they all too often appear on the front pages of the newspapers. . . . [M]ost applications for registration [by these groups] have been rejected both by the Dirección and by the courts.

Id.

57. The Report can be seen in AUGUSTÍN MOTILLA, SECTAS Y DERECHO EN ESPAÑA: UN ESTUDIO EN TORNO A LA POSICIÓN DE LOS NUEVOS MOVIMIENTOS RELIGIOSOS EN EL ORDENAMIENTO JURÍDICO 230–44 (1990).

of citizens as established by the Constitution.⁵⁸ Thus, the rights of freedom of belief and religion could not be arbitrarily limited for reasons of an individual's affiliation with a certain sect or cult. According to the Commission, it is the domain of the courts and not the Parliament to adopt measures sanctioning certain transgressions of cults and, if necessary, proceed to the illegalization of the group.⁵⁹ The Parliament adopted the proposals of the Commission in its resolution of March 2, 1989.⁶⁰ According to these resolutions, the legality of the sect or cult is determined solely by the public registration statutes that apply to all religious or cultural organizations.⁶¹

2. *The registration problem*

One area where Spain has struggled to find balance between religious pluralism and other societal goals when dealing with NRMs is in the area of legal recognition. Unlike traditional denominations, who simply must show that they are religious organizations and must submit their religious objectives at the time of inscription with the Register of Religious Entities,⁶² in practice, NRMs have traditionally faced much more exacting requirements when they seek registration. The General Bureau for Religious Affairs, the board in charge of admissions and rejections, often requires data regarding the number of followers, the period of establishment in Spain, and the organization's purpose.⁶³ This data is verified and if it does not meet certain standards (either in terms of numbers of members, time period established in Spain or legality of the ends of the

59. Legal Reasonings 2d and 3d of the Barcelona Provincial Court's decision on June 23, 1993. See Augustín Motilla, *Grupos Marginales y Libertad Religiosa: Los Nuevos Movimientos Religiosos ante los Tribunales de Justicia*, in 9 ANUARIO DE DERECHO ECLESIASTICO DEL ESTADO 138-51 (1993).

60. *Id.*

61. See General Act on Religious Liberty, art. 7 (B.O.E., 1980, 177), available at <http://www.religlaw.org/interdocs/docs/religiblawsp1980.htm> (last visited May 12, 2004).

62. Royal Decree Concerning the Organization and Functioning of the Registry of Religious Entities, 142/1981, Jan. 9, 1981, art. 3.2(c) (*translated in SPANISH LEGISLATION ON RELIGIOUS AFFAIRS*, 123-26 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998)).

63. See Augustín Motilla, *El Concepto de Confesión Religiosa en el Derecho Español Práctica Administrativa y Doctrina Jurisprudencial*, in CENTRO DE ESTUDIOS POLÍTICOS Y CONSTITUCIONALES 106-11 (1999).

organization) the organization is denied inscription.⁶⁴ Furthermore, registration officials require that the religion have a doctrine of its own which distinguishes it from other denominations.⁶⁵ Also, in order to be registered, the denomination must have clergy or ministers with duties in the sect.⁶⁶ Denominations with smaller congregations have difficulty demonstrating their establishment in the country, and those without a substantially different dogma face difficulty registering in the country. Thus, while Spain may be promoting religious liberty institutionally, the discretionary actions of certain civil servants may curtail religious liberty in some situations.

Spain's Constitutional Court, however, has worked to remedy this problem of granting too much discretion to civil servants. Constitutional Court Ruling 46/2001⁶⁷ highlights the fact that Spanish courts are moving to promote religious pluralism, even when dealing with NRMs. This ruling dealt with a denial of the inscription for the Church of Unification in the Register of Religious Entities.⁶⁸ The Court annulled the General Bureau for Religious Affairs' denial and allowed inscription. The Court found that the right to inscription is part and parcel of the constitutional right of religious freedom because it facilitates the collective exercise of this right.⁶⁹ Therefore, the Court held that the denial of inscription undermined the fundamental right of religious freedom recognized in the Spanish Constitution.⁷⁰

The Court also addressed the problem of imposing more exacting registration requirements on NRMs. The Court said that the law regarding the requirements for inscription did not leave room for interpretation.⁷¹ Thus, the Court required that the Bureau look only to the ends of a religious organization to ensure that they

64. See de la Hera, *supra* note 21, at 388–90.

65. Royal Decree Concerning the Organization and Functioning of the Registry of Religious Entities, art. 3.2(a).

66. See Motilla, *supra* note 63, at 116, 196–200, 381–85.

67. STC, Feb. 15, 2001 (S.T.C., No. 46/2001).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

are not otherwise criminal as described in Article 3 of the Organic Law of Religious Freedom.⁷²

The Constitutional Court did recognize that inscription could be denied where the group's activities would endanger individual rights and freedoms.⁷³ However, in order to use this exception to deny inscription, the Court required that the Bureau first demonstrate in a court of law that the organization would actually constitute a threat to individual rights and freedoms.⁷⁴ Mere suspicions and conjecture would be inadequate grounds to deny inscription.⁷⁵ Because the Administration unreasonably applied the "religious ends" requirement too restrictively to the church and did not show that the Church of Unification constituted a risk to the public order, the Constitutional Court held that the Administration had violated the right to religious freedom guaranteed in Article 16 of the Constitution.⁷⁶ Thus, at least in this area, Spain has worked to stay true to the principle that the only time religious pluralism should be limited is when individual rights and freedoms would be endangered.

3. *State regulation of personal and familial relations in NRMs*

Another area where Spain has struggled to provide greater religious pluralism involves government regulation of personal or familial relationships in which some or all of the family members are also members of an NRM. Lower Spanish courts have split regarding the role religion should play in modifying and defining marital status and conjugal rights and duties. Some courts have been influenced by religious preferences in their interpretations of familial rights and duties, while others have been careful to avoid any influence of religious affiliation.⁷⁷

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. See the different court decisions in Augustín Motilla, *New Religious Movements in Spain*, in NEW RELIGIOUS MOVEMENTS AND THE LAW IN THE EUROPEAN UNION: PROCEEDINGS OF THE MEETING LISBON 8-9 NOVEMBER 1997 338-40 (A. Giuffrè ed., 1999). For the complete text of the court decisions, see Augustín Motilla, *La Pertenencia a Nuevos Movimientos Religiosos en los Procesos Matrimoniales de Separación y Divorcio: Líneas Jurisprudenciales*, in 18 ANUARIO DE DERECHO ECLESIASTICO DEL ESTADO 467-92 (2002).

The Constitutional Court has helped to clarify this confusion by remedying the religious inequalities here as well. The Constitutional Court first confronted the issue of the relevance of religious affiliation in the regulation of family relationships in its decision 141/2000 on May 29, 2000.⁷⁸ In that case, the Provincial Court of Valencia had substantially limited the right of a father to visit and stay with his children during a trial separation. The father was a member of the Gnostic Movement of Spain⁷⁹ and the Provincial Court considered the esoteric beliefs of this so-called “cult” were a potential threat to the welfare of the minors.⁸⁰ However, no evidence was presented that showed any real psychological or physical damage to the children. The Constitutional Court, relying on the European Court of Human Right’s decision in *Hoffman v. Austria*,⁸¹ reversed the Provincial Court’s determination. The Court held, first, that the father had a right to raise his children according to his own beliefs.⁸² This right could only be limited where the moral or physical integrity of the minors was threatened,⁸³ and any limitation on the parents’ rights to raise their children had to be based on real harm to the minors involved.⁸⁴ Because the Provincial Court’s decision was based on the father’s beliefs rather than any real harm,⁸⁵ the court held that the lower court’s ruling was contrary to the right to religious freedom of Article 16 of the Spanish Constitution.⁸⁶ Again, this case adopts the principle that religious freedom should only be limited when other individual rights are threatened, representing the Spanish government’s movement toward increased tolerance.

4. Regulating the criminal activities of NRMs

A final area in which Spain’s commitment to religious pluralism has been put to the test is in its regulation of the criminal activities committed by NRMs or “destructive sects.” The illegal activities of

78. STC, May 29, 2000 (S.T.C., No. 141/2000).

79. *Id.*

80. *Id.*

81. *Id.* (relying on *Hoffman v. Austria*, 255 Eur. Ct. H.R. (ser. A) (1993)).

82. STC, May 29, 2000 (S.T.C., No. 141/2000).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*; *see also* C.E. art. 16.

certain NRMs have become a subject of public concern in Spain.⁸⁷ The final report of the Commission for the Study of the Repercussions of Sects in Spain lists several classic offenses that are often attributed to NRMs. These include illegal proselytising, coercion, threats, offenses against the freedom and security of the person, swindling, fraud, and currency and occupational irregularities.⁸⁸ Since certain offenses are commonly associated with NRMs, some have called for the enactment of special offenses criminalizing certain NRMs, similar to those enacted in France.⁸⁹

However, such a statute would put NRMs on a different footing than other denominations and would put religious offenders on a different footing than nonreligious offenders. Instead, Spain has worked to promote religious freedom and pluralism by refusing to discriminate between larger denominations and NRMs. Thus, the Parliamentary Report found that the Penal Code provided the necessary penalties to protect society from the illicit activities of certain NRMs.⁹⁰ Also, these kinds of criminal proceedings against NRMs in Spain have been few,⁹¹ and only two have resulted in sentences imposed on the NRMs or their members.⁹² Even where certain activities of NRMs have allegedly violated the Penal Code, Spanish courts typically give the religious activity the benefit of the doubt.⁹³ Thus, at least in areas of registration, family rights, and

87. See generally Motilla, *supra* note 63.

88. *Id.*

89. See, e.g., Law No. 2001-504 of June 12, 2001, ch. V., § 9, J.O., June 13, 2001, p. 9337, ch. V., sec. 9, available at http://www.legifrance.gouv.fr/citoyen/jorf_nor.ow?numjo=JUSX9903887L (last visited May 12, 2004).

90. All of these offenses are contemplated in Articles 169, 248, 311, and 522 of the Spanish Penal Code. See Código Penal [C.P.] arts. 169, 248, 311, 522 (Spain).

91. See court decisions and explanations of this, in Motilla, *supra* note 59, at 89, 97–109, 124.

92. One sect, Raschimura, received a small sentence for falsification of a public document. See *id.* at 99–101. Leaders of another, the Center of Esoteric Research, were convicted for impersonating a public officer, cooperating with and protecting prostitution, and obtaining income through illegal means. See *id.* at 101–02.

93. For example, in November of 2001, the Provincial Audience of Madrid ruled in favor of certain members and leaders in the Church of Scientology who were charged with crimes of illegal detention, encroachment, physical harm, offenses against the Tax Authority, and fraud. See *id.* at 102–04. With respect to fraud, the Audience ruled that there was no intent to defraud, despite the large amount of money the Church charged members for certain materials and activities. The Audience held that it would be extremely difficult to put a price on religious affairs. See STC, June 12, 2000 (S.T.C., No. 155/2000). Also, in 1993, leaders of the Children of God sect were accused of creating illegal centers of education, causing bodily

criminal violations, Spain has become increasingly tolerant toward NRMs. This increased tolerance is likely a manifestation of the general principle that Spain has begun to institutionalize into its legal landscape the importance of nurturing religious pluralism and will only intervene to limit it where such pluralism would result in a restriction on other fundamental human rights or constitutional values.

B. Integration of the Muslim Minority

Another area where the Spanish commitment to promote religious pluralism and tolerance has been put to the test involves the law's response to the doctrines and practices of Islam and certain Islamic groups. As noted above,⁹⁴ these groups are not considered NRMs; indeed, Islam is one of three major religions with whom the Spanish government has signed agreements.⁹⁵ Close to 300,000 Muslim immigrants, principally of Moroccan origin, live in Spain.⁹⁶ Nevertheless, problems result when the doctrines or practices of Islam conflict with long-standing Spanish traditions and laws. These problems are compounded by the fact that a wide range of social sectors now advocate a rejection of this minority, particularly after the events of September 11, 2001.⁹⁷ Now more than ever, due largely to the media and xenophobic attitudes, Islam is seen as a fanatical religion bent on imposing a theocratic and intolerant world order. Such a world view directly conflicts with two basic postulates

harm, swindling, and illegal association. The Provincial Audience of Barcelona absolved the sect on all counts. See Motilla, *supra* note 59, at 105–07.

94. See *supra* Part IV.B.

95. See *supra* Part V.

96. Reports from the U.S. State Department, citing the Federation of Islamic Entities, indicate a rapidly increasing Muslim population, which is difficult to estimate owing to the large number of illegal immigrants. Compare SPAIN (2002), *supra* note 54 (“The Federation of Spanish Islamic Entities (FEERI) estimates that there are more than 450,000 Muslims, not including illegal immigrants (who could number a quarter million).”) with SPAIN (2003), *supra* note 1 (“The Federation of Spanish Islamic Entities (FEERI) estimates that there are close to 1 million Muslims, including both legal and illegal immigrants, [in Spain].”).

97. See, e.g., Peter Ford, *Xenophobia Follows US Terror*, THE CHRISTIAN SCI. MONITOR, Oct. 11, 2001, at 4 (reporting, among other instances of xenophobia targeted at Muslims, increased harassment of Moroccans by police in Madrid following the September 11 terror attacks). Furthermore, the evolution of some Arab countries toward radical Islam contributes to a confrontation with western society. This radical Islamism is also occurring among immigrants in Europe.

of Western culture: the separation of church and state, and the idea of inviolable and universal human rights.⁹⁸

Two of the most prominent examples of Islamic practices that conflict with basic Western and Spanish values are Islamic polygamy and the right of unilateral repudiation by the husband. Spain is thus faced with the difficult challenge of striking a balance between providing for pluralism in its treatment of Islam and the need to protect established Spanish values. In striving to achieve this balance, Spain has worked to integrate the Islamic religion and its practices to the full extent possible, only limiting Islamic rights of religious freedom where they violate basic constitutional values against discrimination. This policy of striving to achieve religious pluralism, with human rights and constitutional values acting as the only restraining principles, is consistent with what Spain has done and should continue to do in its Constitution, statutes, and treatment of NRMs.

1. Islamic polygamy and public order

One major Islamic practice that conflicts with traditional Spanish values and therefore challenges the institutional promotion of religious pluralism is the practice of polygamy. Islamic law prohibits a woman from marrying more than one man, but allows a man to have up to four wives at the same time.⁹⁹ Undoubtedly, the Islamic practice of polygamy is a religious practice that directly contrasts with the principles and values of European countries, including Spain. In particular, Spanish Government has consistently denied recognition of polygamous marriages held in foreign countries and has also denied civil matrimony to Spanish citizens who apply for an additional marriage while already married.¹⁰⁰ While tolerance of

98. In the face of these hostile attitudes and this veiled social rejection, Muslim immigrants have turned to their religion and the culture of the Islamic community. In this community, many Muslim immigrants find a base for unity and mutual cooperation as well as a defense against the West and its cultural model. For these individuals, Islam may have become an alternative source of values.

99. Abdullahi An-na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491, 493-97 (1987).

100. See *Resoluciones de la Dirección General de Registros y del Notariado* (Sept. 30, 1999), in ANUARIO DE LA DIRECCIÓN GENERAL DE REGISTROS Y DEL NOTARIADO 381922 (1999) [hereinafter ANUARIO]; *Resoluciones de la Dirección General de Registros y del Notariado* (Apr. 8, 1999), in ANUARIO, *supra*, at 312830 (1999); *Resoluciones de la Dirección General de Registros y del Notariado* (June 10, 1998), in ANUARIO, *supra*, at 274748 (1998); *Resoluciones*

Islamic practices is essential to pluralism, Spanish courts cannot deny the idea that monogamy is an essential element in the conception of marriage in Spanish Law.¹⁰¹

a. European legislative treatment of polygamy outside of Spain. Before delving into Spanish treatment of polygamous marriages, it is useful to observe how other European countries have handled the issue. This discussion can provide a background for Spanish policy and a benchmark to see how Spain compares with other European nations in terms of religious pluralism. One way some European nations have maintained the traditional notion of marriage without significantly impeding religious pluralism in the face of Islamic polygamy is through legal efforts designed to mitigate the effects of failing to recognize polygamy. For example, even when polygamous marriages are invalidated and denied recognition, many European countries have passed legislation in an attempt to mitigate the harsh results to children that result from the failure to recognize polygamous marriages.¹⁰² This is the case in France, where the courts, while refusing to recognize the marriage itself, recognize certain indirect effects of a second marriage, so that the wife and

de la Dirección General de Registros y del Notariado (Feb. 20, 1997), in ANUARIO, supra, at 1363–65 (1997); Resoluciones de la Dirección General de Registros y del Notariado (Dec. 3, 1996), in ANUARIO, supra, at 2519–21 (1996).

101. See JOSÉ MARIA ESPINAR VICENTE, *EL MATRIMONIO Y LAS FAMILIAS EN EL SISTEMA MATRIMONIAL ESPAÑOL DE DERECHO INTERNACIONAL PRIVADO* 122 (1996) (besides monogamy, consensual freedom, heterosexuality, and exogamy are nuclear elements of Spanish matrimony and reflect the application of the international public order exception). At any rate, if a debate exists today concerning the appropriateness of abandoning the principle of heterosexuality while giving legal validity to homosexual unions, how can one justify not recognizing polygamous unions because of the principle of monogamy as an embedded western tradition? See SILVIO FERRARI & IVAN C. IBÁN, *DIRITTO E RELIGIONE IN EUROPA OCCIDENTALE* 174 (1997).

102. For an exposition on French jurisprudence and legislation, see Salomé Adroher Biosca, *Matrimonio Islámico y Derecho Internacional Privado Español*, in WRITINGS CONCERNING MATRIMONY IN HOMAGE TO PROFESSOR DR. JOSÉ MARIA DIAZ MORENO, S.J. 889–90 (2000); J. Deprez, *Statut personnel et pratiques familiales des étrangers musulmans en France: Aspects de Droit International Privé*, in FAMILIES-ISLAM-EUROPE: LE DROIT CONFRONTE AU CHANGEMENT 88 (Marie-Clarie Foblets ed., L'Hartmattan 1996). With respect to the jurisprudential criteria in granting civil effects in Italy to polygamous marriages held outside of Italy, see, among others, Cristina Campiglio, *Famiglia e Diritto Islamico: Profili Internazionale-Privatistici*, in MUSULMANI IN ITALIA: LA CONDIZIONE GIURDICA DELLE COMUNITÀ ISLAMICHE 170–71, 178 (S. Ferrari ed., Bologna 2000).

children can benefit from hereditary succession and the right to alimentary pension.¹⁰³

Despite these efforts to minimize state conflict with Islamic polygamous practices in France, beginning in 1992, a countertrend in French legislation moved to restrict the rights and benefits of individuals who practice polygamy. A 1993 law modified the requirements for French citizenship to require applicants to show linguistic and cultural assimilation.¹⁰⁴ According to the Government Board Ruling of February 11, 1994, polygamy is incompatible with assimilation and is a sufficient motive for denying an application for citizenship.¹⁰⁵ Thus, applicants who are united in a polygamous matrimony are denied citizenship at the moment of the petition. Using similar criteria and reasoning, a 1995 immigration law requires that a foreign male applicant choose only one wife and her children to form a family for the purposes of citizenship recognition.¹⁰⁶

b. The citizenship issue and Spain. Like France, Spain has worked to balance the Islamic practice of polygamy with its views on marriage. Under the Organic Law 4/2000 of January 11 regarding Rights and Freedoms of Foreigners in Spain and their Social Integration, a polygamous immigrant's right to citizenship is limited.¹⁰⁷ Article 17 of the Law prevents foreign residents from bringing more than one spouse back to live in Spain, even if the foreign law where they reside allows polygamous marriages.¹⁰⁸ Additionally, the Article only grants a residence permit to the resident's children and chosen spouse if the resident alone exercises parental custody.¹⁰⁹ Thus, in the case of polygamous marriages, the male has a right to choose the spouse for whom he can solicit residence.

103. Campiglio, *supra* note 102, at 170–71, 178. France continues, however, to deny Social Security pensions and health care benefits to successive wives.

104. *Id.*

105. *Id.*

106. *Id.*

107. General Act of Parliament Regarding the Rights and Freedoms of Foreigners in Spain and Their Social Integration (B.O.E., 2000, 10).

108. *Id.* art. 17(1)(a).

109. *Id.* art. 17(1)(b).

This is a paradoxical situation for Spain, and for other European countries that recognize the legislation of foreign states in the European Union.¹¹⁰ In short, while Spanish and European law reject the practice of polygamy because it violates gender equality, the way in which polygamy is rejected allows males to choose among wives and encourages wives to give up parental custody.¹¹¹ These practices potentially conflict with traditional norms of gender equality.

c. Spanish treatment of polygamous marriages. Marriage inscription is another area where the Spanish definition of marriage collides with Islamic polygamy. Under Spanish law, marriages are recognized through the Office of the Registry and Notary (DGRN).¹¹² A common problem with polygamous marriages occurs when a Moroccan couple marries in Morocco according to Islamic law and then one or both later obtain Spanish nationality. If the documents provided to the DGRN indicate that the man is already married, a second inscription is not permitted in the Registry.¹¹³ Thus, although this union may be valid under Moroccan law, which in principle should be sufficient justification for recognizing the marital status of the couple, these foreign laws have not been recognized in Spain. In rejecting inscription in these kinds of cases, the DGRN relies on Article 12.3 of the Spanish Civil Code.¹¹⁴ Article 12.3 prohibits Spain from recognizing a foreign law that is contrary to the public order of Spain.¹¹⁵ Relying on this language, the DGRN has ruled that Spain “can not allow the inscription of a polygamous matrimony” because it would be a threat to “the constitutional dignity of the [woman] and against the Spanish concept of

110. See Resolution on Respect for Human Rights in the European Union, European Parliament, 1996 O.J. (C 320), available at <http://www.proasyl.de/folien/eu-hr/eu-rese.htm> (last visited May 12, 2004).

111. See this critical observation in ANA QUIÑONES ESCÁMEZ, DERECHO E INMIGRACIÓN: EL REPUDIO ISLÁMICO EN EUROPA 54 (2000).

112. The DGRN is in charge of resolving conflicts that arise at the moment of inscription of couples to be married in the Spanish registries. F. LUCES GIL, DERECHO DEL REGISTRO CIVIL 29 (5th ed. 2002); J. PERE RALUY, DERECHO DEL REGISTRO CIVIL I 52–53 (1962).

113. See *supra* text accompanying note 100.

114. CÓDIGO CIVIL [C.C.] art. 12.3 (Spain), available at <http://civil.udg.es/normacivil/estatal/cc/tprel.htm> (last visited May 12, 2004).

115. *Id.*

matrimony.”¹¹⁶ Thus, by again turning to its constitution, Spain has found a limit to certain expressions of religious freedom.

Similarly, Spain has limited the expression of religious freedom when second marriages are performed according to Koranic rite between a Spaniard and a Moroccan woman in Morocco where the Spanish man is already married. Although the marriages of Spaniards in foreign countries meet all the requirements of a valid marriage according to Article 65 of the Civil Code,¹¹⁷ the marriage must be inscribed with the DGRN to take legal effect in Spain.¹¹⁸ However, because second marriages do not exist in the eyes of the Spanish law, they cannot be inscribed in the Civil Registry.¹¹⁹

Still, the general invalidity of second marriages under Spanish law does not prevent the admission of some limited recognition of polygamous unions. For example, the DGRN already recognizes the possible existence of such unions in resolutions that allow the DGRN to make a provisional inscription in the Civil Registry for second marriages in foreign countries.¹²⁰ Furthermore, nothing in the resolutions prevents recognition of the indirect effects of polygamous marriages on successive spouses and their children. Thus, one way of promoting religious freedom for the Islamic minority while at the same time staying true to principles of gender equality found in the Constitution would be to recognize these indirect effects of marriages. More specifically, Spain could recognize hereditary rights in polygamous households along with rights to

116. General Act of Parliament Regarding the Rights and Freedoms of Foreigners in Spain and Their Social Integration (B.O.E., 2000, 10).

117. C.C. art. 49 (Spain), *available at* <http://civil.udg.es/normacivil/estatal/CC/IT4.htm> (“Cualquier español podrá contraer matrimonio dentro o fuera de España: . . . En la forma religiosa legalmente prevista. También podrá contraer matrimonio fuera de España con arreglo a la forma establecida por la ley del lugar de celebración.”).

118. *Id.* art. 65 (“Artículo 65—Salvo lo dispuesto en el artículo 63, en todos los demás casos en que el matrimonio se hubiere celebrado sin haberse tramitado el correspondiente expediente, el Juez o funcionario encargada del Registro antes de practicar la inscripción deberá comprobar si concurren los requisitos legales para su celebración.”).

119. *Id.* art. 46 (“No pueden contraer matrimonio: . . . Los que estén ligados con vínculo matrimonial.”); *id.* art. 73 (“Es nulo, cualquiera que sea la forma de su celebración: . . . El matrimonio celebrado entre las personas a que se refieren los artículos 46 y 47 salvo los casos de dispensa conforme al artículo 48.”).

120. *See, e.g., Resoluciones de la Dirección General de Registros y del Notariado (Dec. 3, 1996), supra* note 100 (“It is not a question here of clarifying different types of effects that this second marriage can produce for the Spanish regulation.”).

pension, rights to benefits resulting from legal actions, and other benefits that do not infringe upon the public order. Future court decisions will play an important role in the resolution of the problems presented by Islam and the practice of polygamy. These problems will undoubtedly necessitate certain limited recognition of polygamy in the near future.¹²¹ To the extent that recognition of these religious practices does not encroach upon fundamental constitutional rights, Spain should continue to promote religious liberty for these alternative belief sets.

2. Unilateral repudiation by the husband

Just as Islamic doctrines relating to marriage may conflict with Spanish values, Islamic doctrines relating to the dissolution of marriage are also problematic. Classic Islamic law allows for unilateral repudiation by the husband (*talak*) as an automatic means for divorce.¹²² This traditional Islamic form of marital dissolution, still recognized in the majority of Muslim states, presents obvious problems for European legislatures because it compromises the principle of gender-based equality and conflicts with Spanish matrimonial principles. For example, the revocable nature of Islamic repudiation,¹²³ the allowance for “private divorce” without judicial intervention, and the different procedures required under Islamic repudiation counter established Spanish divorce principles. These

121. In fact, a pioneer resolution regarding pensions was recently issued. The National Institute of Health decided to divide between two wives the widowhood pension of a Gambian citizen who had been united in polygamous marriages in his country of origin, later moving to Spain with his two wives. Social Court Number 6 of Barcelona ratified the Resolution of the National Institute of Health, arguing that the Spanish legislation recognizes foreign marriages, and upon the death of the husband, both unions were valid. See Barcelona Social Court’s decision of April 18, 2002; see also Madrid High Court’s decision of July 29, 2002. In reality, the decision follows the criteria set out by Article 34 of the Agreement Between the Kingdom of Morocco and the Spanish Government Concerning Social Security (B.O.E., Oct. 13, 1982, 245), according to which, “the pension of widowhood deriving from a Moroccan worker will be distributed, in its case, in equal parts among those who are determined to be, in conformance with the Moroccan legislation, beneficiaries of said payments.” *Id.*

122. See, e.g., Zoe Papassiopi-Passia, *Conflict of Laws, Comparative Law and Civil Law: The Applicable Law on Divorce and the “Ordre Public” Reservation in Greek Conflict of Laws*, 60 LA. L. REV. 1227, 1232 (Summer 2000).

123. It is irrevocable only when the declaration has been pronounced three times or through a sole declaration which attributes the effects of the triple declaration. See P. GARCÍA BARRIUSO, *DERECHO MATRIMONIAL ISLÁMICO Y MATRIMONIO DE MUSULMANES EN MARRUECOS* 135–36 (1962).

problems once again illustrate that Spain should continue to protect religious freedom for the Islamic community to the greatest extent possible without violating constitutional norms. In this context, Spanish courts should follow the lead of those in Europe and give legal effect to Islamic repudiation only upon assurance of the position of the wife's equality.

a. Tension between Islamic law and European rights. Islamic law allows for divorce only in certain circumstances. Similar to European family law, Islamic law recognizes several legitimate grounds for dissolving a marriage, including death of one of the spouses, divorce by mutual agreement, and judicial order at the request of one of the parties as regulated by law.¹²⁴ Islamic law, however, also allows for the unilateral repudiation of the wife by the husband (*talak*) as an automatic means for breaking the union.¹²⁵ This privilege is thus extended only to the husband and allows him to end the marriage without explaining the reasons for his decision or even submitting to judicial authority.

Muslim states, with the exception of Tunisia,¹²⁶ recognize the right of the husband to repudiate his wife,¹²⁷ just as is set out in the *Shar'ia*.¹²⁸ However, there are some important limitations on the total and uncontrolled right of the husband to repudiate the wife in the classic Islamic formulation. For instance, in both Morocco and Algeria, unilateral repudiation requires judicial authorization, which serves to protect the economic interests of the wife and provides a limited defense to the unfettered prerogative of the husband.¹²⁹

124. See Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 14 (1997).

125. See Papassiopi-Passia, *supra* note 122, at 1231.

126. Article 31 of the Personal Statute Code of Tunisia concedes equal rights to both spouses; the court pronounces divorce in the case of mutual agreement of the spouses, as well as at the request by one of the spouses, according to how he or she is prejudiced. CODE DU STATUT PERSONNEL art. 18 (Tunis.).

127. For a comparison of the laws concerning repudiation in different Muslim countries, see CTR. FOR THE INTERDISCIPLINARY STUDY OF RELIGION, *ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK* (Abdullahi A. An-Na'im et al. eds., 2002).

128. See RODOLPHE J.A. DE SEIFE, *THE SHAR'IA: AN INTRODUCTION TO THE LAW OF ISLAM* 60 (1994) ("The most frequent form of divorce in Islamic law is the talaq, or unilateral repudiation by the husband."). For an introduction to Shar'ia, the law of Islam, see generally *id.*

129. Article 52 of the *Mudawana*, or Moroccan Family Code, requires the fulfillment of certain formalities that must be registered before two notaries public and the inscription of the

Furthermore, some Muslim states allow wife-initiated repudiation (*Khol*).¹³⁰

In contrast, European law rejects the enforceability of unilateral repudiation of the wife by the husband, affirming instead the principle of equality and rejecting gender discrimination. Indeed, strict adherence to these principles of equality would require the absolute rejection of repudiation by the husband since only the husband can exercise this power. Nevertheless, as a general rule, in the interest of promoting religious pluralism, foreign laws should be rejected outright only when their application, not their abstract content, violates the basic principles of the domestic law.¹³¹ In fact, it should be noted that absolute rejection of the Islamic practice of unilateral repudiation could have a negative effect on the wife. For example, a husband could repudiate the wife, but because the repudiation would not be recognized by the State, the wife would have no legally enforceable claim for compensation. Because of these problems that would result from an all-out rejection of repudiation, European courts have typically adopted a flexible approach with respect to Islamic repudiation, recognizing its legal effect only when such recognition would protect the rights of the wife and treat her equally.¹³²

act of official recognition by the judge in the court registry. See QUIÑONES ESCÁMEZ, *supra* note 111, at 75–77 (2000). The role of the judge is not so much to examine the validity of the repudiation, which continues to be the unfettered prerogative of the husband, but instead to attempt reconciliation. See *id.* If no reconciliation is possible, the role of the judge is to set a compensation or dowry as a consolation for the wife—where the husband has no cause for repudiation—or to order and ensure payment of the delayed dowry. See *id.* In Algeria, the act of repudiation has become a judicial process, requiring approval by a judge who, without entering into the motives, ensures fulfillment of the economic obligations of the husband with respect to the wife. See JUDY SCALES-TRENT, *African Women in France: Immigration, Family, and Work*, 24 BROOK. J. INT'L L. 705, 723 (1999).

130. JOHN L. ESPOSITO & NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 103 (2d ed. 2001) (discussing how repudiation in instances of physical harm from the husband is allowed in Algeria, Iraq, Jordan, Kuwait, Malaysia, Morocco, and Syria, and how repudiation in cases of violation of marriage contract stipulations is allowed in Algeria, Bangladesh, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Syria, and Tunisia).

131. See Carrascosa Gonzalez, *Divorcios Extranjeros sin Intervención Judicial: Práctica del Tribunal Supremo*, in ESTATUTO PERSONAL Y MULTICULTURALIDAD DE LA FAMILIA 57 (A. Calvo Caravaca ed., 2000).

132. For an overview of the evolution of European jurisprudence—centered on cases in France, Belgium, Germany, Great Britain, The Netherlands, Switzerland and Italy—see QUIÑONES ESCÁMEZ, *supra* note 111, at 139. In France, the severing effects of a particular repudiation are recognized if the parties fulfill certain conditions. Prior to 1980, domestic law required the woman to have previously consented. Since the 1980s, the Court of Appeals has

C. Resolving the Tension Under Spanish Law

Spain has begun to follow Europe in adopting measures that recognize repudiation in certain cases so long as it does not conflict with constitutional principles of equality and nondiscrimination. Prior to 1997,¹³³ the Supreme Court consistently granted *exequatur* (official recognition) to foreign dissolutions in cases where the repudiation was declared by the husband but sought by the wife in exchange for economic compensation (*Khol* repudiation).¹³⁴ Recently however, the enforceability of unilateral repudiation of the husband has been brought into question. Courts and the DGRN have objected to enforcing these kinds of repudiations for several reasons. First, under Islamic practice, these kinds of repudiations are potentially revocable by the repudiating party. Under Spanish law, however, a marriage annulment is definitive and irrevocable. Therefore, in Spain, revocability is seen as something contrary to the stability and certainty of the marital relationship and in conflict with the equality of rights and duties of husband and wife. These are integral principles of international public order which impede the concession of *exequatur*.¹³⁵

granted the *exequatur* if, during the repudiation procedures, the wife's right to defense was guaranteed according to minimum procedural guarantees and afterwards she received a minimum financial compensation. In general, repudiation of the marriage is recognized without interference from the State, with the consent or agreement of the wife, but is later submitted to rigorous control in order to guarantee the wife sufficient alimony and shared custody of the children. See Deprez, *supra* note 102, at 142; Ferruccio Pastore, *Famiglie Immigrate e Diritti Occidentali: Il Diritto di Famiglia Musulmano in Francia e in Italia*, in 86 RIVISTA DI DIRITTO INTERNAZIONALE 95 (1993).

133. On May 30, 1997, the Agreement for Judicial Cooperation in Civil, Mercantile, and Administrative Matters Between the Kingdom of Morocco and Spain (B.O.E., 1997, 151) removed the enforcement of Moroccan separations and divorce from the jurisdiction of the Supreme Court. Prior to 1997, the general procedures of the Supreme Court for the *exequatur* of foreign rulings were used to give civil effect to resolutions of separation and divorce. Article 25 of the Agreement provides that the enforcement of the resolutions will correspond to the First Level Court—understood to be the court of residence of the petitioner or of the married couple—of each of the States. After the Agreement took effect—two months after its publication—the Supreme Court declared itself incompetent in the enforcement of the decisions of Moroccan separations or divorce in favor of the Magistrate's Court. See ATS, Mar. 16, 1999 (R.J., No. 2149); ATS, July 7, 1998 (R.J., No. 6088).

134. The Supreme Court, in light of the requirements of Article 954 of the Civil Proceedings Law, declared valid the application so as not to infringe on constitutional rights or the guiding principles of our compilation procedures. See ATS, June 8, 1999 (R.J., No. 4346); ATS, Apr. 21, 1998 (R.J., No. 3563); ATS, Jan. 27, 1998 (R.J., No. 2924).

Similarly, the idea that the husband can unilaterally repudiate the wife without state intervention is contrary to the Spanish principle that the annulment of a marriage requires intervention by a public authority.¹³⁶ However, this matter is complicated by the fact that legislators in Muslim states tend to submit the decision of the husband to the control of a judge or other civil authority.¹³⁷ Thus, the Supreme Court has been left to determine whether Moroccan civil servants are adequate substitutes for judicial officials with the requisite public authority to terminate a marriage.¹³⁸ Decisions regarding resolutions on *exequatur* have shown some contradictions. In some cases, the intervention of notaries public has been deemed sufficient for compliance with the condition of legal supervision by a public authority.¹³⁹ In other rulings, the Supreme Court requires that the notary perform more than just ministerial or administrative tasks and exercise some sort of quasi-judicial discretion in determining the validity of the repudiation.¹⁴⁰ In these jurisdictions, the decisions of the notary must also be validated by a notary judge who ensures that the economic interests of the wife are protected.¹⁴¹ Therefore, as

135. See ATs, July 23, 1996 (R.J., No. 2907). Nevertheless, and as Ana Quiñones Escámez points out, the revocable nature of repudiation is, in the resolved case, misunderstood. The Decision does not bear in mind that in Moroccan law if the husband lets the three-month period of nonreconciliation with his wife lapse, the repudiation becomes irrevocable. QUIÑONES ESCÁMEZ, *supra* note 111, at 167. The revocable nature of the repudiation, as stated in the notary proceedings used in rulings on a marriage that took place in Egypt—which, at first, would impede the concession of *exequatur* in Spain—becomes irrevocable. ATs, Apr. 21, 1998, (R.J., No. 3563) (“[T]he period has long passed when the origin of the legislation was bound to the exercise of the faculties of repudiation by the husband who, accredited in the rulings, has therefore remarried . . .”).

136. See C.C. ch. 68 (Spain).

137. *Id.*

138. Moroccan law requires repudiation to be authorized by two *adules*. Under Moroccan Law, the functions of the *adules* assigned to the courts are quasi-legal. The Supreme Court considers the sufficiency, or lack thereof, of these Moroccan resolutions in light of the possible substitution for judicial authority of a civil service employee passed off as an *imperium*, or as a mere Commissioner for oaths. See *supra* note 129.

139. It is denied, in other words, because it is not proven that the *adules* authorizing the divorce are carrying out jurisdictional functions, or even those of the Commissioner for oaths. See ATs, July 23, 1998 (R.J., No. 5337); ATs, Feb. 6, 1996 (R.J., No. 7192).

140. ATs, Jan. 20, 1998 (R.J., No. 2667). In any case, it must be mentioned that the Supreme Court has admitted the validity of private divorce granted by notaries in Cuba when the person requesting the *exequatur* shows that the notary is carrying out functions equivalent to that of a Spanish judge in divorce cases. See ATs, May 12, 1998 (R.J., No. 4344); ATs, Jan. 20, 1998 (R.J., No. 2667); ATs, Feb. 4, 1997 (R.J., No. 5341).

141. See ATs, Sept. 17, 1996 (R.J., No. 2908).

long as intervention is exercised by a public authority in some form, the “public authority” requirement should be satisfied. This approach has the virtue of enabling repudiation while preventing unconstitutional gender discrimination.

Finally, Spain’s interest in applying uniform procedures to all citizens may conflict with Islamic dissolution because of differing procedures. Spain has an interest in applying its own procedures to matters fundamental to society, such as marriage and its dissolution. Thus, the DGRN’s rejection of inscription of repudiation to Spanish citizens abroad is not due as much to the fact that the dissolution is caused by repudiation or a bilateral act, but rather is because the Spanish citizen has modified his or her marital status before a foreign jurisdiction.

Notwithstanding these procedural objections to repudiation, an outright rejection of repudiation, based on the desire to comply with certain procedures, suffers from excessive rigidity and results in a diminished protection of the wife. If, for example, the wife requests *exequatur* or recognition of a dissolution granted abroad, that dissolution should be recognized in Spain without additional burdens on the wife.¹⁴² It would be sufficient to grant the enforceability whenever it is shown that the wife has consented to the divorce. The woman’s desire to be freed from the marriage can be deduced from her request for *exequatur*.

In accordance with this more flexible approach, the Supreme Court has never declared absolute incompatibility of repudiation with Spanish law. Instead, the Court has refrained from evaluating the type of divorce being recognized, restricting itself instead to an examination of the procedural rules¹⁴³ and a determination of whether the conditions required in domestic divorce laws have been circumvented.¹⁴⁴ Furthermore, when the disadvantaged party

142. See Gonzalez, *supra* note 131, at 60.

143. In the ATS of September 17, 1996 (R.J., No. 2667), the Court does not go so far as to determine what type of divorce, according to Moroccan Law, the *exequatur* is trying to obtain; it merely analyzes the fulfilment of the conditions of article 954 of the Civil Procedure Law. In hypothetical cases, there is no default because the wife appears in the appeal procedure and is also the party requesting *exequatur*.

144. Article 85 of the Civil Code deals with the question of conformity with Spanish public order and establishes the possibility of divorce no matter what the form or length of the marriage, requiring examination of the cause from a wide perspective. The stated intervention of a public authority in the procedure and the definitive nature of the dissolution of the tie are

requests recognition of the resolution to dissolve the marriage, the Court has upheld the authority of the foreign resolution on the grounds that the interests of the disadvantaged party have been protected.¹⁴⁵ Noting the impracticality of holding otherwise, the Court has voiced opposition to applying the principle of equality with strict formalism when such application makes it more difficult for the wife to obtain a definitive dissolution of the marriage.¹⁴⁶ In either scenario, the wife would obtain the same results and therefore is not discriminated against.¹⁴⁷ Thus, the law effectively defers to Islamic practices while protecting the Constitutional rights of the wife.

VII. CONCLUSION

As Spain advances into the twenty-first century and is faced with a more culturally diverse population, the accommodation of religious pluralism becomes increasingly important. In spite of Spain's turbulent history and lack of religious diversity, its government in recent years has made significant inroads toward accommodating religious pluralism. Through incorporating principles of religious

considered sufficient for repudiation to be recognized under Spanish Law. C.C. art. 85 (Spain).

145. The ATS of April 21, 1998 expressly states that, in the hypothetical case of a repudiation granted before Egyptian notaries:

[I]t is not possible to raise the obstacle of public order in the international sense—one of otherwise restricted interpretation—so that is insurmountable, when instead it should expire when the person suffering inequality before the law disregards the custody which is due them in order to impede consolidation in our domestic order and prefers not to use this protection in a court of law. It is also important to remember the transcendental information that the situation of imbalance disappears from the moment that the *exequatur* of the foreign resolution is requested . . .

ATS, Apr. 21, 1998 (R.J., No. 3563).

146. *Id.*

147. The ATS of April 21, 1998, also explains that

[r]esolutions are no longer received which materially produce an unjustified inequality between the married couple even though the inequality has its roots in the foreign law being applied, since it cannot be used at the time of legal recognition. Maintaining the contrary would mean raising the formalism of the equality principle above the resulting material which is produced in concrete cases. This ends up making detrimental that which should act as protection for the woman being discriminated against by making her turn to a divorce court in Spain in order to obtain a definitive dissolution of the marriage ties which has already been granted in the State of origin, when through the *exequatur* she would receive the same ruling.

Id.

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freedom in its constitution and statutes, Spain is recognizing the need for increased tolerance. In order to survive and progress, Spain must strive to continue to promote tolerance and pluralism through recognition of and cooperation with non-Catholic denominations, even when their religious practices and beliefs vary from historically rooted values.